No. B295935

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

CITY OF SANTA MONICA,

Appellant-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Respondents and Plaintiffs.

APPELLANT'S OPENING BRIEF

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

Gov't Code, § 6103

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INTRODUCTION

Over 70 years ago, prominent civil-rights leaders in Santa Monica urged the City to adopt its current at-large method of electing its seven-member Council—which *expanded* minority voting strength over the prior system. In the last quarter century of elections, the undisputed evidence demonstrates that Latino voters' preferred candidates have won Council seats the majority of the time, even though Latinos make up only 13.6% of the City's voting population.

The trial court ordered the City to scrap its at-large elections in favor of a district-based scheme that Santa Monica voters—including Latino voters—have twice rejected at the polls. The court arrived at this anti-democratic result by adopting an erroneous, unprecedented, and unconstitutional interpretation of the California Voting Rights Act (Elec. Code, §§ 14025-14032) that contradicts the statute's purpose by *reducing* minority voting strength. Several fundamental legal errors at the heart of the trial court's analysis require reversal:

1. The court applied legally incorrect standards in determining the existence of racially polarized voting because it focused on the ethnicity of candidates, rather than the preferences of voters; it also ignored that Latino-preferred candidates usually win.

The CVRA requires plaintiffs to prove "racially polarized voting," as defined by "case law regarding enforcement of the federal Voting Rights Act of 1965." (Elec. Code, § 14026(a), (e).)

Under that federal case law, racially polarized voting means that minorities vote cohesively for the same candidates, but those candidates "usually" lose as a result of a majority bloc voting for different candidates. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 50-51, 56.)

In identifying Latino-preferred candidates, the trial court erroneously examined only *Latino-surnamed* candidates, precluding the possibility that Latino voters might prefer other candidates. Federal case law widely condemns such unconstitutional stereotyping of Latino voters, who can prefer candidates of all ethnicities, not just fellow Latinos. (*Ruiz v. City of Santa Maria* (9th Cir. 1988) 160 F.3d 543, 551 (per curiam) [joining at least nine other circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority"].) The court's myopic focus on candidates' ethnicities caused it to ignore numerous instances, including in elections involving Latino candidates, of Latino voters genuinely preferring non-Latino candidates. This critical error alone requires reversal.

The court's unduly narrow focus on Latino-surnamed candidates meant that it disregarded not just the vast majority of candidates, but also entire *elections*. Instead of looking at *all* potentially relevant elections, the court arbitrarily narrowed the field of elections to seven in which *Latino-surnamed* candidates ran between 1994 and 2016. Though the CVRA supports giving greater weight to these elections, the trial court erred in failing even to consider the elections that did not happen to include a

Latino-surnamed candidate.

The trial court's flawed methodology also did not take into account that Latino-preferred candidates *usually win* in Santa Monica, regardless of any statistical differences between Latino and white voting patterns. And even in the rare cases in which a Latino-preferred candidate lost, the court failed to account for the *reason* for the loss, which was typically insufficient support from other minority groups, not white voters cohesively supporting a competing candidate.

Application of the correct legal standards to the undisputed facts demonstrates as a matter of law that there is no legally significant racially polarized voting in Santa Monica elections.

2. The trial court misapplied the legal standard for determining whether Latino votes have been diluted.

The CVRA also requires a showing of minority vote dilution. (Elec. Code, § 14027.) Under case law and the federal Constitution, vote dilution means that the minority group would have more electoral success under some alternative system. (E.g., *Reno v. Bossier Parish Sch. Bd.* (1997) 520 U.S. 471, 480.) This requirement is logically necessary because "[u]nless 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." (*Gingles*, 478 U.S. at 50, fn.17.)

The trial court failed to grapple with undisputed demographic data showing that Santa Monica's Latino voting population is too small and too dispersed for any alternative

electoral scheme meaningfully to increase its voting strength. Indeed, the "remedy" selected by the trial court—dividing the City into seven districts—will indisputably *reduce* Latinos' voting strength, as well as the voting strength of other minority groups. The Latino voting population in the court's "remedial" district will be scarcely over 30%, and most of the City's Latino population will be spread across six other districts, none of which has a Latino voting population exceeding 14%. This "remedy" will create the very problems the CVRA and FVRA were designed to avoid.

3. The trial court's erroneous analysis threatens to render the CVRA unconstitutional as applied to the facts of this case for three reasons.

First, the analysis depends on the unconstitutional stereotype that Latino voters prefer only Latino-surnamed candidates. Second, the court's vote-dilution analysis would *require* the imposition of a race-conscious "remedy" (a district gerrymandered to include as many Latino voters as possible) on evidence of bare differences in voting patterns between a majority and a minority group, even if the purported remedy would not improve the minority group's chances of electing candidates of its choice. Third, the trial court usurped the City's right of self-governance by ordering it to abandon its time-honored election system notwithstanding the absence of legally significant racially polarized voting or vote dilution.

4. The trial court's Equal Protection ruling is legally and factually erroneous.

As a matter of law, the at-large election system has had no

disparate impact. Minority voters in Santa Monica have always been too few and too dispersed for any alternative election system meaningfully to increase their voting strength. And, over the last quarter century, Latino voters' preferred candidates have usually won.

The court also erred in concluding that the City intentionally discriminated against minority voters in 1946, when a Board of Freeholders proposed the current electoral system, and again in 1992, when the City Council studied alternative systems and decided not to put a potential switch on the ballot. It is undisputed that neither the Freeholders nor the Councilmembers harbored any discriminatory animus toward minorities; to the contrary, they expressed a desire to *expand* minorities' electoral opportunities. Viewed in the light most favorable to respondents, the evidence shows, at most, that the Freeholders and Councilmembers were *aware* that—under some circumstances, though not necessarily in Santa Monica—at-large elections *may* hinder minority representation. As a matter of law, however, discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (*Personnel Adm'r v. Feeney* (1979) 442 U.S. 256, 279, citation omitted.)

5. The trial court's remedy—a seven-district map drawn by respondents' expert—violates section 10010 of the Elections Code, which requires a series of public hearings before any "court-

imposed change from an at-large method of election to a district-based election." There is no dispute that this democratic process never happened here.

* * *

The CVRA and FVRA serve an important purpose, but without clear standards and judicial supervision, they are subject to misuse and unintended consequences. At-large elections are not per se unlawful or discriminatory, just as districted elections are not necessarily a cure-all for inadequate minority representation in every circumstance. These laws are not meant to allow courts to sweep aside democratically chosen voting systems based on unconstitutional stereotyping and unprecedented, outcome-driven methodologies. Nor do they provide license to impose race-based remedies that are not narrowly tailored to solve actual harms.

Under the correct legal standards, the undisputed facts establish that Santa Monica's at-large elections involve no racially polarized voting, vote dilution, or racial discrimination. The Court should therefore reverse and enter judgment in favor of the City.

STATEMENT OF THE CASE

In 2016, respondents sued the City, claiming its at-large method of electing its Council violates the CVRA and California's Equal Protection Clause. Respondents alleged: (a) the City's at-large elections dilute Latino voting power; and (b) the City adopted this system in 1946, and maintained it in 1992, to discriminate against minorities.

I. The Parties

Respondent Maria Loya ran for City Council in 2004 and lost; she also ran for a seat on the Santa Monica Community College Board of Trustees in 2014, finishing last. (28AA12328, 28AA12332.)

Loya's husband, Oscar de la Torre, is co-chair of respondent Pico Neighborhood Association (PNA). Latinos account for less than one-third of voters in the Pico Neighborhood, and two-thirds of the City's Latinos live outside the Pico Neighborhood. (See RT5352:25-5355:2.)

De la Torre is a five-time winner in Santa Monica-Malibu Unified School District Board races; he prevailed in at-large elections—the very electoral system the trial court found discriminates against Latinos—in 2002, 2006, 2010, 2014, and 2018. (28AA12328-12331.) He also ran for Council in 2016 (after this lawsuit was filed), but did not campaign outside the Pico Neighborhood, raised almost no money, ran no advertising, did not seek significant endorsements, and lost. (25AA11216; RT6249:17-6250:25, RT6251:26-6254:19, RT6243:2-6245:17, RT6247:10-20, RT7837:10-25, RT7841:8-17.) In that same election, Tony Vazquez, a Latino, won his third term on the Council. (25AA12240.)

Santa Monica is a city of just over eight square miles. It is home to approximately 90,000 residents, 16% of whom are Latino. (RT9111:15-16; 28AA12278A.) The Latino share of the City's citizen-voting-age population is 13.6%. (RT2470:8-10.)

Since 1946, the City has been governed by a seven-member

Council elected at-large. Elections are held every other year; four Councilmembers are elected in presidential-election years, and three in gubernatorial-election years. (E.g., 27AA11947, 27AA11994.) Voters may cast up to three or four votes in each election, depending on the number of open seats. (RT2591:24-28.) Other City governing bodies—the School, Rent Control, and College Boards—are also elected at-large.

II. A Brief History of the City's Election and Governance Systems

In 1906, the City's first Charter called for election of a seven-member council by districts, or "wards"; voters could vote for only one councilmember to represent their particular district. (27AA12125, 27AA12128.)

In 1914, voters opted to switch from seven councilmembers elected by district to three commissioners elected at-large to "designated posts." (27AA12145-12146; RT4390:22-25.) Candidates vied for only one of the three distinct commissionerships: Public Works, Finance, or Public Safety. (27AA12145-12146, 28AA12446; RT7550:8-11.)

This system proved ill-suited to Santa Monica's needs. (28AA12411.) In 1946, voters overwhelmingly approved the creation of a Board of Freeholders—a 15-member body tasked with studying various forms of government and proposing a third Charter—and the Charter that the Freeholders proposed. (26AA11593-11594.)

The City's prominent minority leaders publicly endorsed the

Freeholders' Charter, urging residents to vote "yes" on it. (See Part IV.B.2.a, *post*.) The Charter ushered in a host of reforms, many of them favorable to minorities—including a prohibition on racial discrimination against City employees enforced through fines and/or imprisonment. (27AA12105, 27AA12115; RT7695:16-7704:11.)

The Charter also increased electoral opportunities by expanding the City's governing body from three commissioners to seven councilmembers. (27AA12093; RT7559:4-7564:2.) Designated posts—which tend to restrict minorities' electoral opportunities by precluding them from concentrating votes on a preferred candidate—were abandoned. (RT7560:9-7561:27.) Voters who previously could cast a single vote for each designated post in one or two separate elections could now cast up to three or four votes for candidates in the same election. (RT7552:18-23, RT7559:4-7564:2.)

In 1975, City voters overwhelmingly rejected Proposition 3, which called for a switch back to district-based Council elections. (RT4697:26-4698:2; 26AA11606.) It is undisputed that "no major African-American or Latino spokespersons seem to have campaigned" for Proposition 3; a Latino School Board member and the City's two African-American Councilmembers at the time opposed it. (26AA11559, 25AA11226; RT8154:10-8156:16.)

In 1991, the City Council created a 15-member Charter Review Commission to evaluate the merits of adopting a new election method.

The Commission engaged experts, including Dr. J. Morgan

Kousser, who later served as respondents' expert at trial; held public meetings; and delivered a report to the Council. (25AA10951.) All but one Commissioner favored switching to a new electoral system, but the Commissioners could not agree on an alternative—only five preferred districted elections. (25AA10913-10914; RT4852:12, RT4854:20-25.) After a public hearing, the Council voted not to put any alternate election scheme on the ballot but resolved to collect further information on various alternatives. (RT7556:12-26.)

Ten years later, in 2002, another ballot measure called for a switch back to district-based elections. Voters—including 82% of Latino voters—again overwhelmingly rejected the switch. (26AA11613, 28AA12328; RT5862:21-5864:9.)

III. Results of City Council Elections

Santa Monica voters elected their first African-American Councilmember in 1971, their first Latino Councilmember (Vazquez) in 1990, and their first Asian-American Councilmember in 1992. (RT8346:1-10.) At the time of trial in 2018, two of the City's seven Councilmembers were Latino, and another Councilmember (O'Day) lived in the Pico Neighborhood. (RT4823:3-4, RT7811:6-13; p. 43, *post*.)

The evidence at trial showed Latino voters have achieved remarkable success in the City's at-large elections. Over the last quarter century, Latino-preferred candidates have usually won, and they currently occupy several of the City's most important lo-

cal offices. (See 25AA11006-11012, 28AA12328-12332.) As discussed in more detail below (Part I, *post*), the evidence on these points is undisputed; the parties dispute only which candidates and elections should be counted in assessing the legal questions presented in this appeal.

PROCEDURAL HISTORY

Respondents filed the operative complaint on February 23, 2017, asserting claims for violations of the CVRA and California's Equal Protection Clause. (4AA1141.)

A bench trial was held between August 1 and September 13, 2018. Respondents' witnesses included Dr. Kousser, a historian, who presented statistical estimates of the levels of support for various candidates by members of different ethnic groups in various elections. Dr. Kousser also opined, over the City's objection, on (a) how the court should analyze that data under the law, and (b) the intent of the Freeholders in 1946 and the Council in 1992.

The City's witnesses included political scientist Dr. Jeffrey Lewis, who offered largely the same statistical analysis of voting data that Dr. Kousser submitted—but analyzed many additional elections. Another expert, political historian Dr. Allan Lichtman, reviewed the historical evidence on the City's election system and opined that there was no intent to harm minority voters in either 1946 or 1992.

After closing briefing, the trial court issued a tentative decision stating only that it found in favor of respondents on both

causes of action. (22AA9966.) The court instructed the parties to submit briefs "regarding the appropriate/preferred remedy for violation of the [CVRA]." (22AA9967.)

The court issued an amended tentative decision on December 12, 2018, enjoining the City from holding further at-large Council elections and ordering all future Council elections to be district-based. (23AA10220.)

After respondents moved ex parte for "clarification" of this order, the court directed respondents to propose in their statement of decision and judgment a special district-based election in 2019, with all seven districts to follow the map drawn by respondents' expert. (RT9938:12-9939:12.) The court stated, "We will let it run and see where it goes in the Court of Appeal." (RT9939:11-12.)

Respondents filed a proposed statement of decision and judgment (24AA10353, 24AA10368), which the trial court adopted and issued on February 13, 2019. (24AA10649, 24AA10669.) The City objected to both documents. (24AA10411, 24AA10436.) The court sustained a handful of objections to the statement of decision, overruling the balance without explanation, and overruled all of the City's objections to the proposed judgment. (24AA10665, 24AA10667.) The statement of decision, apart from some formatting changes (chiefly moving footnotes into the text), was nearly identical to respondents' proposal.

On the CVRA claim, the court addressed "racially polarized voting" by adopting Dr. Kousser's methodology of examining only those elections in which a Latino-surnamed candidate ran, and in

those elections, examining only the respective levels of support by white and Latino voters for the Latino-surnamed candidates. (24AA10681-10682.) Viewing election data through that narrow lens, the trial court agreed with Dr. Kousser that whites and Latinos voted statistically significantly differently in "6 of the 7 elections" analyzed (1994, 2002, 2004, 2008, 2012, and 2016), and "in all but one of those six elections (2012), a Latino candidate received the most Latino votes" but lost, "making the racially polarized voting legally significant." (24AA10685-10686.)

The court also concluded that at-large elections dilute Latino voting power in Santa Monica—another CVRA element. The court stated that several available remedies would "enhance Latino voting power over the current at-large system" and that "the district map developed by [respondents' expert] and adopted by this Court as an appropriate remedy, will likely be effective, improving Latinos' ability to elect their preferred candidate or influence the outcome of such an election" (24AA10707), but declined to explain how.

On the Equal Protection claim, the trial court cited no evidence of racial animus on the part of the Freeholders in 1946 or the Council in 1992, and acknowledged some of the ample evidence that neither group was bent on discrimination. (24AA10716-10727.) Nonetheless, the court adopted Dr. Kousser's interpretations of circumstantial evidence (mostly newspaper articles from 1946 and documents and video clips from 1992) to find that the Freeholders and Councilmembers were aware that district elections might be preferable to at-large elections from the

standpoint of minority electoral opportunities. (24AA10716-10727.) On that basis, the court concluded that the Freeholders and Councilmembers intended to discriminate against minority voters. (24AA10716.)

The City appealed on February 22, 2019. (24AA10740.) Respondents and the trial court refused to acknowledge that the appeal stayed the court's prohibition on Councilmembers elected at-large serving after August 15, 2019. (25AA10888.) The City therefore filed a petition for a writ of supersedeas (25AA10888A), which this Court granted on March 27, 2019. (25AA10889A.)

In the meantime, respondents and their counsel have asked the trial court to award them over $21 million in attorneys' fees and nearly $1 million in costs as prevailing parties. The trial court is scheduled to hear those motions in September 2020, after the Court decides this appeal.

STATEMENT OF APPEALABILITY

The trial court entered judgment on February 13, 2019. (24AA10664.) The City timely appealed on February 22, 2019. (24AA10740; Code Civ. Proc., § 904.1(a)(1).)

STANDARD OF REVIEW

Issues of law that do "not involve the resolution of disputed facts" are reviewed do novo. (*Topanga & Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779-780.) Such issues include "the application of a statute to undisputed facts." (*Poole v. Orange Cty. Fire Auth.* (2015) 61 Cal.4th 1378, 1384.)

Mixed questions of law and fact—"those in which the

historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the relevant statutory or constitutional standard"—are also decided de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894, alterations and quotation marks omitted.)

The trial court's factual findings are reviewed for substantial evidence. (*Ford & Vlahos v. ITT Commercial Fin. Corp.* (1994) 8 Cal.4th 1220, 1235.) "[S]ubstantial evidence is not synonymous with *any* evidence." (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 349.) "Evidence, to be substantial, must be of ponderable legal significance, reasonable in nature, credible, and of solid value." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 328, alterations and quotation marks omitted.)

When a trial court has relied on a cold record of documentary evidence, the Court of Appeal has "'no need to defer'" to its findings, "'because we can ourselves conduct the same analysis,'" which "'involves a purely legal question or a predominantly legal mixed question.'" (*Flores v. Axxis Network & Telecommc'ns, Inc.* (2009) 173 Cal.App.4th 802, 805; accord *People v. Avila* (2006) 38 Cal.4th 491, 529 ["deference is unwarranted when … the trial court's ruling is based solely on the 'cold record'" of documentary evidence, as "the same information … is available on appeal"].)

ARGUMENT

I. The Trial Court Applied Legally Incorrect Standards in Determining the Existence of Racially Polarized Voting Under the CVRA

The CVRA requires a plaintiff to prove "racially polarized voting." (Elec. Code, § 14028(a).)[1] In defining "racially polarized voting," the CVRA directs courts to look to "case law regarding enforcement of the federal Voting Rights Act of 1965." (*Id*., § 14026(e).)

The Supreme Court articulated the standard for racially polarized voting in *Gingles*. The Court set out three "preconditions" to claims brought under Section 2 of the FVRA: (1) members of the relevant minority group must be numerous and geographically compact enough that they could comprise the majority of eligible voters in a hypothetical and constitutionally

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[1] The full text of the CVRA appears in the Addendum to this brief. The elements of the statute have yet to be decided in any published opinion. (See *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 690.) The only three published CVRA decisions have no bearing on the issues in this case. (See *id.* at 688 [rejecting *facial* constitutional challenge to statute]; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781 [deciding, where finding of vote dilution was not challenged on appeal, that CVRA overrides charter city's control over its electoral system]; *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223 [deciding fee dispute after public entity agreed to alter election system shortly after action filed].) A CVRA case pending in the Sixth Appellate District, *Yumori-Kaku v. City of Santa Clara*, concerns a designated-post system, a 30% Asian-American citizen-voting-age population, and agreement that Asian-American-preferred candidates were defeated by white bloc voting in 50% of analyzed elections.

permissible district; (2) "a significant number of minority group members usually vote for the same candidates"; and (3) "the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." (478 U.S. 30 at 50-51, 56.)

The second and third *Gingles* preconditions (minority cohesion and majority bloc voting) together define "racially polarized voting" under both the FVRA and CVRA. (See, e.g., *Gingles*, 478 U.S. at 56; *Ruiz*, 160 F.3d at 551.)

The CVRA and FVRA part ways only over the first *Gingles* precondition—a minority group sufficiently large and geographically compact to comprise the majority of eligible voters in a district. The CVRA does not require a showing of geographical compactness for liability purposes but allows a minority group's geographic compactness to "be a factor in determining an appropriate remedy." (Elec. Code, § 14028(c).)

Here, the trial court adopted an erroneous, unprecedented, and unconstitutional legal standard for racially polarized voting that respondents' expert reverse-engineered to stack the deck in respondents' favor. Once the relevant elections and candidates are analyzed under the correct legal standards, it becomes clear that Latino voters' preferred candidates for Council seats usually win, and that their few losses were not usually caused by white bloc voting.

A. The Trial Court Focused on an Improperly Narrow Set of Candidates and Elections

In determining which candidates were preferred by Latino

voters in a given election, the trial court examined *only* Latino-surnamed candidates, not the candidates of all races who were preferred by Latino voters.

The trial court compounded that error by disregarding any elections in which no Latino-surnamed candidates ran (and even one in which a Latino-surnamed candidate did run).

This improper focus on the ethnicity of candidates, rather than the preferences of voters, requires reversal.

1. Racially Polarized Voting Is Determined Based on the Protected Class's Preferred Candidates, Not Candidates' Ethnicity

The touchstone of racial-polarization analysis is not the race or ethnicity of *candidates*, but instead the preferences of minority *voters*. To that end, the CVRA defines racially polarized voting in terms of voter preference, not candidate ethnicity. (Elec. Code, § 14026(e) ["'Racially polarized voting' means voting in which there is a difference ... in the choice of candidates … *preferred by voters in a protected class*, and in the choice of candidates … preferred by voters in the rest of the electorate"], italics added.)

"One circumstance"—but only *one*—"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).) The CVRA thus appropriately leaves open the possibility that members of a protected class might prefer candidates *other than* fellow class members.

In the federal cases the CVRA incorporates by reference, courts have repeatedly warned against presuming 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 Cty.* (4th Cir. 1996) 99 F.3d 600, 607.) Nearly every circuit has reached the same conclusion:

- *Clay v. Bd. of Educ.* (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."
- *Sanchez v. Bond* (10th Cir. 1989) 875 F.2d 1488, 1495: "Nothing in the [FVRA] indicates that the chosen representative of a minority group must be a minority."
- *City of Carrolton Branch of NAACP v. Stallings* (11th Cir. 1987) 829 F.2d 1547, 1557: "it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate that is important."

(*Accord Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, 988 fn.8; *Clarke v. City of Cincinnati* (6th Cir. 1994) 40 F.3d 807, 810 fn.1; *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ*. (3d Cir. 1993) 4 F.3d 1103, 1125-1126.)

In *Ruiz v. City of Santa Maria*, the Ninth Circuit joined these other circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority." (160 F.3d at 551.) "The minority community may prefer a white candidate just as the white community may prefer a minority candidate." (*Ibid.*) "To hold otherwise would … provide judicial approval to 'electoral apartheid'" and would be "'inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy.'" (*Ibid*.)

The U.S. Supreme Court—likewise concerned about the misuse of voting-rights statutes to create "political apartheid"—has forbidden any voting scheme that "reinforces the perception that members of the same racial group … think alike, share the same political interests, and will prefer the same candidates at the polls," because the Court has "rejected such perceptions elsewhere as impermissible racial stereotypes." (*Shaw v. Reno* (1993) 509 U.S. 630, 647; see also *Miller v. Johnson* (1995) 515 U.S. 900, 911-912 [race-based assumptions used to draw districts are "offensive and demeaning" and "cause society serious harm"].)

This clear line of authorities requires reversal here.

2. The Trial Court Improperly Focused on the Ethnicities of Candidates Rather than Voter Preferences, Requiring Reversal

The trial court confined its analysis to 10 *Latino-surnamed* candidates who ran for Council in the last quarter century. (24AA10685-10686.) The court did not account for the possibility that Latino voters in Santa Monica might prefer candidates who

did not happen to have Latino surnames. This legal error requires reversal.

The court proceeded in this manner because it adopted the methodology—and corresponding tables of election results—of respondents' expert, Dr. Kousser. (24AA10684-10686.) The decision emphasizes the court's reliance on Dr. Kousser's flawed legal test: "Dr. Kousser focused on the level of support for *minority candidates*…." (24AA10682, italics added.)[2]

Dr. Kousser conceded that he did not examine the actual preferences of Latino voters—instead, he focused exclusively on the relative performance of "candidates who are Latino-surnamed." (RT4239:2-4241:20; see also RT4240:12-14 ["this only lists Spanish-surnamed candidates. I do not list the candidates whom I consider non-Hispanic white candidates in that table."].) Dr. Kousser was asked during his direct examination, "What is your understanding of what [the law] directs you to do in terms of your racially polarized voting analysis?" He answered: "You look at the Latino voting for Spanish surname candidates. You look at the non-Latino, non-Hispanic White voting for Spanish surname candidates. You see whether those are statistically significantly

[2] Before trial, the City moved unsuccessfully to exclude Dr. Kousser's testimony on several grounds, including that he was improperly supplanting the court's role by opining on issues of law. (9AA3286.) Dr. Kousser's subsequent testimony included, among other things, his lengthy exegesis on the text and meaning of *Gingles*. (E.g., RT3080:9-23.)

different…." (RT4978:10-20.)[3]

Dr. Kousser focused only on "candidates who are Latino-surnamed," *not* on "the three or four candidates who [his] statistical analyses show[ed] appearing on the three or four highest percentages of Latino ballots" in any given election. (RT4241:11-20.) The trial court followed this approach; the election table in the decision lists *only* Latino-surnamed candidates. (24AA10685-10686.)

In adopting Dr. Kousser's legal framework, the trial court misread *Gingles* and related cases to say that courts *must* focus solely on minority candidates in assessing racial polarization. (24AA10682-10683.) The court acknowledged that Justice Brennan, who authored the majority opinion in *Gingles*, also wrote an opinion on behalf of four Justices stating that "the race of the candidate *per se* is irrelevant to racial bloc voting analysis." (*Gingles*, 478 U.S. at 67 (plurality opn.).) But the court discounted Justice Brennan's statement because he "did not command the majority of the Court" on this point. (24AA10683.)[4] The trial court then

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[3] Dr. Kousser admitted that, when testifying in another CVRA case, he had counted a white candidate as "Latino preferred," even though a Latino candidate was also running in that election. (RT3942:20-3951:1.) He abandoned that methodology here because it would have doomed respondents' case.

[4] The trial court also quoted language in *Gingles* that referred to candidates preferred by African-American voters as "black candidates." (24AA10682.) Justice Brennan explained that he used that shorthand only "as a matter of convenience," because, in North Carolina in the 1970s and 1980s, the race of voters and their preferred candidates happened to be the same. (478 U.S. at 67-68.) But the Court certainly did not hold that the only candidates who can be preferred by minority voters

stated, citing the Ninth Circuit's opinion in *Ruiz*, that "federal circuit courts" have adopted "a more practical race-sensitive analysis." (24AA10683.)

But the trial court hardly performed a "practical race-sensitive analysis." It simply flipped Justice Brennan's view on its head and applied a per se rule that candidate ethnicity is the *only* factor driving Latino voting behavior—which is inconsistent with the law. As noted above, in *Ruiz* itself, the Ninth Circuit joined at least nine other circuits in expressly "rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority." (160 F.3d at 551.)

The trial court purported to acknowledge that "a minority group can prefer a non-minority candidate" and that "it is not that minority support for minority candidate is presumed; to the contrary, it must be demonstrated." (24AA10684, 24AA10700.) But the court repudiated those stated principles by adopting Dr. Kousser's methodology, which focused *solely* on "the level of support for *minority candidates* from minority voters and majority voters." (24AA10682, italics added.)

There is a glaring inconsistency between what the court *said* (that Latinos might prefer non-Latinos) and what it *did* (focusing solely on Latino-surnamed candidates). For example, in the 2008 election, the trial court looked only at voting for Piera-Avila. (24AA10685, RT3082:15-3083:1.) But Piera-Avila received

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must always themselves be minorities—as the overwhelming case law to the contrary makes clear.

fewer Latino votes than two white candidates, both of whom won, and both of whom the trial court ignored. (25AA11010, RT4986:26-4987:4, RT7144:7-7145:5.) Similarly, with respect to the 1996 election, the court examined support for only Alvarez (24AA10685, RT3064:18-27), even though she was Latino voters' *seventh* choice. (25AA11007.) In that same year, roughly *all* Latino voters voted for three white candidates, two of whom won, but the trial court ignored those preferences entirely. (25AA11007; see RT3061:2-9, RT3076:9-25, RT7131:23-7133:22.)

The trial court's improper focus on only Latino-surnamed candidates also contradicts the facts of this case. Respondents' own voting histories belie the contention that Latino voters can prefer only Latino candidates. In 2002, respondent Loya and her husband, de la Torre (also respondent PNA's co-chair) advocated for and preferred Arnold, a white candidate, over Aranda, a Latina candidate, even though they voted for both. (RT6207:17-6208:3, RT6398:24-6399:12; see also RT8719:8-28 [Ana Jara, a Latina resident now on the City Council, also campaigned on behalf of white candidates].)

Consequently, the trial court's methodology was improperly reductive, legally erroneous, and unconstitutional. (E.g., *Johnson v. De Grandy* (1994) 512 U.S. 997, 1027 (conc. opn. of Kennedy, J.) [assumption that minority voters "elect only minority representatives … is false as an empirical matter" and "reflects 'the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens"].)

3. The Trial Court Improperly Examined Only Those Council Elections in Which a Latino-Surnamed Candidate Ran, Requiring Reversal

The trial court's focus on Latino-surnamed candidates also caused it to disregard some elections altogether. Even though 14 Council elections were held between 1994 and 2016, 11 of which were analyzed by the parties' experts, the court examined only *seven* (1994, 1996, 2002, 2004, 2008, 2012, and 2016) in which Latino-surnamed candidates ran. (24AA10685-10686.)[5] This approach is legally invalid.

Courts deciding Section 2 claims generally examine *all* elections, including those in which only white candidates ran, though they differ as to the "weight" such elections ought to be given. (See, e.g., *Lewis*, 99 F.3d at 608-609; *Sanchez*, 875 F.2d at 1495.)

The trial court purported to find support for its methodology—ignoring all elections that did not include Latino-surnamed candidates—in the Ninth Circuit's decision in *Ruiz*. (24AA10683.) But, as with the other federal case law, *Ruiz* addresses only the *weight* to be given to "non-minority elections," making clear that they are still relevant to a racial-polarization analysis. "Most courts hold that a fully non-minority election may be relevant and is admissible to determine whether there is a voting bloc of sufficient power that usually defeats a minority's

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[5] The court also inexplicably ignored the 2014 election, in which a Latino-surnamed candidate (Muntaner) ran but was not remotely preferred by Latino voters. (28AA12332.)

preferred candidate. An election pitting a minority against a non-minority, however, is considered more probative and accorded more weight." (160 F.3d at 552.)

Likewise, the CVRA does not preclude consideration of elections in which only white candidates ran; rather, as with the federal case law, the CVRA indicates merely that greater weight should be given to elections involving minority candidates. The statute provides: "The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class…." (Elec. Code, § 14028(b).) But the statute does not say that the analysis shall include "only" those elections in which minority candidates ran. (See *Gen. Dev. Co. v. City of Santa Maria* (2012) 202 Cal.App.4th 1391, 1395 [declining to adopt a reading of a statute that would add the word "only," since courts are "loath[] to construe a statute which has the effect of adding or subtracting language"], quotation marks omitted.)

Indeed, if section 14028(b) required courts to look *only* at elections in which minority candidates ran, it would lead to absurd results—courts could *never* find racially polarized voting in jurisdictions in which only non-minority candidates ran. (See *Lomeli v. State Dept. of Health Care Servs.* (2019) 36 Cal.App.5th 817, 820 [courts should avoid construing statutes to "produce absurd consequences"].)

Accordingly, the trial court erred by failing even to consider the three analyzed Council elections between 1994 and 2016 in which no Latino-surnamed candidates ran (as well as the 2014

election in which a Latino-surnamed candidate did run).

B. Application of the Correct Legal Standards to the Undisputed Facts Demonstrates That There Is No Racially Polarized Voting

1. Latino-Preferred Candidates Usually Win

When the undisputed facts are analyzed properly under the federal standards the CVRA adopts, they confirm that Latino-preferred candidates usually *win*. In Council elections held between 1994 and 2016 and analyzed by the experts, the undisputed data show: (a) there were 22 Latino-preferred candidates, and (b) 16 of those candidates won. This disposes of respondents' CVRA claim as a matter of law. (*Cano v. Davis* (C.D.Cal. 2002) 211 F.Supp.2d 1208, 1238 (three-judge panel) [because minority-preferred candidates "actually win elections," any "evidence of racial polarization is insufficient as a matter of law to establish the 'effects' required in vote dilution case"]; *Askew v. City of Rome* (11th Cir. 1997) 127 F.3d 1355, 1381 (per curiam) [victories of "23 of 33 black preferred candidates" were dispositive].)

a) Identifying Latino-Preferred Candidates in Multi-Seat Elections Requires Examination of Latino Voters' Relative and Absolute Support for Each Candidate

Courts do not identify minority-preferred candidates simply by looking at candidates with minority surnames and ignoring all others. Rather, federal cases establish several overarching principles for identifying minority-preferred candidates in multi-

seat elections like those held in Santa Monica (i.e., elections in which voters can and generally do cast up to three or four votes).

First, courts recognize that, in multi-seat elections, "looking only at the top-ranked candidate does not capture the full voting preference picture," because "it disregards the fact that multiple seats are available in each election, and with that the possibility that minority voters prefer more than one candidate." (*Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.* (E.D.Mo. 2016) 201 F.Supp.3d 1006, 1047.)

To accommodate the possibility that minority voters prefer more than one candidate, many courts preliminarily define as "minority-preferred" any "candidate who receives sufficient votes to be elected if the election were 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.)

Second, minority voters may prefer one or more candidates in a given election more strongly than others. For that reason, courts have held that it is error to "treat[] as 'minority-preferred' successful candidates who had significantly less [minority] support than their unsuccessful opponents." (*Niagara*, 65 F.3d at 1017.) Conversely, "if the unsuccessful candidate who was the first choice among minority voters did not receive a 'significantly higher percentage' of the minority community's support than did other candidates…, then the latter should also be viewed … as minority-preferred candidates." (*Levy v. Lexington Cty.* (4th Cir. 2009) 589 F.3d 708, 716.)

"The level of support that may properly be deemed

'substantial' will vary … depending on the number of candidates on the ballot and the number of seats to be filled." (*Lewis*, 99 F.3d at 614, fn.11; see also *Levy*, 589 F.3d at 716-717.) In *Niagara*, for example, although African-American voters' top choice lost, "support for that candidate was not dramatically higher than support for one of the successful candidates," so the Second Circuit saw "no reason to discount" the success of that African-American-preferred white candidate. (65 F.3d at 1018.)

The CVRA adheres to this approach, directing courts to address "relative groupwide support received by candidates from members of a protected class"—which ensures that no weakly preferred candidates are misidentified as truly preferred. (Elec. Code, § 14028(b).)

Third, courts also recognize that certain candidates' levels of minority support may be too low to justify describing them as truly "minority-preferred."

For that reason, some courts hold that candidates cannot be minority-preferred unless they win at least 50% of the minority group's votes. (E.g., *Niagara*, 65 F.3d at 1018-1019.) Other courts qualify that rule by holding that candidates winning less than 50% *could* be deemed minority-preferred, but only given further qualitative evidence that they were the minority group's representatives of choice. (E.g., *Lewis*, 99 F.3d at 614.) The former rule—a bright-line cutoff—eliminates the "unavoidably malleable, highly subjective inquiry" of "assess[ing] candidates' authenticity in matters racial." (*Niagara*, 65 F.3d at 1018-1019.) Such a cutoff also "prevents a candidate with tepid minority

support from being considered in a *Gingles* prong three analysis"; without such a backstop, courts would "open[] the door for candidates only marginally favored by minority voters to count in the *Gingles* equation." (*Ruiz*, 160 F.3d at 561, conc. and dis. opn. of Hawkins, J. [criticizing majority for not adopting 50% cutoff].)

b) The Parties' Agreed Methodology for Determining Elections Results

Because ballots are secret, it is impossible to determine exactly how many members of a particular minority group voted for any given candidate in an election. Political scientists therefore estimate voting patterns by comparing election returns against precinct-level demographic data.

Here, the experts for both sides relied on methods of statistical inference, including weighted ecological regression, following the same general methodology but differing in the number of elections and the number of candidates analyzed. Both experts' basic output—tables providing estimates of the share of white, African-American, Latino, and Asian voters who supported each candidate—is essentially identical. (Compare 28AA12328-12332 with 25AA11006-11012.) In the interest of narrowing the issues on appeal, the City will follow, as it did in the trial court, Dr. Kousser's weighted-ecological-regression estimates where available. (See also 24AA10684, fn.6.)

The illustrative table below shows the estimates for the 1994 Council election. (25AA11006.) (The results for all the analyzed elections between 1994 and 2016 are reproduced in the Addendum to this brief.)

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

The rightmost column shows the actual percentage of votes won 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 in combination to produce a "confidence interval," which is a range of values within which the true value likely falls. (See, e.g., RT4097:28-4098:23, RT6772:20-6773:16.)

Both sides' experts used 95% confidence intervals.[6] The 95% confidence interval for Vazquez's share of white votes in 1994, for example, ranges from 31.2% to 38.6%. (RT4099:27-4100:3.) And the 95% confidence interval for Finkel's share of

[6] They calculated the 95% confidence interval by multiplying the standard error by 1.96 and then adding and subtracting the result from the point estimate. (RT3066:7-9, RT4096:1-3, RT5849:3-15.)

Latino votes is between 66.7% and 178.1%.[7]

When confidence intervals overlap, the estimates are not statistically significantly different. (RT3064:28-3065:12.) For example, in 1994, the confidence intervals for white support for Holbrook, O'Connor, Ebner, Vazquez, and Finkel all overlap.

How to read these election tables is the key dispute in this case. Respondents insisted, and the trial court agreed, that only the two highlighted cells matter—Latino and white support for the Latino-surnamed candidate. (24AA10684-10690.) The City, by contrast, has argued that 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 actually preferred by Latino voters, and only by looking at each candidate's performance across all ethnics groups can the Court determine why a candidate was able to win a seat or fell short of that goal.

c) Latino-Preferred Candidates Usually Win Council Elections

1990. Neither side's expert analyzed the 1990 election. But it bears noting that Vazquez won—becoming the City's first Latino Councilmember, and, later, Mayor. (RT2476:4-12.) The parties agree that Vazquez was Latino-preferred in every other election in which he ran.

1994. Three Latino-preferred candidates were supported by

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[7] Because weighted-ecological-regression estimates depend on the drawing of a best-fit line, they can exceed the logical bounds of 0% and 100%. (RT3023:20-22, RT3031:23-26.)

effectively 100% of the Latino electorate: Vazquez, Finkel, and O'Connor. (25AA11006.) O'Connor won. (25AA11006.)

1996. There were three Latino-preferred candidates, each of whom received effectively 100% Latino support: Feinstein, Olsen, and Genser. (25AA11007.) Feinstein and Genser prevailed, along with Rosenstein and Greenberg, an Asian-American candidate. (25AA11007; RT4879:9-27.)

2002. The two Latino-preferred candidates were Aranda and McKeown, who received statistically indistinguishable support from Latino voters. (25AA11008.) McKeown won. (25AA11008.)

2004. Respondent Loya was the one Latino-preferred candidate, supported by between 82% and 100% of Latino voters, with the next-closest candidate (Bloom) supported by between 28% and 82% of Latino voters (based on the confidence interval). (25AA11009.) Loya lost. (25AA11009.)

2006. McKeown was the one Latino-preferred candidate; he won. (28AA12329.)

The trial court did not consider this election because there were no Latino-*surnamed* candidates.

2008. The two Latino-preferred candidates were Genser and Bloom; both won. (25AA11010.)

Latino voters' third choice—Piera-Avila—should not be considered Latino-preferred under the federal case law discussed above, since she received only between 23% and 44% of Latino votes based on the confidence interval. (25AA11010.)

2010. Five Councilmembers were elected in 2010 in two

distinct elections, three to full terms and two to partial terms.

There were three Latino-preferred candidates—McKeown and O'Connor in the full-term election, and O'Day in the partial-term election—all of whom won. (28AA12330-12331.)

The trial court did not consider 2010 election results because there were no Latino-*surnamed* candidates. But Gleam Davis (the City's current Mayor) ran and won in 2010, and her biological father was Latino. (RT9077:17-20, RT9079:19-9080:26, RT9124:9-9134:4.) That makes Davis part of the protected class of Latino voters under the CVRA. (Elec. Code, § 14026(d) [defining "protected class" by reference to federal law"]; 52 U.S.C. §§ 10303(f)(2), 10310(c)(3) [defining one protected class as "persons who are … of Spanish heritage"].)

The trial court disregarded Davis's ethnicity and concluded that she is constructively white because, according to a telephone survey conducted by one of respondents' experts, "the Santa Monica electorate does not recognize her as Latina." (24AA10684-10685, fn.7.)

2012. The four Latino-preferred candidates—Vazquez, O'Day, Winterer, and Davis—all won. (25AA11011.)

There were two other Latino-surnamed candidates in the 2012 election: Gomez and Duron. (25AA11011.) They performed relatively poorly among Latino voters, finishing fifth and tenth, respectively. This illustrates another fatal flaw in the trial court's Latino-surname-centric methodology; the stereotype that Latinos vote only based on candidates' ethnicity is not just offensive, but also inaccurate.

2014: The only Latino-preferred candidate was McKeown; he won. (28AA12331-12332.)

The trial court did not consider this election, even though it featured a Latino-surnamed candidate, Muntaner. (25AA11143.) Muntaner was tied for Latino voters' eighth choice—which again demonstrates that Latino voters select candidates for reasons other than ethnicity.

2016. The two Latino-preferred candidates were Vazquez and de la Torre. (25AA11012.) Vazquez won. (25AA11012.) De la Torre received low support from white voters and lost, coming in sixth. (25AA11012.)

A third candidate—O'Day—received between 43% and 68% of Latino votes. And O'Day won. (25AA11012.) Nonetheless, in the interest of resolving doubts in favor of the judgment, O'Day is not deemed a Latino-preferred candidate because he received significantly less support than either Vazquez or de la Torre.

d) Latino Voters' Preferences Also Usually Prevail in Exogenous Elections and Ballot Initiatives

Latino voters' preferences also prevailed in nearly every School Board, Rent Control Board, and College Board election ("exogenous" elections) over the last 25 years, and in several racially charged statewide ballot initiatives. (See Addendum; RT7122:19-26; 28AA12328-12332.) As noted above, respondent Loya's husband, de la Torre (who also co-chairs respondent PNA), is a longtime member of the School Board, having won at-large elections to that body since 2002.

The trial court discounted the probative value of these elections but concluded that they nevertheless "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 included a table showing differences in Latino and white support for 16 Latino-surnamed candidates who ran in exogenous elections between 2002 and 2016. (24AA10693-10694.)

The trial court's table perfectly illustrates the flawed nature of its approach. The court overlooked that *14 of the 16 candidates in its table won.* (26AA11611, 26AA11657, 26AA11692, 26AA11733, 27AA11868, 27AA11947, 27AA11995, 28AA12253.) Similarly, white voters in Santa Monica joined Latino voters in sufficient numbers to reject several racially charged propositions, even though three of them were approved statewide. (28AA12295, RT7107:10-13 [Prop. 187]; 28AA12297, RT7110:4-23 [Prop. 209]; 28AA12298, RT7117:27-7118:6 [Prop. 227]; 28AA12299, RT7120:28:7121:19 [Prop. 54].)

The Central District of California has specifically rejected the legal framework advanced by Dr. Kousser and adopted by the trial court here—namely, that voting-rights plaintiffs may "prevail so long as they demonstrate that the electorate is 'racially polarized,'" even if minority-preferred candidates "actually win elections." (*Cano*, 211 F.Supp.2d at 1238.) The three-judge panel in *Cano* rejected Dr. Kousser's approach because he "focuse[d]

exclusively on the relative percentage of Latino and white voters who chose the Latino candidate," but failed to "address whether the percentage of white … voters who voted against that candidate was sufficient to defeat him or her." (*Id.* at 1238, fn.34.) "[T]o the extent Dr. Kousser concludes there is 'racially polarized' voting in the district, it is not the type of 'legally significant' polarization about which *Gingles* speaks." (*Ibid.*)

The same is true here: Because Latino-preferred candidates usually win, differences in voting patterns between Latino and white voters are not *legally* significant.

2. White Bloc Voting Does Not Usually Cause the Defeat of Latino-Preferred Candidates

To establish racially polarized voting under the third *Gingles* precondition, plaintiffs must show that the protected class's preferred candidates are "usually" defeated—which means "something more than just 51%" of the time. (*Lewis*, 99 F.3d at 606 & fn.4; see also *Clarke*, 40 F.3d at 812-813.) Under any definition of "usually," a plaintiff must show, at a minimum, that a majority bloc defeats a minority-preferred candidate "more often than not." (*Williams v. State Bd. of Elec.* (N.D.Ill. 1989) 718 F.Supp. 1324, 1328 & fn.5.)

Because Latino-preferred candidates usually *win*, there is no need to examine whether those who lose are usually defeated by white bloc voting. But that examination reinforces that the trial court's racial-polarization analysis was erroneous.

CVRA plaintiffs must prove that differences in voting pat-

terns between the majority and minority groups *result in* the defeat of minority-preferred candidates. (E.g., *Uno*, 72 F.3d at 980 ["The third *Gingles* precondition … addresses whether the challenged practice, procedure, or structure is the cause of the minority group's inability to … elect its preferred candidates."]; *Nipper v. Smith* (11th Cir. 1994) 39 F.3d 1494, 1533 (en banc) ["to be actionable, the electoral defeat at issue must come at the hands of a cohesive white majority"].)

In particular, when a Latino-preferred candidate loses, courts must ask if the loss was *caused* by white bloc voting, or whether it was due to other factors, such as an unusually low level of support from Asian or African-American voters. (See *Salas v. Sw. Tex. Jr. Coll. Dist.* (5th Cir. 1992) 964 F.2d 1542, 1554-1555 [question is whether minority voters' "inability to elect their preferred representatives [is] caused primarily by racial bloc voting or, instead, by other circumstances which the [FVRA] does not redress"].)

Of the six Latino-preferred Council candidates who lost, only three were even arguably defeated by white bloc voting.

In 1994, neither Vazquez nor Finkel was defeated by white bloc voting. To the contrary, both enjoyed strong support from white voters; respondents' experts conceded that if whites had been the only voters, Vazquez and Finkel both would have *won*. (25AA11006; RT2615:22-2616:11, RT4242:3-25.) Instead, the undisputed data reveal that Vazquez and Finkel lost because both are estimated to have received zero Asian support and low African-American support. (25AA11006.)

Similarly, in 1996, the one Latino-preferred candidate who lost—Olsen—was not defeated by white bloc voting. He won the fourth-highest share of white votes in an election for four seats but finished fifth overall; the lack of Asian and African-American support sank his candidacy. (25AA11007.)

* * *

In sum, in analyzed Council elections between 1994 and 2016: (a) there were 22 Latino-preferred candidates; (b) 16 of those candidates won; and (c) of the six Latino-preferred candidates who lost, only three were arguably defeated by white bloc voting.[8] Because Latino-preferred candidates are not usually defeated by white bloc voting in Santa Monica, there is no pattern of legally significant racially polarized voting—which requires reversal on respondents' CVRA claim. (*Gingles*, 478 U.S. at 57 [requiring "pattern" to show "vote dilution," which "is distinct from the mere inability to win a particular election"]; *Clay*, 90 F.3d at 1361.)

C. Because There is No Racially Polarized Voting, the Court Should Disregard the Factors Set out in Section 14028(e)

Section 14028(e) provides that "[o]ther factors such as the history of discrimination … are probative, but not necessary … to establish a violation" of the CVRA. The trial court made findings purportedly relevant to those factors. (24AA10700-10706.) The

[8] Even in the seven elections involving Latino-surnamed candidates on which the trial court focused, 11 of 17 Latino-preferred candidates won.

City vigorously disputes those findings, but the Court need not consider them in this appeal. The additional factors, which closely track the "Senate factors" addressed in Section 2 cases (see *Gingles*, 478 U.S. at 36-37), become relevant if and only if a plaintiff has proven legally significant racially polarized voting. Without such evidence, "[m]inority voters may be able to prove that they still suffer social and economic effects of past discrimination…, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district." (*Id.* at 48, fn.15.) For that reason, courts consistently disregard the Senate factors if one or more *Gingles* preconditions are not satisfied. (E.g., *Johnson v. Hamrick* (11th Cir. 1999) 196 F.3d 1216, 1220; *McNeil v. Springfield Park Dist.* (7th Cir. 1988) 851 F.2d 937, 942.) The Court should do the same here.

II. The Trial Court Misapplied the Legal Standards for Determining Whether the City's At-Large Elections Dilute Latino Voting Strength

Even if the trial court's racially-polarized-voting analysis were correct, the judgment should nevertheless be reversed because the court misapplied the legal standard for determining whether the City's election system has diluted Latino voting strength.

A. Vote Dilution is an Element of the CVRA

The trial court assumed without deciding that vote dilution "is a separate element of a violation of the CVRA." (24AA10706.) There should be no question that it is.

The CVRA requires a plaintiff to prove that an at-large

method of election "*impairs* the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, *as a result of the dilution* or the abridgment of the rights of voters who are members of a protected class." (§ 14027, italics added.) Courts have interpreted the nearly identical language in the FVRA (52 U.S.C. § 10301) to require proof of harm (vote dilution) and causation (a direct connection between vote dilution and the challenged electoral system). As the Court explained in *Gingles*, plaintiffs must "demonstrate[] a substantial inability to elect caused by the use of a multimember district." (478 U.S. at 48, fn.15.) Accordingly, "proof of [a] 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial." (*Gonzalez v. Arizona* (9th Cir. 2012) 677 F.3d 383, 405 (en banc).)

To prove vote dilution, a plaintiff must show that a protected class would have greater opportunity to elect candidates of its choice under some other electoral system, which serves as a "benchmark" for comparison. (See, e.g., *Bossier*, 520 U.S. at 480 ["a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice"].) Such a benchmark is logically necessary because "[u]nless 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." (*Gingles*, 478 U.S. at 50, fn.17.)[9]

[9] Unlike the FVRA, the CVRA allows claims premised on impairment of the "ability to influence the outcome of an election," at

B. The Undisputed Facts Demonstrate That There Is No Vote Dilution in Santa Monica

For a court to impose a race-conscious remedy for a purported harm, there must be a "'strong basis in evidence' that the remedial actions [a]re necessary." (*Ricci v. DeStefano* (2009) 557 U.S. 557, 582.) This high evidentiary standard reflects courts' "presumptive skepticism of all racial classifications." (*Miller*, 515 U.S. at 922.) Here, there is no "strong basis in evidence" for concluding that the CVRA demanded a remedy. The judgment is premised on mere speculation that alternative methods of election, in particular "the district map developed by [respondents' expert] Mr. Ely," "would enhance Latino voting power over the current at-large system." (24AA10706-10707.)

That legal conclusion is untenable because Latino voters are too few in number and too dispersed across the City for any alternative voting system to enhance their voting strength.

First, it is impossible to draw a majority-Latino district anywhere in the City, and the purportedly remedial district adopted by the trial court would likely harm rather than help Latino voters.

Although the trial court focused on the Pico Neighborhood, where whites account for a smaller-than-typical share of eligible

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least in theory. (§ 14027.) As discussed in Part II.B, *post*, in Santa Monica the alternatives identified by the trial court would, if anything, *reduce* Latino voting strength. Consequently, the Court need not resolve the significant justiciability and constitutional problems posed by influence claims, as explained in Part III, *post*.

voters, two-thirds of the City's Latinos live outside that neighborhood. (RT5354:25-5355:2.) As a result, respondents' expert could not draw a district with a Latino eligible voting population larger than 30%. (RT2312:6-12, RT2317:15-22; 25AA11000-11001, 25AA11241.)

Latinos have substantial voting power under the current system. They account for 13.6% of the roughly 65,000 eligible voters citywide, creating the potential for a substantial voting bloc in at-large elections for three or four seats. Candidates have won Council seats with as few as 6,696 votes. (27AA11994.) It should therefore come as little surprise that Latinos *have* by and large been able to elect candidates of their choice.

By contrast, the districted system ordered by the trial court is a recipe for disenfranchisement. The premise of the court's decision is that there is insufficient crossover voting by white voters to support Latino-preferred candidates. (E.g., 24AA10690.) Creating a district in which 30% of eligible voters will be Latino, and where voters can choose *only one* candidate, would exacerbate that purported problem since, if Latinos and whites within the district voted in distinctly different ways, Latinos would be routinely outvoted. (See RT7258:4-10; RT7575:6-16.)[10] It is no

[10] Conversely, if whites and Latinos vote sufficiently alike for Latino-preferred candidates usually to succeed, as the City contends, there could be no legally significant racially polarized voting and therefore no liability, as it would be "difficult to see how the majority-bloc-voting requirement could be met in a dis-

answer to point to the potential support from other minority groups, because Asian and African-American voters consistently vote differently than Latino voters. (See 25AA11006-11012.)

Consequently, without substantial white crossover voting—which would fatally undermine the trial court's racial-polarization finding—Latino voters inside the new district will not have the numbers to elect candidates of their choice. And Latino voters outside that district will be submerged in overwhelmingly white districts. (RT5354:25-5355:11, RT6947:23-6948:7, RT7215:17-23.) Unrebutted evidence demonstrates that the same would be true for the City's African-American and Asian voters. (See RT8338:23-8339:11, RT8340:20-8341:15, 25AA11006-11012.) The result is similar to the "packing" and "cracking" of minority voters that frequently gives rise to vote-dilution claims in the first place. (See, e.g., *Shaw*, 509 U.S. at 670-671 (diss. opn. of White, J.).)[11]

In fact, it is *worse*, because at least minorities in a "packed" district are all but guaranteed *one* representative of their choice. Here, by contrast, even Latinos in the "packed" district would likely be unable to elect candidates of their choice.

Second, evidence purportedly showing that the district

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trict where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." (*Bartlett*, 556 U.S. at 16.)

[11] Packing occurs when a group is concentrated in a single district, creating a supermajority of that group's voters and "wasting" a large number of their votes. Cracking occurs when a group is split across multiple districts. Both tactics result in the dilution of the group's voting strength.

adopted by the trial court would enhance Latino voting strength fails on its own terms.

In *Bartlett v. Strickland* (2009) 556 U.S. 1, 17 (plurality opn.), the Court explained that measuring the potential effectiveness of an influence district like Ely's Pico district would "require" courts to answer a long list of questions, including "What percentage of white voters supported minority-preferred candidates in the past?" and "What are the historical turnout rates among white and minority voters and will they stay the same?" Ely and the trial court neither asked nor answered any of these "required" questions.

Instead, Ely based his analysis on Dr. Kousser's improper assumption that Latino-preferred candidates must themselves be Latino. Ely set out to show that Latino-surnamed candidates would have fared better in a district system by cherry-picking a few elections—1994, 2004, and 2016—and then estimating that a Latino-surnamed candidate would have won those elections in the hypothetical "Pico Neighborhood district" despite losing in the actual at-large election. (25AA11243-11245; 25AA11002, RT2319:24-2320:6 [1994]; 25AA11003, RT2321:13-2322:2 [2004]; 25AA11004, RT2323:27-2324:26 [2016].)

Ely emphasized that his analysis was "in no way predictive of what would happen in a district election." (RT2610:23-25.) Still, Ely's full analysis, which the trial court credited, demonstrated only that the top choices of voters in the hypothetical district were generally the same candidates who prevailed under the at-large system. (26AA11536, 26AA11612,

26AA11734, 27AA11947, 27AA12066.)

Even Ely's cherry-picked elections show that his Pico district would at best be neutral—and often *worse*—for minority candidates (again, he did not analyze the impact on minority-*preferred* candidates). For instance, in 2012, Vazquez would have *lost* in the hypothetical district even though he prevailed under the at-large system. (26AA11537, 27AA11947, 28AA12240; see also RT2599:7-2601:2, RT2635:6-2643:8.) In 2016, de la Torre would not have received the most votes in the Pico district in two of Ely's three scenarios. (25AA11004.) And in 2008, Piera-Avila would have finished *eighth*. (26AA11537.)

The trial court also purported to find evidence of vote dilution through various alternative at-large systems, such as limited voting. (24AA10707.) Respondents have contended that if the City (a) "destaggered" its elections (holding an election every four years for all seats at once); and (b) used an alternative at-large scheme, Latinos would exceed the resulting 12.5% "threshold of exclusion"—that is, the share of the vote required to guarantee that Latinos could elect a candidate of their choice even absent any crossover support from non-Latino voters. (RT6964:8-6965:10, RT7052:9-15.)

Even under those assumptions, Latinos would see no significant increase in voting strength, much less one enabling them to elect candidates of their choice absent white crossover support. Unlike with hypothetical district-based elections, whose efficacy is measured solely on the basis of eligible voters and not actual turnout, courts *do* consider turnout with respect to the

efficacy of hypothetical alternative at-large schemes, presuming a high, but not complete, minority turnout. (E.g., *United States v. Euclid City Sch. Bd.* (N.D.Ohio 2009) 632 F.Supp.2d 740, 761-770 [presumption of two-thirds].) Latinos account for just 13.6% of the City's eligible voters, barely more than the threshold of exclusion if they all show up to vote *and* all vote for the same candidate. Making reasonable adjustments to the 13.6% figure for low historical turnout and inconsistent cohesion results in a share of the electorate well below the 12.5% threshold of exclusion. (E.g., 28AA12378, RT8301:2-11 [low turnout]; 25AA11010 [low cohesion].)

Under any alternative voting system, then, Latino voters would not significantly increase their ability, much less be able, to elect candidates of their choice without white voting support. Under a district-based system, Latino voters would account for 30% of total voters in one district and a far smaller share of voters in others. And under even a radically altered at-large system, the turnout-adjusted fraction of Latino voters would still fall well short of the threshold of exclusion.

The trial court thus ordered a drastic, race-conscious remedy without the required "strong basis in evidence" that it was necessary.

III. The Trial Court's Interpretation of the CVRA Would Render Its Application Here Unconstitutional Under the Federal and State Constitutions

The trial court's racially-polarized-voting and vote-dilution analyses were not only legally erroneous, but would render the

CVRA unconstitutional as applied to the facts of this case for at least three reasons.

First, the judgment rests on an unconstitutional stereotype concerning Latino voting behavior. (See Part I.A, *ante*.) In deciding an Equal Protection case, the trial court itself "offend[ed] principles of equal protection" by assuming that "a minority candidate is the minority preferred candidate simply because of that candidate's race." (*Clay*, 90 F.3d at 1361.)

Second, the trial court's conception of vote dilution is so expansive that it would exist in *any* case and require a finding of liability and the imposition of a remedy even without evidence that a protected class could elect candidates of choice under some alternative election system. In theory, a group of any size—even a class of one—could contend that its votes have been "diluted" by an at-large system, if its votes are consistently different from white votes and its preferred candidates consistently lose. Federal courts have rejected "influence" claims—that is, claims that a protected class would have greater "influence" under some alternative system, even if it could not elect candidates of its choice—as inherently unmanageable for precisely this reason. (*Dillard v. Baldwin Cty. Comm'rs* (11th Cir. 2004) 376 F.3d 1260, 1267 ["This 'influence dilution' concept … has been consistently rejected by other federal courts"]; see also *Bartlett*, 556 U.S. at 13 ["This Court has held that § 2 does not require the creation of influence districts."].) There is no reasonable lower bound on the number of voters who could be said to "influence" the outcome of an election. (See *Illinois Legislative Redist. Comm'n v. LaPaille*

(N.D.Ill. 1992) 786 F.Supp. 704, 716.)

This justiciability problem also gives rise to a constitutional concern. If the FVRA or CVRA protected mere "influence," "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." (*LULAC v. Perry* (2006) 548 U.S. 399, 446 (opn. of Kennedy, J.).) The U.S. Constitution forbids the imposition of any predominantly race-based remedy unless that remedy is narrowly tailored to serve a compelling governmental interest. (*Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463-1464.)

Courts have assumed without deciding that governments have a compelling interest in remedying vote dilution. (*Id.* at 1464.) But if any protected class, on proof of mere differences in voting behavior, were able to prevail on a voting-rights claim, then districts would be required just about everywhere, and they would be drawn predominantly on the basis of race; indeed, that would be the only motivation for drawing them in the first place. (See *Bartlett*, 556 U.S. at 21 [rejecting concept of influence districts to "avoid[] serious constitutional concerns under the Equal Protection Clause"].) "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters." (*Shaw*, 509 U.S.

at 657.)[12]

In other words, because the trial court's analysis supports a finding of "vote dilution" even when, as here, a protected class would be no closer to electing candidates of its choice under an alternative system—and may have, at most, some theoretically enhanced "influence"—it is unconstitutionally expansive. Absent evidence that the City's electoral system "thwarts a distinctive minority vote by submerging it in a larger white voting population, … there neither has been a wrong nor can be a remedy." (*Growe v. Emison* (1993) 507 U.S. 25, 40-41.) There is no compelling state interest justifying the imposition of districts, for reasons purely racial, to remedy a race-based harm that does not exist.[13]

Third, Santa Monica is a charter city. The California Constitution provides that its ordinances "supersede state law with respect to 'municipal affairs,'" including city elections. (*State Bldg. & Constr. Trades Council v. City of Vista* (2012) 54 Cal.4th

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[12] The CVRA echoes this concern, making the geographical compactness of a minority group relevant to the question of remedy. (§ 14028(c).) And one CVRA decision raises the possibility that even if a defendant is liable under the CVRA, there might be no "permissible remedy" available, such that the statute "would be unconstitutional" as applied to the facts of the particular case. (*Sanchez*, 145 Cal.App.4th at 689-690.)

[13] In theory, some "influence" claims could be justiciable and constitutional, particularly if there were some evidence that a near-majority of minority voters in a hypothetical district would often be sufficient for the minority group to elect its preferred candidates. But the Court need not decide that question in this case, which presents no such district.

547, 555, quoting Cal. Const., art. XI, § 5.) Without evidence of legally significant racially polarized voting or vote dilution, there is no compelling interest that would override the City's constitutional right to self-determination.[14]

IV. The Trial Court's Equal Protection Ruling Is Legally and Factually Erroneous

The trial court found that the City violated California's Equal Protection Clause because the relevant decisionmakers in 1946 and 1992 adopted and maintained the at-large election system to diminish minority voting strength.

California's Equal Protection Clause (art. I, § 7(a)) is generally interpreted coextensively with the federal Constitution's Equal Protection Clause. (E.g., *Jauregui*, 226 Cal.App.4th at 800 ["California decisions involving voting issues quite closely follow federal Fourteenth Amendment analysis."]; *Hull v. Cason* (1981) 114 Cal.App.3d 344, 372-374 ["The equal protection standards of the Fourteenth Amendment, and of the state's Constitution, are substantially the same."].)

A plaintiff claiming discrimination based on an electoral system must prove both: (a) that the challenged system has caused a disparate impact on a protected class; and (b) that the relevant decisionmakers who adopted or maintained the challenged system affirmatively intended that disparate impact.

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[14] In *Jauregui*, the court decided that the CVRA overrode charter-city autonomy when vote dilution was proven and uncontested on appeal. (226 Cal.App.4th at 798, 808.) Here, *without* evidence of vote dilution, the holding of *Jauregui* does not apply.

(*Rogers v. Lodge* (1982) 458 U.S. 613, 617; *Johnson v. DeSoto Cty. Bd. of Comm'rs* (11th Cir. 2000) 204 F.3d 1335, 1343-1346; *Cano*, 211 F.Supp.2d at 1245; see also *Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361.)[15]

Here, the trial court committed legal error as to both disparate impact and discriminatory intent.

A. The Trial Court Erred as a Matter of Law in Finding Disparate Impact

An at-large election system cannot violate the Equal Protection Clause unless it causes minorities to have "less opportunity to participate in the political processes and to elect candidates of their choice." (*Rogers*, 458 U.S. at 624; see also *Washington v. Finlay* (4th Cir. 1981) 664 F.2d 913, 919 ["vote dilution" is a "special form of discriminatory effect"].)

Here, as a threshold matter, any claim of disparate impact premised on vote dilution fails as a matter of law. Many courts have held that the first *Gingles* precondition—proof of the possibility of a majority-minority district—applies to vote-dilution claims brought under the Equal Protection Clause. (See, e.g., *Johnson*, 204 F.3d at 1344 [impact that must be shown is identical "in both section 2 and constitutional vote dilution cases"]); *Lowery*

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[15] Each element is necessary but insufficient on its own to prove liability. (*Washington v. Davis* (1976) 426 U.S. 229, 239 [disparate impact alone insufficient]; *Sanchez v. State of Cal.* (2009) 179 Cal.App.4th 467, 687 [same]; *Palmer v. Thompson* (1971) 403 U.S. 217, 224 [intent alone insufficient]; *Doe v. Lower Merion School Dist.* (3d Cir. 2011) 665 F.3d 524, 549-550 [same].)

v. Deal (N.D.Ga. 2012) 850 F.Supp.2d 1326, 1331 [same]; *Skorepa v. City of Chula Vista* (S.D.Cal. 1989) 723 F.Supp. 1384, 1393 [same].)

The undisputed facts demonstrate that no minority group in Santa Monica has *ever* been large or compact enough to form a voting-age majority in any hypothetical district. (See, e.g., 24AA10734 [Latino citizen-voting-age population in purportedly remedial district is 30%]; RT5349:1-5353:21 [arithmetic upper limit of Latino share of citizen-voting-age population in *any* district, however configured, is well under 50%]; 26AA11520 [vast majority of City's population—over 95% in the 1940s—has always been white].)[16]

Indeed, there is no evidence of a disparate impact under *any* standard—even if respondents need not have proven the possibility of a majority-minority district. No record evidence shows that the City's minority groups *should have been able* to elect more candidates, but were thwarted by the electoral system; to the contrary, the only evidence on this subject shows that the

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[16] The court observed that in 1992 a political scientist told the Council that a district "could be drawn with a combined majority of Latino and African American residents." (24AA10726.) But this district is not in the record—indeed, it is unclear whether there really was any such district (RT3315:14-19, RT3457:11-16, RT3458:1-7, RT8297:20-27)—and respondents' expert did no analysis showing that such a district would have increased Latino voting strength. (RT4844:12-20.) Although the court appears to have assumed that Latino and African-American voters must vote alike in Santa Monica, undisputed voting data reveal precisely the opposite in election after election. (E.g., 25AA11006, 25AA11008-11009, 25AA11011-11012.)

City's minority populations were always too small and too dispersed for any alternative electoral system to have enhanced their voting strength. (RT7568:18-7575:28, RT8334:17-8343:1.) Moreover, in the analyzed elections between 1994 and 2016, Latino-preferred candidates usually won, directly demonstrating that the at-large election system has not negatively affected Latino voting strength. (See Part I.B.1, *ante*.)

The evidence cited by the trial court cannot support a finding of disparate impact.

First, the court found that the 1946 Charter, which was supported by every local minority leader and indisputably enhanced minority voting strength, did not result in more minorities being elected. (24AA10726.) The court lamented that "[t]hough several ran, no candidates of color were elected to the Santa Monica City Council in the 1940s, 50s, or 60s." (24AA10718.)

But the record is devoid of evidence showing how many minority candidates ran in those decades, much less evidence that such candidates were preferred by minority voters but lost due to white bloc voting. The trial court again appears to have resorted to its unconstitutional assumption that ethnicity determines voting behavior, and then relied solely on speculation that some meaningful number of minority candidates must have run and lost. Even if there were evidence on those points, the defeat of minority candidates would not, by itself, prove a disparate impact because there is no evidence that minority voters would have had greater voting strength under an alternate system, for example,

had the City not changed from its prior at-large three-commissioner system, or had the City switched back to districts.

Second, the trial court adverted to "the impact on the minority-concentrated Pico Neighborhood over the past 72 years"—specifically, that the 10 Freeway, maintenance yard, and other "undesirable elements" are located there. (24AA10705-10706, 24AA10718, 24AA10725.) But this begged the question. If the City's minority voters could not have had greater electoral power under any alternative voting system, then the at-large scheme cannot logically be responsible for the "undesirable elements" noted by the trial court. (See, e.g., *Osburn v. Cox* (11th Cir. 2004) 369 F.3d. 1283, 1288 ["To establish a Fourteenth Amendment claim, the Plaintiffs must not only plead that they lack the equal opportunity to participate in the political process, but must also demonstrate that this inequality *results from the open primary system*," italics added].) There is no evidence that these elements would have been located elsewhere had the City not switched in 1946 from the three-commissioner system or if there had been a hypothetical alternative electoral system in place since 1946.

Third, the trial court stated that "[t]he discriminatory impact of the at-large election system was felt immediately after its maintenance in 1992," when Vazquez failed to win reelection to the Council. (24AA10725.) This is a non sequitur. Vazquez had been elected in 1990 under precisely the same system, so its "maintenance" did not alter the playing field on which he had already prevailed. Further, Vazquez did not lose in 1994 because

of that system, or because he obtained too few white votes. He lost a close race because he won effectively zero Asian and few African-American votes. (See Part I.B.2, *ante*.) And he went on to win a Council seat again in 2012 and 2016. (27AA11947, 28AA12240.)

Lastly, in assessing the purportedly discriminatory impact of the Council's decision not to put districted elections on the ballot in 1992, the trial court overlooked what happened 10 years later. In 2002, voters, including 82% of Latino voters, overwhelmingly rejected the switch. (26AA11613, 28AA12328; RT5863:23-5864:9.) To conclude that something different would have happened in 1992—that, if offered the choice then, voters would have favored district elections—would be speculation.

B. The Trial Court Erred as a Matter of Law in Finding Discriminatory Intent

The judgment should also be reversed because there was no discriminatory intent as a matter of law. The at-large system was not "conceived or operated as [a] purposeful device[] to further racial discrimination." (*Whitcomb v. Chavis* (1971) 403 U.S. 124, 149.)

1. The Trial Court Applied the Wrong Legal Standard, Incorrectly Equating Awareness of Potential Consequences with Affirmative Intent to Cause Those Consequences

At most, the trial court found that the Freeholders in 1946 and the Councilmembers in 1992 were *aware* in the abstract of the potentially discriminatory *effects* of at-large elections, but chose

the at-large election method anyway. (E.g., 24AA10723 ["the City Council understood well that the at-large system prevented racial minorities from achieving representation"].) This is insufficient as a matter of law to establish purposeful discrimination.

"'Discriminatory purpose' … implies more than … intent as awareness of consequences. It implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (*Feeney*, 442 U.S. at 279, citation omitted.)

Courts have applied this requirement of purposeful discrimination—and rejected the theory that mere awareness of consequences is enough to prove it—in vote-dilution cases. (E.g., *City of Mobile v. Bolden* (1980) 446 U.S. 55, 71, fn.17, superseded by statute on other grounds ["if the District Court meant that the state legislature may be presumed to have 'intended' that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard"]; *NAACP v. Snyder* (E.D.Mich. 2012) 879 F.Supp.2d 662, 674 (three-judge panel) [similar].)

Ironically, in conjuring up an "atmosphere" of racism in the decades leading up to the Council's decision in 1992, Dr. Kousser relied on a school-desegregation decision that was reversed for this very reason. (RT3765:1-18.) As this Court explained in that case, "there was no evidence of acts done with specific segregative intent and discriminatory purpose." (*Crawford v. Bd. of Educ.* (1980) 113 Cal.App.3d 633, 645-646; see also *Crawford v. Bd. of Educ.* (1982) 458 U.S. 527, 545 ["we see no reason to challenge the

Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose"].)

The trial court analogized this case to *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, in finding intentional discrimination with respect to the Council's 1992 decision. (24AA10724.) But this reliance on *Garza*, an unusual decision in which the Ninth Circuit found purposeful discrimination notwithstanding a lack of evidence of racial animus, was misplaced.

Garza found that the Board of Supervisors discriminated against Latino voters by choosing "fragmentation of the Hispanic voting population as the avenue by which to achieve [their] self-preservation" as incumbents. (918 F.2d at 771.) Here, however, three of the four Councilmembers who voted against districts in 1992 did not seek reelection when their terms expired, so their opposition to districts had nothing to do with "self-preservation." (RT4748:27-4749:25, RT8430:7-8431:4.)

The trial court nevertheless found *Garza* applicable, because one retiring Councilmember (Zane) voted the way he did to "maintain the power" of a local renters' rights group. (24AA10724.) Zane favored a "hybrid" system that he thought would enhance minority representation and allow the Council to make affordable housing available to City residents. (RT3377:14-3382:21.) Neither *Garza* nor any other case would justify a finding of purposeful racial discrimination based on a retiring councilmember's view that a *partially* district-based method of election, rather than an *entirely* district-based method, would

more closely align with the City's affordable-housing goals.

Because the trial court applied the wrong legal standard, this Court should reverse the judgment.

2. There is No Substantial Evidence of Discriminatory Intent

This Court should review the trial court's findings on discriminatory intent de novo, since all evidence purportedly bearing on intent consisted of a "'cold record'" of documents, newspaper clippings, and videos—improperly refracted through the prism of Dr. Kousser—that the trial court was in no better position to evaluate. (*Avila*, 38 Cal.4th at 529.)

Regardless, the court's findings cannot survive scrutiny even under a more deferential standard.

a. The Freeholders in 1946 Did Not Intend to Discriminate against Minorities

There is zero evidence that any of the Freeholders who proposed the Charter in 1946 harbored animus against minorities. (RT4429:2-14, RT7656:27-7657:14.) To the contrary, one was a member of the NAACP and an organizer of Santa Monica's "Interracial Progress Committee," whose purpose was ensuring "[r]espect for human dignity through common appreciation of the worth of each individual regardless of racial origin." (RT7716:24-28; 25AA11219.) At least one other Freeholder was also active on that Committee. (25AA11218.)[17]

[17] The trial court and Dr. Kousser viewed the existence of the Committee as proof of racial *intolerance*: "racial tensions were

The Freeholders organized meetings to introduce the new Charter. (E.g., 28AA12396, 28AA12398, 28AA12404; RT7691:2-17.) An article reporting on one such meeting with the NAACP—entitled "New Charter Aids Racial Minorities"—described how "the opportunity for representation in minority groups has been increased two and a half times over the present charter by expansion of the City Council from three to seven members." (28AA12404.)[18]

The new Charter was endorsed in a series of newspaper advertisements by six members of the Interracial Progress Committee as well as the City's most prominent African-American, Latino, and Jewish leaders—including Reverend W.P. Carter, president of the local NAACP chapter and the preeminent African-American civil-rights leader in Santa Monica at the time. (28AA12411, 24AA12413 [advertisements]; 28AA12448 [Committee members]; 25AA11218, 25AA11223 [Carter]; RT7738:18-28 [Mrs. Carter]; 25AA11219, 25AA11222 [Wilken];

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prevalent enough in Santa Monica that a Committee on Interracial Progress was necessary." (24AA10719.) Even if this speculative theory were true, it would not support that the Committee members intentionally *furthered* racial discrimination.

[18] In Dr. Kousser's eyes, this article too was evidence of discriminatory intent. He purported to interpret comments made to the NAACP as suggesting the speaker's recognition that district-based elections would be even better for minorities. (RT3482:11-3483:1, RT4445:11-4446:1.) But he admitted that he premised that logical leap solely on the document itself, which says no such thing. (RT4446:18-28.)

28AA12412 [Barnes]; 28AA12443, 28AA12444, RT4658:23-4664:28 [Tucker]; 25AA11221, RT4431:14-4433:22 [Goodfriend]; 28AA12383, RT4435:12-26 [Marx]; RT4665:1-15 [Kleinberg]; 28AA12445 [Reyes]; RT4658:11-22 [Sanchez].)

By contrast, respondents identified *zero* minority residents, *zero* minority groups, and *zero* members of the Interracial Progress Committee who opposed the new Charter. (See RT7746:20-7747:2.) Dr. Kousser nevertheless opined that minority leaders urging a "yes" vote on the Charter must have been "aware that there was a widespread feeling that" "it would dilute minority voting power." (RT4677:11-18.) Even if true, however, this would not support a finding of discriminatory intent. (See Part IV.B.1, *ante*.)

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (1977) 429 U.S. 252, 266, the Supreme Court explained that determining whether a legislative body was motivated by an "invidious discriminatory purpose … demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." The trial court purported to divine the Freeholders' intent through the five *Arlington Heights* factors. (See 24AA10714-10715.) But the record evidence does not support the court's findings on any of these factors.

First, the court found that the 1946 Charter had an "immediate[]" discriminatory impact on minorities. (24AA10718.) But, as noted above (see p. 18, *ante*), the Charter contained an

anti-discrimination provision,[19] and it *increased* minority electoral opportunities—expanding the governing body from three to seven members and eliminating designated posts. (RT4533:24-28, RT7559:4-7561:27.)

The trial court's observation that "no candidates of color were elected to the Santa Monica City Council in the 1940s, 50s, or 60s" (24AA10718) demonstrates nothing. The record contains no evidence of voting behavior in those decades—which candidates ran, of what ethnicity, or how many voters of each group voted for each candidate.

It is likewise legally irrelevant, even if it were true, that "[t]he elements of the city that most residents would want to put at a distance [such as the 10 Freeway] have all been placed in the Latino-concentrated Pico Neighborhood," in some cases "at the direction, or with the agreement, of Defendant or members of its city council." (24AA10705-10706, 24AA10718.) The Pico Neighborhood is not a valid proxy for minority and/or Latino voters because the majority of such voters live *outside* it (RT5354:25-5355:2); moreover, there is no evidence or logical inference that these elements would have been located elsewhere had the City not altered its electoral system in 1946.

Second, the court purported to recount the "historical background" of the 1946 Charter, stating that "[a]t-large elections were known to disadvantage minorities, and that was understood

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[19] Dr. Kousser offered the legal opinion that this had "no legal addition of protection" for minorities, because he considered it duplicative of the Fourteenth Amendment. (RT4548:9-4551:18.)

in Santa Monica in 1946." (24AA10718.)

The only evidence supporting that assertion comes from 1946 newspaper advertisements placed by the "Anti-Charter Committee," urging residents to vote "no" on the new Charter. (24AA10716-10717, quoting 25AA11005 and 25AA10890.) The Committee was a cabal of anonymous businessmen who, far from advocating for minority voting rights, favored keeping the status quo of three commissioners elected at-large to designated posts, likely to preserve their entrenched business relationships with the commissioner-led government. (28AA12399 ["Our present government can't be too bad!"]; 28AA12405 ["Why change to the unknown?"]; 28AA12401, 28AA12406; RT8124:2-16, RT8132:16-26, RT8136:27-8138:23, RT8143:22-8144:22.)

The Anti-Charter Committee advanced many disjointed arguments against the Freeholders' proposal, ranging from anti-Communist rhetoric (28AA12401) to concerns about expenses, bureaucracy, and lack of accountability. (28AA12399, 28AA12405, 28AA12408.) Some thought the Committee was simply trying to "arouse fears" in the "hope of blocking this essential and long overdue reform." (28AA12382.)

One ad expressed concern that the new system would "establish dictatorial rule that will starve out minority groups," a reference to political (not racial) minorities. (25AA11005.) Another wondered, "Where will the laboring man go? Where will the Jews, colored or Mexican go for aid in his special problems" under the new "dictatorship"? (25AA10890.) This ad does not mention district-based elections or suggest that they would be

better for minority groups. Rather, as with all Anti-Charter Committee ads, it simply urges a "NO" vote on the Freeholders' proposal, in favor of the status quo with three designated posts—which unquestionably would have been worse for minority voters. (See *Gingles*, 478 U.S. at 56 [listing "designated posts" among "potentially dilutive electoral devices"].)

The court also interpreted a short article reporting on Census results as somehow expressing "alarm[]" at "the rate of increase in the non-white population." (24AA10719.) The article reported a rise in that population between 1940 and 1946 from 3.4% to just 4.5% of the City's residents. (26AA11520, 28AA12379-12380, 28AA12402; RT7657:16-7662:21.)

The court also noted that Dr. Kousser "show[ed] a strong correlation between voting in favor of the [Charter] and against the contemporaneous Proposition 11," "which sought to ban racial discrimination in employment." (24AA10717, 24AA10720.) But Dr. Kousser's only source on interpreting propositions (a) explained that the debate over Proposition 11 was clouded by anti-Communist rhetoric, and (b) warned that it would be unreasonable to conclude that opposition to Proposition 11 was racially driven, because many people who voted against Proposition 11 also simultaneously voted *against* a straightforwardly racist measure, Proposition 15, which would have barred aliens from holding land. (28AA12375, 28AA12377; RT7667:3-7673:22.)

The court also observed that the pre-Charter Commissioners had adopted a resolution calling for the

deportation of Japanese residents after WWII, and that "Los Angeles County had been marred by the zoot suit riots." (24AA10719.) The court was unable to draw any logical connection between such generalized evidence of discrimination, however abhorrent, and *elections*. As for the riots, the unrebutted evidence showed that they did not occur in Santa Monica. (RT7654:11-7656:6.)

Third, the court addressed the "sequence of events" predating the Charter's adoption, stating only that the Freeholders "waffled between giving voters a choice of having some district elections or just at-large elections, and ultimately chose to only present an at-large election option despite the recognition that district elections would be better for minority representation." (24AA10720-10721.) Yet:

- There is no evidence that *any* minority residents or minority groups advocated for districted elections in 1946. (RT7568:10-17.)
- No evidence supported a purported "recognition" by the *Freeholders* (or anyone else in 1946) that district elections "would be better for minorities."
- Unrebutted evidence showed that districted elections, far from enhancing minority voting strength in 1946, "would have been highly detrimental to minorities," packing them into overwhelmingly white districts in which they would never have had the ability to elect candidates of their choice. (RT7568:18-7575:28.)

- The "hybrid" plan that the Freeholders had "waffled" on at one point (four councilmembers elected at-large and three by districts) would have been "the worst of all worlds for minorities" given the demographics in 1946, since there would have been no "hope of creating a district with enough minority concentration to give them the ability to elect candidates of choice with only four districts." (RT7691:19-7693:6.)

Fourth, as evidence of "substantive and procedural departures," the court cited the same decision by the Freeholders to submit to the voters only an at-large system, instead of a hybrid system. (24AA10721.)

Fifth, the court acknowledged that there was no "legislative and administrative history" behind the Freeholders' decision, but adverted to "statements by proponents and opponents of the charter" that purportedly "demonstrate that all understood that at-large elections would diminish minorities' influence on elections." (24AA10721.) Nothing in the record shows that proponents of the 1946 Charter, including the City's minority leaders, understood that it "would diminish minorities' influence on elections." And certainly nothing in the record suggested that the Freeholders intended to bring about that result.

* * *

The only permissible conclusion to draw from this record is that the Freeholders aimed to *increase* minority voting power through the new Charter. This Court should reject the trial court's contrary conclusion, regardless of the standard of review.

(See *Diego*, 15 Cal.App.5th at 349 ["substantial evidence is not synonymous with *any* evidence…. An inference also may not stand if it is unreasonable in light of the whole record…."].)

b. The Councilmembers in 1992 Did Not Intend to Discriminate Against Minorities

The trial court also found that the City Council in 1992 intended to discriminate against minorities when it declined to put the question of districted elections on the ballot. (24AA10721-10727.) As with the trial court's findings about the Freeholders in 1994, these findings cannot withstand any degree of scrutiny.

As a preliminary matter, there is no evidence of racial animus on the part of the Council; to the contrary, the Councilmembers consistently expressed a desire to *expand* minority representation, which was one of the reasons they established the Charter Review Commission to study the issue in the first place. (E.g., RT3392:2-4, RT3460:2-12, RT4741:5-4743:18.)

The trial court relied heavily on the Commission's recommendation to the Council that a change should be made in the electoral system "'to distribute empowerment more broadly in Santa Monica, particularly to ethnic groups but to neighborhoods and issue groups as well.'" (25AA10914; see 24AA10716, 24AA10722.) This recommendation was tentative: The Commissioners noted that they had drafted their report "with less information than we would have liked" and under a "time frame" too short to allow a full investigation. (25AA10917-10918.)

Moreover, the Commission did not favor district-based elections, for a host of reasons that remain relevant today, including: (i) "voting Latinos in the district might be too few to prevail, and Latinos outside the district would have less influence on the outcome than they do now"; (ii) African-Americans and Latinos in the district would not vote cohesively but instead for their own candidates "in head-to-head competition," with a white candidate possibly emerging as the winner; (iii) minorities were not sufficiently concentrated for districts to make sense; (iv) minority voters would lose influence over six of seven councilmembers; (v) councilmembers would focus only on their own districts rather than the good of the whole City; (vi) voters would vote only every four years instead of every two; and (vii) "for many Santa Monicans, the group with which we identify is not geographically defined." (25AA10915, 25AA10935-10937; RT8420:16-8421:10.) The Commissioners likewise had misgivings about alternative at-large systems, including their "complexity, which would necessitate a thorough public education campaign prior to being put forward as an option for voter consideration." (25AA10916.)

The trial court placed significant weight on Councilmember Zane's statement from a 1992 Council meeting concerning the Commission's findings. The court found that these statements demonstrated "intentional discrimination—Zane understood that his action"—voting against putting district-based elections on the ballot—"would harm Latinos' voting power, and he took that action to maintain the power of his political group to continue

dumping affordable housing in the Latino-concentrated neighborhood." (24AA10722-10724; see RT3377:14-3382:21 [transcribed statement].) The phrase "political group" was a reference to Santa Monicans for Renters' Rights (SMRR), which has advocated for rent control, affordable housing, and other issues since its creation in 1978.[20]

In fact, Zane expressed concern that districts might turn each councilmember into a "case manager … rather than [a] policy maker," more focused on hyperlocal issues than the good of the City as a whole and "afraid" to pass affordable-housing measures in the face of "neighborhood protests." (RT3378:5-25.) Zane stated that he was "sympathetic with some of the views of the district election idea," but that he wanted a system that both solved "representational issues" and addressed "the needs of the poor with things like affordable housing." (RT3380:12-3381:9.) For that reason, Zane proposed a "hybrid" system that he thought would both enhance minority representation *and* allow the Council to make affordable housing available to City residents. (RT3377:14-3382:21.) If Zane's desire to balance these competing concerns amounts to "purposeful discrimination" against

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[20] SMRR has consistently endorsed minority candidates—including candidates who have publicly backed districts, such as respondent Loya and her husband, de la Torre. (E.g., RT2165:21-25 [Loya]; 28AA12356, 28AA12361-12365, RT2169:8-28, RT4822:20-4825:26 [Escarce, Leon-Vazquez, Jara, Quinones-Perez, Vazquez, and Willis]; 28AA12358, 28AA12370, RT4833:11-20, RT6222:23-28 [Snell, de la Torre]; RT3620:15-18 [Duron].) Loya and other minorities have also served on SMRR's steering committee. (RT2167:8-11, RT4848:11-15.)

minorities, then those words have no meaning.

The trial court next applied the five-factor *Arlington Heights* framework and concluded that it "militate[s] in favor of finding discriminatory intent in this case." (24AA10721-10727.) Again, though, the court's findings cannot withstand any degree of scrutiny.

First, the court found that "[t]he discriminatory impact of the at-large system was felt immediately after its maintenance in 1992," when Councilmember Vazquez lost his re-election bid in 1994. (24AA10725.) But this ignores Vazquez's victories in 1990, 2012, and 2016, as well as the undisputed fact that Vazquez polled well among whites in 1994 but poorly among African-Americans and Asians; respondents' experts agreed that Vazquez would have won re-election if whites had been the only voters. (25AA11007; RT2615:22-2616:11, RT4242:3-25; see also RT7128:10-7129:17.) And the analyzed elections from 1994 to 2016 showed that, like Vazquez, other Latino-preferred candidates usually won. (See Part I.B.1, *ante*.)

Second, in recounting the "historical background" of the Council's 1992 decision, the court acknowledged that the contemporary Council "was sometimes supportive of policies and programs that benefited racial minorities." (24AA10726.) Among other things, the City prohibited discrimination in private clubs (28AA12384-12385, RT8407:22-8409:25); required that 30% of new construction be set aside for affordable housing (28AA12387, RT8409:27-8410:11, RT7847:13-25, RT9019:10-21); and began holding Council elections on the same cycles as presidential and

gubernatorial elections, which enhanced minority turnout. (RT7552:12-16, RT8405:25-8407:3; see also RT4221:11-26, RT7086:23-7088:4.)

Notwithstanding these progressive decisions, the court found that the scales tipped toward a finding of intentional discrimination because "the members [of the Council] also supported a curfew that [Vazquez] described as 'institutional racism.'" (24AA10726.)

The court also noted that it was "understood in Santa Monica in 1992" that "[a]t-large elections are well known to disadvantage minorities." (24AA10725.) At most, though, there was a general awareness (which exists in *every* jurisdiction) of the *potential* for at-large elections to dilute minority voting strength in some circumstances—typically when a compact minority group could form a majority in a single-member district, which is not the case in Santa Monica. But "at-large election schemes … are not *per se* violative of minority voters' rights." (*Gingles*, 478 U.S. at 48; see also *United States v. Dallas Cty. Comm'n* (11th Cir. 1988) 850 F.2d 1433, 1438 ["'At-large procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme.'"].) In fact, in many cases, *districted* elections are used to dilute minority voting rights. (E.g., *Garza*, 918 F.2d at 771.)[21]

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[21] The trial court tied the Council's "understanding" to political survival as in *Garza*, asserting that Councilmembers believed districts "would undermine the slate politics" that had helped some get elected. (24AA10726.) The Commission's report, however, noting "positive aspects" of slates, concluded that

Third, as for the "sequence of events" predating the Council's decision, the court stated only that the Charter Review Commission and others had "intertwined the issue of district elections with racial districts, and the connection was clear from the video of the July 1992 city council meeting." (24AA10726.)

This is, yet again, at most evidence of mere awareness of a hypothetical disparate impact, not evidence of an affirmative intent to bring about such an impact.

Fourth, the court identified the Council's decision not to submit the issue of district elections to the voters as a "substantive or procedural departure." (24AA10726-10727.) Dr. Kousser, by contrast, conceded that there were no procedural or substantive departures in 1992. (RT3465:6-26; see also RT8422:23-8423:5.)

Fifth, as for "legislative and administrative history," the court relied on the Council's "deliberate decision to maintain the existing at-large election structure because of, and not merely despite, the at-large system's impact on Santa Monica's minority population." (24AA10727.) This legal conclusion flows solely from the grossly misinterpreted statements of Councilmember Zane; the purportedly discriminatory intent bears no relation either to statements based on animus or the sort of self-preservation tactics at issue in *Garza*.

In sum, whether reviewing de novo or for substantial

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they would "adapt comfortably to the district format." (25AA10924-10925, 25AA10938.)

evidence, the Court should reverse the trial court's finding that the 1992 Council intentionally discriminated against minorities.

V. The Trial Court's Remedial District Map Violates the Elections Code

The trial court's judgment is erroneous not only as to liability, but also as to remedy; the court's adoption of a seven-district map drawn by respondents' expert is in direct conflict with the Elections Code.

Section 10010 of the Code mandates that a public entity switching to districts propose a districting plan after soliciting broad public input through a series of mandatory hearings. There is no dispute here that respondents' expert's districting plan, adopted by the trial court, did not follow this democratic process.

The trial court expressly declined to follow section 10010, reasoning that the statute applies only when a public entity is contemplating the adoption of districts, not when a court is ordering a remedy in a CVRA suit. (24AA10736.) But that conclusion is impossible to reconcile with subdivision (c) of the statute, which specifically states that "[t]his section applies to, but is not limited to, a proposal that is required due to a *court-imposed* change from an at-large method of election to a district-based election." (Italics added.) A court may "impose" such a change only through a final remedial order following a finding or admission of liability. Under the trial court's reading of the statute, there is *no* circumstance under which a court may impose a change in an election system and a public entity would retain

the right and obligation to follow the hearing process required by section 10010. That reading must therefore be erroneous, as courts "should not adopt an interpretation which ... renders parts of the statute surplusage." (*Littoral Dev. Co. v. S.F. Bay Conservation & Dev. Comm'n* (1994) 24 Cal.App.4th 1050, 1060.)

CONCLUSION

The Court should reverse the judgment and enter judgment in favor of the City on both of respondents' causes of action. Alternatively, the Court should reverse the judgment and remand for application of the correct legal standards to both the CVRA and Equal Protection claims. At the very least, the Court should reverse the judgment in part and remand with instructions to order the City to follow the public-hearing process required by section 10010.

DATED: October 18, 2019

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 opening brief contains 16,981 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, the verification, and the signature blocks.

DATED: October 18, 2019

Kahn A. Scolnick

ELECTIONS CODE - ELEC

DIVISION 14. ELECTION DAY PROCEDURES [14000 - 14443] *(Division 14 enacted by Stats. 1994, Ch. 920, Sec. 2.)*

CHAPTER 1.5. Rights of Voters [14025 - 14032] *(Chapter 1.5 added by Stats. 2002, Ch. 129, Sec. 1.)*

14025. This act shall be known and may be cited as the California Voting Rights Act of 2001.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14026. As used in this chapter:

(a) "At-large method of election" means any of the following methods of electing members to the governing body c a political subdivision:

(1) One in which the voters of the entire jurisdiction elect the members to the governing body.

(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.

(3) One that combines at-large elections with district-based elections.

(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and elected only by voters residing within that election district.

(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a general law city, general law county, charter city, charter county, charter city and county, school district, community college district, or other district organized pursuant to state law.

(d) "Protected class" means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.).

(e) "Racially polarized voting" means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.

(Amended by Stats. 2016, Ch. 86, Sec. 121. (SB 1171) Effective January 1, 2017.)

14027. An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14028. (a) A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices

by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

(b) The occurrence of racially polarized voting shall be determined from examining 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. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an actio based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employmen and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtl racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14029. Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14030. In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standard established in Serrano v. Priest (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14031. This chapter is enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II o the California Constitution.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14032. Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

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%

Trial Exhibit 1653A_27

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
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%	5%	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%

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
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%	9%	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)

				Asian		Black		Latino/a		White	
Year	Office	Alternative	Votes	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%	5%	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%