12-08-20

ITEM # 7
RTC# 20-1267

City of Santa Clara
The Center of What's Possible

City Attorney's Office
Memorandum

Date: December 8, 2020

To: Honorable Mayor and Council Members

From: Brian Doyle, City Attorney

Subject: Update on Appeal of *Yumori Kaku, et al v City of Santa Clara*

Councilmember Chahal has requested an update on the appeal of the trial court's California Voting Rights Act decision in *Yumori Kaku, et al v City of Santa Clara.*

The notice of appeal was filed on August 15, 2018. The case was fully briefed and ready for the setting of the oral argument in October 2019. A copy of the briefs on appeal are being transmitted with this memorandum.

On November 16, 2020, the 6th District Court of Appeal notified the parties that the oral argument would be held on December 17, 2020 at 9:30 am. The public will be able to listen to the oral argument by telephone. The dial-in instructions are as follows:

LISTEN-ONLY TELEPHONIC ORAL ARGUMENT

Instructions to participate in telephonic oral argument for members of the public and press.

REQUEST: The court requests that if you would like to listen-only to the oral argument, you should join in **no later than 9:25 a.m.** for the morning session and **no later than 1:25 p.m.** for the afternoon session. When a caller joins in the conference call, it makes a beeping sound. The beeping sound is disruptive to the justices and counsel during oral argument presentation.

REMINDER: If for any reason you get disconnected, you can immediately call the phone number and enter the participant code listed on this page and you will be reconnected.

Step 1. Dial in **1 (877) 820-7831.** If the 1-877 line is busy, please use the alternate number **1 (720) 279-0026.**

Step 2. Enter your participant code: **1043034#**

Step 3. Hang up the phone when oral argument is completed.

POST MEETING MATERIAL

Attorneys' Fees

Following trial, the plaintiffs requested an award of fees and costs as prevailing party. Their request for attorneys' fees was for a total of $4,239,056. By comparison, the City had expended only $755,000 to defend the litigation. The City objected to the request and the trial court entered an order on January 22, 2019 awarding plaintiffs a total of $3,164,956 in attorneys' fees. Their motion for costs was granted in the amount of $174,550. Thus, the City will owe plaintiffs at least $3,339,505 if they prevail on appeal.

In addition, plaintiffs would also recover the fees and costs that they expended in the course of the appeal. A reasonable estimate of the additional amounts that they would claim could bring the total amount to $4 million or more. If the City wins the appeal, plaintiffs would no longer be the prevailing party, saving the taxpayers the need to pay their costs and fees.

Councilmember Jain requested a summary of the City's expenditures on both the trial and appeal of the case. As set forth above, the City's outside counsel costs through trial were approximately $755,000. An additional amount was expended to reduce plaintiff's request for fees from $4.2 million to $3.2 million. The City has spent approximately $700,000 in addition to the trial expenses for a total amount of approximately $1.5 million. The additional work was to reduce plaintiffs' request for fees by $1 million and to research and draft the appellate arguments. In the past year since the case has been ready for hearing on the appeal, the City has not incurred significant expenditures.

We do not anticipate an additional expenditure of more than several hundred dollars between now and the conclusion of the oral argument on December 17.

If you have any questions, please contact me.

Recommendation

Note and file this report.

Brian Doyle
City Attorney

cc: City Manager
City Clerk

12-08-20

ITEM #7
RTC#20-1267

Exempt from Government
Code § 6103

H046105 / H046696

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

LADONNA YUMORI-KAKU, ET AL.
Plaintiffs-Respondents,
v.
CITY OF SANTA CLARA,
Defendant-Appellant.

Appeal From an Amended Statement of Decision Regarding Remedies Phase of Trial; Judgment
Superior Court of California, County of Santa Clara
Honorable Thomas E. Kuhnle, Judge
Superior Court No. 17-CV-319862

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This initial certificate is being submitted on behalf of Appellant City of Santa Clara. The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208(e)(2).

/s/ Steven G. Churchwell

Steven G. Churchwell
Attorneys for Appellant *City of Santa Clara*

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I. INTRODUCTION

This case turns on a simple legal issue: did the Asian-American plaintiffs prove that voters in "the rest of the electorate" usually vote in local elections held in the City of Santa Clara to defeat the preferred candidate of Asian-Americans? The simple answer is no; they did not.

The trial court found that "racially polarized voting" ("RPV") was present in five out of 10 (5/10) of the city council elections reviewed at trial. However, 5/10 does not meet the definition of "usually" in "case law regarding enforcement of the federal Voting Rights Act," which is incorporated into the definition of RPV in the California Voting Rights Act. An unbroken line of this case law since 1986 requires the plaintiff to prove: (1) it votes as a cohesive bloc for its preferred candidate; and (2) the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances such as a minority candidate running unopposed—**usually** to defeat the minority's preferred candidate." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 51 [bold added] ("*Gingles*").) The most generous judicial interpretation of this standard requires the plaintiffs to prove that RPV happens in *more than* 50 percent of the elections. (*Old Person v. Cooney* (9th Cir. 2000) 230 F.3d 1113.)

This showing is a crucial part of proving RPV, because "the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election." (*Gingles*, *supra*, at p. 51.) The error of law below is obvious, because the trial court findings of fact found RPV present in 5/10 city council elections, and *not* present in the other five elections. The application of the "usually" requirement is a question of law that is reviewed de novo.

The trial court committed a second, related error. Plaintiffs' expert, Dr. J. Morgan Kousser, analyzed 10 city council elections between 2002

and 2016. (Appellant's Appendix ("AA"), Vol. 10, 2339:2 [Statement of Decision re: Liabilities, issued June 6, 2018 ("SD-L") 20:2].) The parties agreed that there was RPV in three of those elections. The parties also agreed there was *no* RPV in five of those elections. (AA, Vol. 10, 2339:2-6 [SD-L 20:2-6].) The parties disputed whether there was RPV in two elections held in 2016. Dr. Kousser had used three different statistical methods to analyze the data in his report, but the trial court found that one of them—Ecological Inference ("EI")—which was also used by the City's statistical expert Dr. Jeffrey Lewis, was the superior method. (AA, Vol. 10, 2339, fn. 8 [SD-L 20, fn. 8].)

The trial court ultimately found that there was RPV in 5/10 city council elections, based *not* on evidence in the record, but only after performing its own EI calculations post-trial. (AA, Vol. 10, 2339, fn. 9 [SD-L 20, fn. 9].) The trial court found after the trial, using the 95% confidence level used by Dr. Kousser in his report and at trial, that 3/10 of the city council elections met the test for RPV. However, the trial court then lowered the confidence level from 95% to 80% and performed its own EI analysis. It found that 5/10 city council elections met the test for RPV.

Similarly, in the nine "exogenous" school board elections reviewed at trial, the parties agreed there was RPV in two. (AA, Vol. 10, 2340:3-4 [SD-L 21:3-4].) The parties also agreed there was **no** RPV in three of the school board elections. (AA, Vol. 10, 2340:5 [SD-L 21:5].) The trial court found after the trial, using the 95% confidence level used by Dr. Kousser, that 2/9 of school elections met the test for RPV. (AA, Vol. 10, 2340:3-5 [SD-L 21:3-5] The trial court again lowered the 95% confidence level used by Dr. Kousser to 80% and performed its own EI analysis on the four disputed elections. (AA, Vol. 10, 2340:10-11 [SD-L 21:10-11].) Using its own calculations, the trial court found RPV in two of the disputed elections

bringing total RPV in school elections up to 4/9. (AA, Vol. 10, 2340:10-18 [SD-L 21:10-18].)

In addition, if the trial court's judgment imposing race-based districts in City elections were allowed to stand on findings that do not meet the "usually" standard, it would raise two constitutional issues. First, the trial court's application of the CVRA remedy of forcing the creation of race-based districts without sufficient proof that the minority's preferred candidates were "usually" defeated by voters in the rest of the electorate would violate the rights guaranteed to all *non*-Asian voters under the Equal Protection Clause. Second, the lack of evidence of RPV is insufficient to prove the Equal Protection violation that is necessary to overcome the City's plenary authority to choose the "manner ... and method" of electing its officers, as set forth in Article XI, section 5(b)(4) of the California Constitution.

Therefore, the City requests that the trial court's judgment regarding the City's liability under the California Voting Rights Act be reversed.

II. STATEMENT OF APPEALABILITY

These two appeals are from a judgment (H046105) and amended judgment (H46996) of the Santa Clara County Superior Court and are authorized by the Code of Civil Procedure, section 904.1, subdivision (a)(1).

III. PROCEDURAL HISTORY

Plaintiffs Ladonna Yumori Kaku, Wesley Kazuo Mukoyama, Umar Kamal, Michael Kaku, and Herminio Hernando ("Plaintiffs") filed this action against the City of Santa Clara ("City") on December 1, 2017, and a First Amended Complaint ("FAC") on December 27, 2017. (AA, Vol. 1, pp. 47-57 & 69-79.) Plaintiffs alleged that the City's at-large election system for

electing City Council members violates the California Voting Rights Act ("CVRA"). (Elec. Code, §§ 14025–14032.)[1]

On April 2, 2018, the trial court ordered the Plaintiffs and City to file simultaneous expert reports and trial briefs. (AA, Vol. 1, 105-107.)

On April 23 through April 26, 2018, the trial court conducted the liability phase of the trial. (AA, Vol. 10, 2320:20-21 [SD-L 1:20-21].)

The trial court issued its Proposed Statement of Decision for the liabilities phase of trial on May 15, 2018. (AA, Vol. 10, 2259-2284.) The City (May 30, 2018) and Plaintiffs (June 1, 2018) filed their respective objections and responses to the Proposed Statement of Decision. (See AA, Vol. 10, 2288-2298, 2305-2319.) The trial court then issued its Statement of Decision on June 6, 2018, which adjudged "the City liable for violating the CVRA." (AA, Vol. 10, 2345:9 [SD-L 26:9].)

On July 18 through July 20, 2018, the trial court conducted the remedies phase of the trial. (AA, Vol. 16, 3234-3242.) The trial court issued an "Amended Statement of Decision Regarding Remedies Phase of Trial; Judgment" on July 24, 2018. (AA, Vol. 16, 3267:2-3.)

On August 15, 2018, the City timely filed a Notice of Appeal (H046105) from the Judgment. (AA, Vol. 16, 3281.)

Plaintiffs filed a motion for attorneys' fees on October 20, 2018, and the trial court heard the matter on January 4 and January 22, 2019. (AA, Vol. 24, 5177:19-22.)

On January 22, 2019, the trial court issued an "Amended Statement of Decision Regarding Remedies Phase of Trial; Amended Judgment." (AA, Vol. 24, 5195:3, 5196-5205.)

[1] All textual references to "Section" or citations to "§" are to the California Elections Code, unless otherwise noted.

The City filed a timely Notice of Appeal from the Order Regarding Motion for Attorneys' Fees and Amended Judgment on February 27, 2019 (H046696). (AA, Vol. 24, 5220.)

Plaintiffs/Respondents filed a Motion for Calendar Preference on May 21, 2019. (Motion for Calendar Preference, filed May 21, 2019.) This Court granted the motion on June 4, 2019.

On June 28, 2019, the parties filed a joint Stipulation for Consolidation of both appeals with the Appellant's Opening Brief to be filed on July 23, 2019. (Stipulation for Consolidation of Appeals, filed June 28, 2019.) By order of this Court filed July 3, 2019, appeals H046105 and H046696 will be considered together for the purposes of briefing, oral argument and disposition, but not consolidated.

IV. STATEMENT OF FACTS

The City of Santa Clara ("City") is a charter city, established under Article XI, section 5 of the California Constitution. (AA, Vol. 4, pp. 917-918.) The City had approximately 115,000 residents in 2010. (AA, Vol. 10, 2321:11 [SD-L 2:11].)

The City Charter provides for a seven-member City Council, including a separately elected Mayor. (AA, Vol. 4, 918.) Council Members, including the Mayor, are elected from the entire City at-large to four-year terms. (*Ibid.*) Each City Council office is designated by a seat number (e.g., Council Member Seat No. 1). (*Id.* at p. 919.) A vacancy on the City Council, including the office of the Mayor, is filled through City Council appointment by four-fifths vote of the remaining members of the City Council, or through an election to fill the vacancy. (*Id.* at p. 921.) Elections are held in accordance with the California Elections Code, except to the extent it conflicts with the City's Charter. (*Id.* at p. 919.) Any change in the City's election system requires an amendment of the City Charter, which—

in turn—requires a vote of a majority of the City's voters. (Gov. Code, § 34458.)

A. Summary of the 10 City Council Elections Involved in This Case.

The Plaintiffs presented 10 city council elections held between 2002 and 2016 that they wished the trial court to evaluate. (AA, Vol. 9, 1959-1968.) City council elections are also referred to as "endogenous" elections because only residents of the City vote in these elections.[2] The data in the tables below is from the website of the Santa Clara County Registrar of Voters. (Request for Judicial Notice ("RJN"), pp. 2-5 (Exhibits ("Exs.") 1-19.)

2002 Councilmember Seat 2	**Vote Count**	**Percentage**
Dominic Caserta	8,773	49.7%
Mike Rodriguez	4,334	24.6%
Frederick J. Clegg	2,493	14.1%
Nam Nguyen	2,037	11.5%
Total	17,637	

2004 Councilmember Seat 3	**Vote Count**	**Percentage**
Will Kennedy	12,113	41.86%
Karen Hardy	12,056	41.66%
Nam Nguyen	4,768	16.48%
Total	28,937	100.00%

2004 Councilmember Seat 4	**Vote Count**	**Percentage**
Kevin Moore	13,442	48.10%
Gap Kim	7,749	27.73%
Frederick J. Clegg	3,396	12.15%
Mario Bouza	3,359	12.02%
Total	27,946	100.00%

[2] See *Luna v. County of Kern* (E.D. Cal. 2018) 291 F.Supp.3d 1088, 1119.

2010 Councilmember Seat 2	Vote Count	Percentage
Patrick Kolstad	12,962	54.12%
M. Nadeem	10,990	45.88%
Total	23,952	100.00%

2012 Councilmember Seat 3	Vote Count	Percentage
Debi Davis	19,334	61.70%
Mohammed Nadeem	12,000	38.30%
Total	31,334	100.00%

2014 Councilmember Seat 2	Vote Count	Percentage
Patrick Kolstad	8,051	38.72%
Karen Hardy	6,818	32.79%
Mohammed Nadeem	5,926	28.50%
Total	28,937	100.00%

2014 Councilmember Seat 5	Vote Count	Percentage
Dominic Caserta	8,042	39.37%
Kevin Park	7,194	35.22%
Roseann Alderete LaCoursiere	5,190	25.41%
Total	28,937	100.00%

2016 Councilmember Seat 4	Vote Count	Percentage
Patricia Mahan	11,384	32.78%
Tino Silva	10,059	28.96%
Raj Chahal	9,365	26.96%
Markus A. Bracamonte	3,925	11.30%
Total	34,773	100.00%

2016 Councilmember Seat 6	Vote Count	Percentage
Kathy Watanabe	16,526	47.95%
Mohammed Nadeem	6,895	20.00%
Suds Jain	5,319	15.43%
Anthony J. Becker	2,966	8.61%
Mario Bouza	2,762	8.01%

Total	34,468	100.00%

2016 Councilmember Seat 7	**Vote Count**	**Percentage**
Teresa O'Neill	19,634	57.13%
Kevin Park	10,635	30.94%
Ahmad Rafah	4,100	11.93%
Total	34,369	100.00%

B. Summary of the Nine School Board Elections Involved in This Case.

The Plaintiffs also presented nine "exogenous" elections[3] held between 2000 and 2016 that they wished the trial court to evaluate. (AA, Vol. 9, 1968-1977.) These elections were for: (1) the Santa Clara County Board of Education, Area 5; and (2) the Board of the Santa Clara Unified School District, Area 2. (*Ibid.*) Although some city residents were able to vote in these elections, both the jurisdictions and the districts involved include areas outside of the City's boundaries. The City will adopt the trial court's shorthand and refer to the combined County Board and School District elections as "School Elections." (AA, Vol. 10, 2340:1.)

2000 County Board of Ed., Area 5	**Vote Count**	**Percentage**
Anna E. Song	33,548	57.7%
Mike Rodriguez	15,524	26.7%
Pauline Curiel	4,623	8.0%
Aeneas D. Casey	4,403	7.6%
Total	58,098	100.00%

[3] See *Luna v. County of Kern*, *supra*, 291 F.Supp.3d at p. 1130.

2004 County Board of Ed., Area 5	Vote Count	Percentage
Anna E. Song	47,498	68.92%
Toan Le	21,423	31.08%
Total	68,921	100.00%

2008 County Board of Ed., Area 5	Vote Count	Percentage
Anna E. Song	40,886	53.73%
Carmen Montano	35,216	46.27%
Total	76,102	100.00%

2008 Santa Clara USD, Area 2 Vote for Two	Vote Count	Percentage
Albert Gonzalez	17,876	36.79%
Don Bordenave	12,071	24.85%
Noelani Sallings	12,042	24.79%
Ashish Mangla	6,594	13.57%
Total	48,583	100.00%

2010 Santa Clara USD, Area 2 Vote for Two	Vote Count	Percentage
Christine Ellen Koltermann	9,231	20.78%
Ina K. Bendis	8,572	19.30%
Viola Smith	8,251	18.58%
Patricia C. Flot	8,129	18.30%
Anna Strauss	6,612	14.89%
Ashish Mangla	3,624	8.16%
Total	44,419	100.00%

2012 County Board of Ed., Area 5	Vote Count	Percentage
Anna E. Song	35,401	57.45%
David J. Neighbors	26,215	42.55%
Total	61,616	100.00%

2012 Santa Clara USD, Area 2 Vote for Two	Vote Count	Percentage
Christopher R. Stampolis	17,260	32.65%
Albert Gonzalez	16,967	32.10%
Jim Vanpernis	12,088	22.87%
Ashish Mangla	6,548	12.39%
Total	52,863	100.00%

2014 Santa Clara USD, Area 2 Vote for Two	Vote Count	Percentage
Jodi Muirhead	13,336	32.28%
Noelani Sallings	10,885	26.35%
Christine Ellen Koltermann	6,143	14.87%
Ina K. Bendis	4,735	11.46%
Steve Kelly	3,349	8.11%
Ashish Mangla	2,864	6.93%
Total	41,312	100.00%

2016 Santa Clara USD, Area 2 Vote for Two	Vote Count	Percentage
Albert Gonzalez	26,613	49.26%
Mark Richardson	15,890	29.41%
Ashish Mangla	11,518	21.32%
Total	54,021	100.00%

V. STANDARD OF APPELLATE REVIEW

This Court reviews de novo matters presenting pure questions of law. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) Accordingly, this Court independently reviews the proper interpretation of a statute and is not bound by evidence on the question presented in the trial court or by the trial court's interpretation of the statute. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Daugherty v. City & County of San Francisco* (2018) 24 Cal.App.5th 928, 944.) Application of the interpreted statute to

undisputed facts also presents a question of law subject to independent appellate determination. (*International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611.) Under these well-established rules, this Court should independently review "usually" requirement by interpreting Section 14026(e) and "case law regarding enforcement of the federal Voting Rights Act" that is incorporated by reference into that definition.

The propriety of the trial court's decision to conduct its own statistical analysis, instead of relying on the expert testimony that had been vetted through the adversarial process, is reviewed under an abuse of discretion standard of review. (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 49 ("*Duran*").)

VI. APPLICABLE LAW

The California Voting Rights Act provides that an at-large method of election may not be applied in a manner that results in dilution of the rights of voters who are members of a protected class. (§ 14027.) A "protected class" means "a class of voters who are members of a race, color or language minority" as defined in the federal Voting Rights Act ("federal VRA"). (§ 14026, subd. (d).) It is not in dispute that the five plaintiffs in this lawsuit are Asian-American and members of a protected class of voters under the CVRA.

In order to establish a violation of Section 14027, a plaintiff must prove that RPV occurs in elections for members of the governing body of the defendant jurisdiction or exogenous elections. (§ 14028, subd. (a).) Here, the Santa Clara City Council is the governing body. The CVRA defines "racially polarized voting" as:

> "[V]oting in which there is a difference, **as defined in case law regarding enforcement of the federal Voting Rights Act** ... in the choice of candidates ... that are preferred by voters in the protected class, and in the choice of candidates ... that are preferred by voters in the rest of the electorate." (§ 14026, sub. (e) [bold added].)

A. "Case Law Regarding Enforcement of the Federal Voting Rights Act."

This comparison in Section 14026(e) of the "difference" in the voting choices of the protected class and "the rest of the electorate" describes two of the three preconditions set forth in the landmark voting rights decision *Thornburg v. Gingles*, *supra*, 478 U.S. 30. There, the United States Supreme Court established three preconditions[4] that a plaintiff-minority claiming vote dilution under Section 2 of the federal VRA must prove before moving on to a trial. Failure to establish any of the three is fatal to a Section 2 claim. (*Romero v. Pomona* (9th Cir. 1989) 883 F.2d 1418, 1422; *Overton v. City of Austin* (5th Cir. 1989) 871 F.2d 529, 538.) Federal plaintiffs have the burden of proving each of these three elements. (*Gingles*, supra, 478 U.S. at p. 50 & fn. 17.)

[4] See *Gingles, supra,* 478 U.S. at pp. 50-51. The courts have also referred to the three preconditions as "threshold requirements." (See *Campos v. City of Houston* (5th Cir. 1997) 113 F.3d 544, 547 & fn. 12.)

The three "preconditions" that a plaintiff must prove in federal court are:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district ... . Second, the minority group must be able to show that it is politically cohesive ... . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." (*Sanchez v. City of Modesto* ("*Sanchez*") (2006) 145 Cal.App.4th 660, 667-668 [citing *Gingles, supra*, 478 U.S. at pp. 50-51].)

If the plaintiff establishes all three preconditions, the court will then conduct a trial to consider the "totality of the circumstances."[5] "There are two steps to proving a section 2 vote dilution claim: (1) satisfying the so-called "*Gingles* preconditions," and (2) showing the violation based on a totality of the circumstances." (*Missouri State Conference of the National Association for the Advancement of Colored People v. Ferguson–Florissant School District* (8th Cir. 2018) 894 F.3d 924; see also *Negron v. City of Miami Beach, Florida* (11th Cir. 1997) 113 F.3d 1563, 1566-67 ["[p]roving the three preconditions is not the end of the story, however."].)

At the "totality" trial, the court hears evidence on the seven "Senate Factors."[6]

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[5] *Gingles, supra,* 478 U.S. at p. 36, citing Section 2 of 42 U.S.C. § 1973; see also *N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y.* (2nd Cir. 1995) 65 F.3d 1002, 1019.

[6] The *Gingles* court discussed the Senate Factors contained within the report by the Senate Committee on the Judiciary that accompanied the 1982 federal voting rights legislation. (*Gingles, supra,* 478 U.S. at p. 36.) The report suggested seven factors for courts to consider when determining whether, within the totality of the circumstances in a jurisdiction, the

B. Differences Between the CVRA and Federal VRA.

The CVRA is modeled on section 2 of the federal VRA, but with changes, described below, to reflect the California Legislature's desire to provide a broader cause of action for vote dilution. (*Sanchez, supra,* 156 Cal.App.4th at p. 669.) At the time of the CVRA's enactment in 2001 as SB 976 (Polanco), *Gingles*' first precondition (i.e., whether the plaintiffs could draw a majority-minority district) had been a difficult hurdle for the plaintiff-minority to get over in federal cases. (See, e.g., *Campos v. City of Houston* (5th Cir. 1997) 113 F.3d 544, 547-548 [Hispanic population constituted only 15.3% of citizen voting-age population of the city and was not geographically compact].)

In addition, other federal plaintiffs in the 1990s had met the three preconditions, only to run aground after the court weighed the Senate factors at the "totality" trial:

> "After its effort to apply the third *Gingles* [precondition], the district court found that, under the "totality of the circumstances" presented on this record, the plaintiffs failed to show that the challenged voting structure impairs the plaintiffs' rights to enjoy an equal opportunity to participate in the political process and elect candidates of their choice." (*N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y.* (2nd Cir. 1995) 65 F.3d 1002, 1019; accord *Rural W. Tennessee African-Am. Affairs Council, Inc. v. McWherter* (W.D. Tenn 1995) 877 F. Supp. 1096, 1099 [plaintiff established all three preconditions of *Gingles*, but failed to prove a Section 2 violation after the court considered the totality of the circumstances].)

Thus, the California Legislature diverged from *Gingles* and the proof required of a plaintiff in federal cases in two important respects: (1) it

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operation of the electoral system being challenged results in a violation of Section 2. (S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pp. 28-29.)

expressly **eliminated the first precondition**[7] (see § 14028, subd. (c) [bold added]); and (2) makes the Senate Factors "probative, **but not necessary** factors to establish a violation ... ." (§ 14028, subd. (e) [bold added].)

What Plaintiffs *did* have to prove in this case were the second and third preconditions of *Gingles*: (1) Asian-Americans vote as a cohesive bloc for their preferred candidate; and (2) the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances such as a minority candidate running unopposed—usually to defeat the minority's preferred candidate." (*Gingles*, supra, 478 U.S. at p. 51.)

VII. ARGUMENT

A. The Trial Court's Incorrect Conclusion of Law that 5/10 Elections Meets the "Usually" Standard Requires Reversal of Its Liability Determination.

Plaintiffs bore the burden of proving at trial that legally cognizable RPV had occurred in the at-large elections for Santa Clara's City Council. The trial court erred in finding that Plaintiffs had satisfied the third *Gingles* precondition, which required Plaintiffs to prove that the "majority votes sufficiently as a bloc to enable it — in the absence of special circumstances such as a minority candidate running unopposed — **usually** to defeat the minority's preferred candidate." (*Gingles*, supra, 478 U.S. at p. 51 [emphasis added].)

The trial court noted in its Statement of Decision that the liability phase of the trial focused on the two applicable *Gingles* preconditions. (AA, Vol. 10, 2327:27-2328:9 [SD-L 8:27 – 9:3].) The trial court correctly described the "usually" requirement in the "Burden of Proof" section of its Statement of Decision:

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[7] See also Bill Analysis, Senate Floor Third Reading, SB 976 (Polanco), As Amended June 11, 2002, ("CVRA Leg. History") (RJN, Ex. 20.)

> "Among other things, this means plaintiffs must prove by a preponderance of the evidence that a significant number of minority group members 'usually' vote for the same candidate and that a white bloc vote will 'normally' defeat the combined strength of the minority support plus white crossover votes." (AA, Vol. 10, 2329:21-24 [SD-L 10:21-24].)[8]

But the trial court never *applied* the "usually" requirement to its findings of fact regarding the number of racially polarized elections.

California courts have quoted the "usually" language in describing what *Gingles* and its progeny require. (*See Wilson v. Eu* (1992) 1 Cal.4th 707, 748; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 789; *Sanchez*, *supra*, 145 Cal.App.4th at p. 668; *Nadler v. Schwarzenegger* (2006) 137 Cal.App.4th 1327, 1342.) And the "usually" test is a crucial part of proving RPV because, as the Supreme Court explained in *Gingles*, it is "the usual predictability of the majority's success" that "distinguishes structural dilution from the mere loss of an occasional election." (*Gingles, supra,* 478 U.S. at p. 51.)

Section 14026(e) defines "racially polarized voting" as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act" between the candidates preferred by "voters in a protected class" and those preferred by "voters in the rest of the electorate." This language incorporates federal case law regarding both the second and third *Gingles* preconditions, which relate to methods of proving

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[8] "Normally," "usually" and "generally" are used in *Gingles* to describe the number of elections showing RPV that are required to satisfy the third precondition. (*Gingles, supra,* 478 U.S. at pp. 31, 33, 49, 51, 56, 63 ["usually" in the plurality] & pp. 90, 92 ["usually" in O'Connor, J., concurring in the judgment]; *id.* at pp. 56, 58, & 76 ["generally" in the plurality]; *id.* at pp. 31 & 56 ["normally" in the plurality] & p. 92 ["normally" in O'Connor, J., concurring in the judgment].)

a legally significant "difference" in voting patterns between the protected class and the rest of the electorate. (AA, Vol. 10, 2327:27-2328:3 [SD-L, 8:27-9:3].) The trial court acknowledged that the CVRA "incorporates" federal case law on these points. (AA, Vol. 10, 2327:16-17 [SD-L 8:16-17].)[9]

An unbroken line of federal cases has uniformly required a plaintiff to prove, at the very least, that a majority voting bloc defeats the minority's preferred candidates in *more than* 50% of the relevant elections. For example, in *Old Person v. Cooney*, *supra*, 230 F.3d 1113, the Ninth Circuit noted that "white bloc voting is said to be 'legally significant' " only if it meets the "usually" test, and endorsed the definition of "usually" as "more than half the time." (*Id.* at p. 1122.) The trial court did not cite a different standard.

Other federal circuits have required an *even greater* showing of the usual defeat suffered by minority-preferred candidates to satisfy the "usually" requirement. For example, in *Lewis v. Alamance County, N.C.* (4th Cir. 1996) 99 F.3d 600 ("*Lewis*") , the Fourth Circuit stated:

> "We do not imply that the third *Gingles* element is met if plaintiffs merely show that white bloc voting defeats the minority-preferred candidate more often than not. The terms used by the *Gingles* Court are 'usually', 'normally', and 'generally'. [citation] We need not in this case specify a meaning for these terms; suffice it to say that they mean something more than just 51%. [citation] *Uno v. City of Holyoke,* 72 F.3d 973, 985 (1st Cir.1995) ('[T]o be legally significant, racially polarized voting in a specific community must be such that, over a period of years, whites vote sufficiently as a bloc to defeat minority [-preferred] candidates *most of the time.*' (emphasis added))."

[9] The City highlighted the "usually" requirement in two places in its objections. (AA, Vol. 10, 2289:17-2290:28 ["Burden of Proof"] & 2297:1-7 ["Evaluating the Evidence"].)

(*Lewis*, *supra*, at p. 606, fn. 4.)

The trial court's findings of fact of RPV voting in only 5/10 city council elections, and not being present in the other five elections effectively forecloses Plaintiffs' claim of vote-dilution. (*Clay v. Board of Ed. of the City of Saint Louis* (8th Cir. 1996) 90 F.3d 1357, 1361 [affirming dismissal of § 2 claim because plaintiffs failed to "identify the minority preferred candidates and show that, due to majority bloc voting, they usually are not elected ... ."])

Therefore, the trial court's failure to apply the correct "usually" test requires reversal of the judgment of liability. The trial court found that Plaintiffs proved RPV in five out of ten City Council elections. (AA, Vol. 10, 2344:9-10 [SD-L, 25:9-10].) The trial court also found that RPV was **not** present in the other five elections. (AA, Vol. 10, 2339:4-6 [SD-L 20:4-6].)

This finding that only 5/10 of the city council elections met the definition of RPV (AA, Vol. 10, 2344:6-12 [SD-L 25:6-12]) does not support a conclusion that the "usually" standard was met. And the trial court's finding that 4/9 of the exogenous school elections (which it found "not as probative") met the definition of RPV (AA, Vol. 10, 2344:12-14 [SD-L 25:12-14]) does nothing to change that conclusion.

Even apart from the uniform case law, logic dictates that 5/10 cannot mean "usually." No one would say that a flipped coin "usually" lands on heads, because it is equally likely to land on tails. Likewise, it is impossible to say that Santa Clara's elections are "usually" characterized by RPV after finding RPV in only five of ten elections. (AA, Vol. 10, 2344:9-10 [SD-L, 25:9-10].) If the trial court had correctly applied the "usually" test to its findings of fact, it would have decided that Plaintiffs failed to meet their

burden of proving that the City violated the CVRA. This error alone requires reversal of the judgment of liability against the City.

B. The Trial Court Abused Its Discretion by Conducting Its Own Statistical Analysis Post-Trial Using an 80% Confidence Level.

Plaintiffs' expert, Dr. Kousser performed a complex statistical analysis called "ecological inference" to estimate how different racial groups had voted in Santa Clara elections. (AA, Vol. 10, 2336:18 [SD-L 17:18].) Because ballots are secret, there is no record of how individuals of any race actually voted in any of the elections at issue. (Reporter's Transcript ("RT"), Vol. 3, 715:9-21.) Statistical methods can sometimes be used, however, to make estimates of group voting because some precincts in the relevant jurisdiction will contain large percentages of one racial group to provide statistically useful information about how that racial group voted (at least in that precinct). (AA, Vol. 10, 2325:19-24 [SD-L 6:19-24].) By making some assumptions, and using statistical tools, an expert can try to estimate voting behavior for racial groups. (AA, Vol. 10, 2334:7-14 [SD-L 5:7-14].) Because of the layers of assumptions and imprecise estimates involved in this exercise, however, it is standard for statisticians to use a 95% "confidence level" in evaluating the results.[10] This means that the expert creates a range of estimates of how many voters of each race supported each candidate that he or she believes will include the true answer 95% of the time (and will fail to include the true answer 5% of the time). (RT, Vol. 3, 717:18-28.)

[10] Testimony of Dr. Kousser (RT, Vol. 3, 718:9-12, 719:4-25, 746:23 & 751:13-16.)

In his expert report and trial testimony, Dr. Kousser used the 95% confidence level (also referred to as 0.05).[11] He testified at trial that he chose the 95% confidence level because it was: "the most usual one," "a standard convention," "the bona fide level," and the "statistically significant margin." (RT, Vol. 3, 718:9-12, 719:4-25, 746:23 & 751:13-16.) Using that standard confidence level, Dr. Kousser could show RPV in only 3/10 City Council elections (AA, Vol. 10, 2339:2-3 [SD-L 20:2-3]), far short of the evidence Plaintiffs needed to show that Asian preferred candidates were "usually" defeated.

The trial court acknowledged in its Statement of Decision that, using "the 95 percent confidence intervals," Plaintiffs could not show there was any candidate who was preferred by Asian-American voters in the two 2016 elections (for Seat 4 and Seat 6). (AA, Vol. 10, 2339:7-17 [SD-L 20:7-17].) In other words, at the 95% confidence level utilized by Dr. Kousser, there could be no RPV in those two 2016 City Council. This is because it was not possible to tell whether Asian-American voters *preferred* a specific candidate, which makes it impossible to determine whether those preferred candidates were defeated by the voters in the rest of the electorate (precondition three). Accordingly, Plaintiffs failed to prove the third *Gingles* precondition for those two city council elections.

But instead of applying the confidence level that Plaintiffs' expert statistician had used, the trial court erred by conducting its own statistical

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[11] During the trial, the statistical experts used these numbers interchangeably: (1) 0.05 level of statistical significance (Kousser Report, 10:8-13); (2) 95% level of certainty (Kousser Testimony, RT, Vol. 3, 717:18-22); (3) 0.05 level (Kousser Testimony, RT, Vol. 3, 751:3-8); (4) 0.95 level (Kousser Testimony, RT, Vol. 3, 776:21-22); (5) 95% confidence interval (SD-L, 16:14-17); (6) 95 percent or .05 uncertainty level (Kousser Testimony, RT, Vol. 3, 809:23-24); (7) 95 percent confidence level (Lewis Testimony, RT, Vol. 5, 1235:23).

analysis using a lower confidence level that was not supported by any evidence in the record. As discussed more fully below, this deviation from the proper procedure for considering expert testimony was an abuse of discretion. It also demonstrates Plaintiffs failure to meet the "usually" standard as required by the third *Gingles* precondition.

Under proper procedures, expert testimony enters a trial in two phases: first, the trial court determines whether the opinion is admissible; second, the trier of fact evaluates the opinion and how much weight it deserves. (See *Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58.) The trial court acts as a "gatekeeper" to exclude "'clearly invalid and unreliable' expert opinion." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 772 [citations omitted].) The trial court must not weigh an expert opinion's probative value or "substitute its own opinion for the expert's opinion." (*Ibid.*) Once expert testimony is admitted in a bench trial, the judge becomes the trier of fact, and the judge then must evaluate the evidence itself. (See *Guadalupe A. v. Superior Court* (1991) 234 Cal.App.3d 100, 108.)

These cases give trial judges a role as gatekeepers (and, in bench trials, fact finders). They do not permit trial judges to usurp the role of experts or empower trial judges to conduct their own expert analyses unvetted by the adversarial process, especially in complex arenas such as the statistical methods that might sometimes enable a statistician to estimate group voting behavior. Rather, concern for the parties' rights requires that complicated statistical methods be employed with caution, vetted through the adversarial process, and scrutinized by gatekeepers to ensure that the results obtained from statistical analyses are "sufficiently reliable to satisfy concerns of fundamental fairness." (*Duran, supra,* 59 Cal.4th at pp. 41 & 49.)

In *Duran*, the California Supreme Court rejected a trial court's effort to substitute his own statistical methods for the analyses offered by the expert witnesses for the parties. The trial court had devised its own statistical sampling plan in an effort to find a manageable way to conduct a trial in a wage and hour class action. (*Duran, supra,* 59 Cal.4th at pp. 38 & 40.) Specifically, the trial court invented its own sampling methodology to identify which class members would be used as the test group and "adamantly adhered to this methodology, rejecting substantial expert criticism." (*Id.* at p. 49.) The Supreme Court reversed the judgment after a lengthy bench trial, rejecting the trial court's approach, because it was "profoundly flawed," was not "developed with expert input," and did not "afford the defendant an opportunity to impeach the model." (*Id.* at pp. 12-13.)[12]

Here, the trial court made the same type of error as the trial court in *Duran*, and the judgment should be reversed for the same reasons. As in *Duran*, the trial court offered "an alternative of its own devising." (*Duran, supra,* 59 Cal.4th at p. 15.) The trial court's "80 percent confidence interval," was not supported by any expert evidence, not included in any expert report, and was offered at a time (post-trial) and in a way (in a footnote in the statement of decision) that did not provide the City with the opportunity to impeach the trial court's statistical analysis.

The trial court recognized that its "80 percent confidence interval," was not support by evidence in any of the expert reports or other expert evidence offered at trial. Rather, the trial court stated that it had devised this method based on an argument in Plaintiffs' post-trial brief:

[12] Notably, the California Supreme Court found that statistical experts typically calculate the margin of error using a 95% confidence level. (*Id.* at p. 46 & fn. 36.)

> "Moreover, at the 80 percent confidence interval urged by the Plaintiffs in their post-trial brief, there is an Asian preferred candidate in both contests, and for the reasons noted above, the Court believes that an 80 percent confidence interval provides sufficiently reliable results." (AA, Vol. 10, 2339:12-15 [SD-L 20:12-15].)

The trial court performed its own statistical and mathematical calculations and applied them to the two 2016 elections at issue. The trial court used these untested calculations without providing an opportunity to critique the appropriateness of the underlying assumptions. Moreover, the trial court ignored record evidence that expert statisticians do not use such low confidence intervals in their ordinary work. (RT, Vol. 3, 718:9-12, 719:4-25, 746:23 & 751:13-16.)

Most likely, the trial court did not understand the effect the application of this new confidence level had on the reliability of the conclusion. Unlike a probability bell curve, where the point estimate is the most likely answer and the further away from the point estimate the more unlikely the result, under EI, each point in a confidence interval is equally likely. (RT, Vol. 3, 717:22-28.) As a result, the change from a 95% confidence interval to an 80% confidence interval increased the likelihood the answer was wrong by 400%.[13]

These flaws in the process and the lack of support in the record for the trial court's statistical choices fatally undermine the trial court's finding that an Asian-preferred candidate could be identified in these two elections. (AA, Vol. 10, 2339:15-17 & fn. 9 [SD-L 20:15-17 & fn. 9].) Only by including these two disputed elections did the trial court find RPV in 5/10

[13] 95% confidence interval means the true answer is not in the range five times out of 100. (RT, Vol. 3, 717:18-28.) 80% confidence interval means the true answer is not in the interval 20 in 100 times. (RT, Vol. 3, 808:20-27 [correct 8 in 10 times].)

City Council elections. Without the trial court's unsupported statistical calculations, Plaintiffs could prove RPV in only 3/10 elections.

The trial court also conducted the same unsupported statistical analysis regarding the school elections. After performing its own calculations in chambers, the trial court was able to find an Asian preferred candidate in two elections Dr. Kousser's analysis indicated it could not determine which candidate Asian voters preferred. The trial court found that there was "an Asian preferred candidate in the 2008 and 2012 elections at the 80 percent confidence interval." (AA, Vol. 10, 2340:10-11 [SD-L 21:10-11].)

With respect to the 2008 School election, it is unclear whether the trial court believes Mr. Mangla (an Asian candidate highlighted by Dr. Kousser in his report) or Ms. Sallings (the Asian (Filipino) candidate disregarded by Dr. Kousser) was the Asian-preferred candidate. (AA, Vol. 9, 1972:17-24; RT, Vol. 3, 770:20-24.) The determination affects the analysis under the third precondition as the voting behavior of whites was within one percent of Asians for Ms. Sallings. (AA, Vol. 9, 1972:17-24.)

With respect to the 2012 election, we are left to guess as to whom the trial court identified as the Asian-preferred candidate. Mr. Stampolis appears to be preferred by Asians based on a higher point estimate and a confidence interval that exceeds Mr. Mangla both on the high and low end. (AA, Vol. 9, 1975:1-8.) Mr. Stampolis was elected, suggesting the Asian-preferred candidate won that election. (*Ibid.*) On the other hand, the White-preferred candidate (at the 95% level), Mr. Gonzalez, was not elected. Thus, it would be impossible to show RPV because the *Gingles* third precondition requires the white bloc to defeat the Asian-preferred candidate, an act that did not occur in the 2012 election. (AA, Vol. 10, 2327:8-2328:3 [SD-L 8:27-9:3].)

The trial court's substitution of its own statistical methods for those offered into evidence by Dr. Kousser increased the number of school elections where the trial court found RPV from 2/9 to 4/9. (AA, Vol. 10, 2340:16-17 [SD-L 21:16-17].)

Because the trial court's calculations were not supported by evidence in the record or vetted using the usual adversarial process, they cannot support the trial court's finding that 5/10 City Council elections involved RPV nor that 4/9 School Elections involved RPV. (See *Duran*, *supra*, 59 Cal.4th at pp. 12-13; SD-L, pp. 20-21.) Accordingly, the trial court's judgment should be reversed because Plaintiffs failed to prove that Asian preferred candidates were "usually" defeated by the voters in the rest of the electorate.

C. The Trial Court's Implication That It Also Could Have Found the Two 2016 Elections Were Racially Polarized Using "Point Estimates" Is Not Supported by the Cited Case and Demonstrates a Misunderstanding of Ecological Inference.

In attempting to justify its reliance on its own statistical evidence, the trial court noted Plaintiffs suggestion [citing an unpublished district court case from Texas] that:

> "FVRA cases regularly exercise some flexibility in reviewing statistical evidence. (See, e.g., *Fabela v. City of Farmers Branch* (2012) 2012 WL 3135545 at *11 & fn.33 [relying on point estimates to find cohesion because the broad confidence intervals were the unavoidable results of the absence of highly concentrated Hispanic precincts and it was "undisputed that a point estimate is the 'best estimate' for the data"]; ..." (AA, Vol. 10, 2335:20-24 [SD-L 16:20-24].)

The trial court subsequently suggests that "other courts have used point estimates, which would dispense with the City's argument. (*Fabela v. City of Farmers Branch*, 2012 WL3135545 at *11 & n.33.)" (AA, Vol. 10, 2339:10-12 [SD-L 20:10-12].) Tellingly, the trial court did *not* evaluate

point estimates based on *Fabella*, both because *Fabella* is an unpublished district court case and because *Fabella* required a minority-preferred candidate to have a point estimate greater than 50%, precluding a positive finding for Mr. Chahal in his 2016 election. (*Fabella v. City of Farmers Branch*, 2012 WL3135545 at *10; AA, Vol. 9, 1967:1-8.)

This trial court's implied willingness to rely upon point estimates further highlights its misunderstanding of what a point estimate represents along a confidence interval line. In evaluating EI point estimates and confidence intervals, each and every point on the confidence interval line is equally as likely as any other, and equally as likely as the point estimate. (RT, Vol. 3, 717:22-28.) This is different than a probability bell curve where the point estimate would be *the most likely* point. As a result, one may not rely solely upon the point estimate for any candidate.

A failure to prove either precondition two or three is fatal to a finding of RPV. (AA, Vol. 10, 2327:27-2328:3 [SD-L 8:27-9:3] [acknowledging "and" between the two preconditions that must be shown for liability].) As a result, based on *Fabella,* Mr. Chahal's election fails to show cohesion (*Gingles* precondition 2) and, thus, cannot prove RPV. (*Sanchez, supra*, 145 Cal.App.4th at p. 669].) As a result, had the trial court applied *Fabella,* in the alternative, correctly to the 2016, Seat 4, election, it would have necessarily acknowledged that the election did *not* meet the definition of RPV.

D. Applying the CVRA Without the "Usually" Standard Would Violate the Equal Protection Clause.

The trial court's judgment also raises serious equal protection issues. It imposes a draconian race-conscious remedy without an adequate showing by Plaintiffs that structural vote dilution exists in the jurisdiction, or that abolishing at-large elections in the jurisdiction would remedy any such vote dilution. This Court may avoid these constitutional questions by applying

the "usually" test as it has been consistently applied in the federal case law. (See *People v. Morera-Munoz* (2016) 5 Cal.App.5th 838, 856–857 [courts should interpret statutes to avoid constitutional conflicts].) Without the "usually" test, the CVRA would violate the equal protection rights of all other citizens who are not in the protected-class of the plaintiffs.

Under the Equal Protection Clause as set forth in the Fourteenth Amendment to the United States Constitution (U.S. Const., amend. XIV, § 1), a State may not impose a race-conscious remedy without narrowly tailoring them to achieve a compelling—and clearly articulated—state interest. (*Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 227; *Shaw v. Reno* (1993) 509 U.S. 630, 642; *see also Sanchez*, *supra*, 145 Cal.App.4th at p. 668 [explaining circumstances under which race-conscious remedies trigger and survive strict scrutiny].)

The CVRA unquestionably classifies individuals by race. Elections Code Section 14032 authorizes any voter "who is a member of a protected class" to challenge an at-large election system under the CVRA. Section 14026(d) defines a "protected class" to mean "a class of voters who are members of a race, color or language minority group" as defined in the federal VRA. Thus, a voter may sue under the CVRA only on the basis of his or her race or ethnicity, and his or her membership in a "protected" racial, ethnic or language group. A voter is not allowed to challenge at-large elections individually without regard to his or her racial identity, or on the basis of political affiliation, religion, gender, disability or any group basis *other than race*. The CVRA classifies all individuals who may sue on the basis of race.

Moreover, the CVRA invalidates at-large systems *solely* on the basis of race, *i.e.*, a finding by a court that RPV usually occurs in the jurisdiction. (§§ 14026, subd. (e), 14028.) Section 14028(a) provides, "[a] violation of Section 14027 is established if it is shown that racially polarized voting

occurs … ." Nothing more is required. Race, then, forms the sole basis of liability. Race is "the factor," "decisive by itself" and "determinative standing alone." (*Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* (2007) 551 U.S. 701, 723.) RPV is an express racial classification that explicitly distinguishes between individuals on racial grounds and, thus, falls within the core prohibition of the Equal Protection Clause. (*Shaw v. Reno*, *supra*, 509 U.S. at p. 642; *Miller v. Johnson* (1995) 515 U.S. 900, 904-05.)

As the Supreme Court recognized, the purpose of the "usually" test is that "the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election." (*Gingles*, *supra*, 478 U.S. at p. 51.) Here, the trial court ignored this crucial safeguard while forcing the City to adopt a district-based system and choosing among proposed maps that all took race into account in drawing the proposed boundaries between districts. Strict scrutiny applies in these circumstances. (*Sanchez*, *supra*, 145 Cal.App.4th at p. 683.)

Without requiring the Plaintiffs to meet the "usually" test, the trial court's application of the CVRA cannot survive strict scrutiny. It imposes boundaries that segregate citizens into districts affected by racial considerations and it burdens the right of citizens to vote (because citizens now vote for only the mayor and one member of the council, instead of voting for all seven members of the council). These heavy burdens cannot be constitutionally imposed on the City and its citizens unless the burdens are shown to be the least restrictive means of advancing the government's compelling interests. Plaintiffs cannot make that showing where they cannot prove majority bloc voting that is sufficient to "usually" defeat the preferred candidates of the protected class.

E. Applying the CVRA Without the "Usually" Standard Would Violate the Constitutional Plenary Authority of Charter Cities to Choose the Manner and Method of Electing Their Officers.

The City of Santa Clara is a charter city. (AA, Vol. 4, 914.) Section 600 of the Santa Clara City Charter provides for at-large election of City Council Members. (*Id.* at p. 918.) The City of Santa Clara challenged the trial court's authority to apply the CVRA to override the at-large election method mandated by the Santa Clara City Charter. (AA, Vol. 1, 89.) The trial court dispensed with this issue in a single sentence: "Because it governs an issue of statewide concern, however, the CVRA supersedes the City's Charter. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 802.)" (SD-L 3:11-12.)

Article XI, Section 5(b) of the California Constitution grants "plenary authority ... subject only to the restrictions of this article" to a charter city to provide in its charter the "manner in which, the method by which, the times at which, and the terms for which ... municipal officers ... shall be elected ... ." The provision's plain meaning is unambiguous and needs no interpretation. A "plenary" power of a charter city is one which the Legislature may not overrule. (Cf. *Baines v. Zemansky* (1917) 176 Cal. 369, 377-78 [plenary authority under former Article XI, § 8½ (now Article XI, § 5(b)(4) discussed here) allows the charter to make the Registrar the judge of the sufficiency of recall petitions to the exclusion of the courts].)

In *Johnson v. Bradley* (1992) 4 Cal.4th 389, 398, the California Supreme Court examined the reach of a charter city's plenary power under Section 5(b)(4) with respect to an ordinance that the City of Los Angeles had enacted to implement its charter. Although the Supreme Court in *Johnson* conceded that the state's interest in the integrity of the electoral process was of statewide concern, it approved the decision in *Mackey v. Thiel* (1968) 262 Cal.App.2d 362, which had held that a charter city's

plenary power to regulate the manner of its elections prevailed over a conflicting state statute. (*Id.*; see also *Sonoma City Org. of Pub. Employees v. City of Sonoma* (1979) 23 Cal.3d 296, 317; *Ector v. City of Torrance* (1973) 10 Cal.3d 129, 132-33.)

The *Jauregui* court concluded that the State's interest in "election integrity" overrode the state constitutional powers granted to a charter city. (*Jauregui*, 226 Cal.App.4th at p. 801.) However, the *Jauregui* decision ignored the plenary powers granted by Section 5(b)(4) of Article XI and, instead, conducted a Section 5(a) "home rule" analysis of statewide concern vs. local affair. (*Id.* at p. 795.) The *Jauregui* court, therefore, wrongly read the word "plenary" out of the Constitution.

Nevertheless, the City asks only that this Court consider the plenary power of a charter city in a very limited and specific context. The Supreme Court in *Johnson* was considering a *statute* regarding elections versus a charter city's authority over elections. Here, the CVRA was enacted to implement the Equal Protection Clause in the California Constitution (see § 14031). Thus, the City agrees that its charter must yield if the City's method of holding elections violates a protected class's right to equal protection of the laws, as implemented in the CVRA.

But there can be no such violation *unless* the City's method of electing its officers usually results in RPV in those elections. In this case, it did not for the reasons stated above. For that reason, the trial court's judgment of liability, and concomitant invalidating of its charter provision, violated Article XI, section 5(b)(4), as applied in this case.

F. Reversal of the Judgment on Liability Necessarily Requires Reversal of the Award of Attorneys' Fees and Costs.

Following the trial court's judgment of liability in their favor, Plaintiffs moved for, and were awarded, attorneys' fees and costs as a prevailing plaintiff in CVRA litigation. (See Elec. Code, § 14030; AA, Vol.

24, 5195:3, 5196-5205.) The trial court then amended its earlier judgment solely to add the award. (*Id.* at 5205:6-8.) If this Court reverses the trial court's judgment of liability under the CVRA, the award of attorneys' fees and costs that is dependent on that judgment must likewise be reversed. (*See, e.g., California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 220 [fee award "falls with a reversal of the judgment on which it is based"].)

VIII. CONCLUSION

For the reasons stated above, the City of Santa Clara requests that the trial court's judgment regarding the City's liability under the California Voting Rights Act be reversed, the dependent award of attorneys' fees and costs to Plaintiffs be reversed, and that the trial court be directed to enter a new judgment in favor of the City.

DATED: July 23, 2019

Respectfully submitted,

By /s/ Steven G. Churchwell
Steven G. Churchwell
Attorneys for Appellant and Defendant,
City of Santa Clara

STATEMENT OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, the enclosed "Appellant's Opening Brief" was produced using 13-point Roman type, and including footnotes, but excluding the tables and this certificate, contains 8,980 words. Counsel relies on the word count of the computer software used to prepare this brief.

DATED: July 23, 2019 CHURCHWELL WHITE LLP

By /s/ Steven G. Churchwell
Steven G. Churchwell
Attorneys for Appellant and
Defendant, City of Santa Clara

CERTIFICATE OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed by Churchwell White LLP and my business address is 1414 K Street, 3rd Floor, Sacramento, CA 95814. I caused to be served the following document(s):

APPELLANT'S OPENING BRIEF

☒ By United States Mail. I enclosed the DOCUMENTS in a sealed envelope or package addressed to the PERSON's at the addresses set forth below.

☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☒ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepared.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 23rd day of July 2019, at Sacramento, California.

/s/ Alicea Norsby
Alicea Norsby

12-08-20

ITEM #7
RTC#20-1267

No. H046105/H046696

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

The City of Santa Clara,
Appellant,
v.
LaDonna Yumori Kaku, Wesley Kazuo Mukoyama, Umar Kamal, Michael Kaku, and Herminio Hernando,
Respondents.

APPEAL FROM AN ORDER OF THE SANTA CLARA SUPERIOR COURT,
CASE NO. 17-CV-319862
HON. THOMAS E. KUHNLE

RESPONDENTS' BRIEF ON APPEAL

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court 8.208 and 8.488, the undersigned counsel for Plaintiffs-Respondents, LaDonna Yumori Kaku, Wesley Kazuo Mukoyama, Umar Kamal, Michael Kaku, and Herminio Hernando, certifies that, other than the named parties to this proceeding, he knows of no other persons or entities who may have a financial or other interest in the outcome of this proceeding.

Respectfully submitted,

Dated: August 22, 2019

GOLDSTEIN, BORGEN, DARDARIAN & HO

/s/ Morris J. Baller
Morris J. Baller

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I. INTRODUCTION

Defendant-Appellant City of Santa Clara ("City" or "Santa Clara") asks this Court to throw out the lower court's well supported finding, after a full trial, that the City's at-large method of election for its City Council discriminates against Asian Americans in violation of the California Voting Rights Act ("CVRA"), Elections Code sections 14025-14032 (2002).

In its Statement of Decision on liability the trial court ruled that Plaintiffs established a CVRA violation based on four specifically enumerated liability factors in the CVRA (10 AA 2344-45).[1]

1. **Racially polarized voting (§ 14028(a))** – The court looked at ten city council elections over the course of fourteen years contested by Asian American candidates (all of whom had lost). It found racially polarized voting ("RPV") in five out of the ten of elections. Another four of the ten elections, involving a single Asian American candidate who did increasingly worse with both Asian American and other voters, did not display racially polarized voting but the court gave them little weight based on Plaintiffs' showing that they were marked by "special circumstances." Of the six elections to which the court gave greater weight, in five elections (or 83%), the rest of Santa Clara's electorate voted as a bloc to defeat the

[1] Citations in the form __ AA__ are numbered to volume and pages in Appellants' Appendix.

candidate preferred by Asian Americans voters. Thus, even if the City were correct that its appeal turns only on whether racially polarized voting occurs in the numerical majority of relevant elections, that test was met here.

2. **The extent to which candidates who are members of a protected class have been elected (§ 14028(b))** – No Asian American candidates had ever been elected to Santa Clara's city council in the City's nearly 70-year history.

3. **Electoral devices that enhance the dilutive effect of at-large elections (§ 14028(e))** – Santa Clara's insistence on using "numbered posts or seats" increased the difficulty that minority groups face in winning at-large elections by preventing them from concentrating their votes.

4. **Other probative factors (§14028(e))** – There is a long history of discrimination against Asian Americans and the extent to which Asian Americans in Santa Clara bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.

Ignoring all but the Court's findings on racially polarized voting, Santa Clara attempts to reduce the CVRA's proof requirement to a simple mathematical formula. That approach disregards the totality of the CVRA's requirements, on which the lower court made specific findings based on extensive evidence submitted by Plaintiffs, much of which was

uncontroverted by the City. This Court should reject Santa Clara's myopic focus on an incomplete recitation of just one of the lower court's findings regarding RPV and affirm, not only in deference to the well-founded fact findings of the trial court, but also because its decision correctly identifies and interprets *all* of the relevant provisions of the CVRA, and correctly applies those provisions to the facts established at trial, thereby properly fulfilling the statute's important remedial purposes.

II. STATEMENT OF THE CASE

Plaintiffs-Respondents are five registered voters of Santa Clara who are Asian American and therefore members of a "Protected Class" within the definition of the CVRA, Elections Code section 14026(d). They filed a First Amended Complaint on December 27, 2017, the operative pleading here, alleging that the City's at-large election system diluted the votes of Asian American voters and prevented them from electing candidates of their choice to the City Council. (1 AA 0069.) After discovery[2] and extensive pre-trial proceedings including four Case Management Conferences,[3] the Superior Court conducted the first phase of a bifurcated

[2] That discovery included service of and responses to Plaintiffs' Requests for Admissions, Special Interrogatories, and Requests for Production of Document, the designation of five expert witnesses (three for Plaintiffs and two for Defendant), the day-long deposition of three experts, and three other depositions taken by Plaintiffs.

[3] The Superior Court conducted CMCs on December 8, 2017, and on January 25, March 29 and April 16, 2018.

bench trial, to adjudicate liability issues, from April 23 to 26, 2018, and issued its detailed final Statement of Decision on liability on June 6, 2018 ("SOD"). (10 AA 2320.) In its SOD, the court found that the City's at-large election system impaired and abridged the voting rights of Plaintiffs and Asian American voters, and therefore violated the CVRA. (10 AA 2345:6-9.)

After further pre-trial proceedings,[4] the Superior Court conducted the second phase of the trial to determine the appropriate remedy for the CVRA violation on July 18-20, 2018. The court issued its Amended Statement of Decision re: Remedies Phase of Trial and Judgment on July 24, 2018 just in time for its remedial orders to be implemented for the November 2018 City Council elections. (16 AA 3259.) In that decision, the Court enjoined the City from conducting further at-large elections for the City Council (except for the mayor's position) and ordered the City to conduct district elections using a district map developed and proposed, along with other alternative maps, by the City itself. (16 AA 3267:1-21.)[5]

Heavily litigated subsequent proceedings resulted in an Order

[4] The Superior Court conducted three further CMCs on June 6 and 20, and July 2, 2018 and ordered short briefing on two substantive issues related to Defendant's anticipated remedy.

[5] Appellant does not appeal from the specific remedy based on a map and plan the City submitted, which was ordered by the Superior Court and implemented by the City for the November 2018 City Council elections.

Regarding Motion for Attorneys' Fees and a further Amended Statement of Decision Regarding Remedies Phase of Trial and an Amended Judgment, entered January 22, 2019 ("ASOD"), awarding Plaintiffs substantial attorneys' fees, costs, and expenses. (24 AA 5194 (Fee Order); 24 AA 5196 (ASOD).) As reflected in this Court's July 3, 2019 order, the City does not challenge the Superior Court's determination of the amount of recoverable costs and attorneys' fees, but only its ruling that Plaintiffs are prevailing parties entitled to any such recovery.

III. STATEMENT OF FACTS

A cardinal, and undisputed, fact in this case is that from the adoption of Santa Clara's Charter in 1951 to the time of trial, no Asian American candidate had ever been elected to, or served on, its seven-member City Council. (10 AA 2323:19-21, 2341:25-2342:3 (SOD); 9 AA 1937:19-1938:6 (Declaration of Morgan Kousser ("Kousser Report")).)[6] This absence is particularly glaring because the Asian American population comprises a substantial portion of the City's population and electorate. The U.S. Census data presented at trial showed that Asian Americans were 39.5% of the City's total population and 30.5% of its citizen voting age

[6] In addition, no Latino candidate has ever been elected to the City's council since at least 1979, when one Latino was elected, and other than that one, no Latino has served on the Council since then. (6 AA 1236, 1253, 1263-64.)

population ("CVAP") or eligible voters. (10 AA 2321:11-20.)[7] The absence of Asian American representatives on the City Council was not due to lack of candidacies or effort: from 2002 to 2016, there were at least ten contested races in which an Asian American candidate ran under the at-large system, but every one of them lost (10 AA 2323:19-21, 2341:25-2342:3 (SOD); 9 AA 1907:25-1908:8, 1934:16-22, 1937:19-1938 (Kousser Report ¶¶ 5, 52, 57)); and only white candidates were elected (9 AA 1907:25-1908:8 (Kousser Report ¶ 5). The trial court found that this record reflected a broader phenomenon: although Asian American voters voted cohesively and preferred Asian American candidates, those voters were usually unable to elect their candidates of choice. (10 AA 2339:18-21, 2344:6-14 (SOD).) In those ten elections Asian American voters were only able to elect their candidates of choice when the voting majority, which was almost entire comprised of white persons,[8] supported the same candidates

[7] Latinos comprised 16.9% of the population and 15.0% of the CVAP. (10 AA 2321:11-20.)

[8] Since race/ethnic identifications of voters and voting patterns was based on surname analysis and the surnames of whites and African American voters cannot be distinguished using that method, the voting analyses offered by Plaintiffs' experts combined those groups into a single Non-Hispanic white and Black ("NHWB") category. (10 AA 2321:12-20, 2336:19-23 (SOD); 9 AA 2011:9-2012:6 (Expert Declaration of David Ely ¶¶ 11-14); 9 AA 1933:5-14, 22-24, 1935:15-16, 24-28 (Kousser Report ¶¶ 48 & n.35, 54 & n.46.) In Santa Clara, almost all of the NHWB population according to census data is white and not African American. In this Brief, and in referring to the evidence, the summary identifier 'white' may therefore be used to refer to NHWB voters without loss of accuracy

and the candidates were themselves white. (8 AA 1532 ; 3 RT 686-687.)[9] In other words, white voters' preferences determined who won, regardless of which candidates Asian American voters preferred. (3 RT 687.)

Plaintiffs proved at the liability phase of the trial that Santa Clara's at-large election system was responsible for the inability of Asian American voters to elect candidates of their choice. That proof consisted of detailed and extensive statistical analysis of voting records by Dr. Morgan Kousser, Plaintiffs' principal expert witness, using well-accepted methods[10] demonstrating that racially polarized voting occurred in City Council elections. (10 AA 2338-41, 2344-45 (SOD); 9 AA 1937-51, 1957 (Kousser Report ¶¶ 57-76, 88-90).) The trial court also found other factors that contributed to vote dilution, including the City's use and retention of numbered posts, the total lack of success of Asian American candidates, and the long history of discrimination against Asian Americans on a national, state, and local level. (10 AA 2341:19-2345:4 (SOD).) All of

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from a practical standpoint. (9 AA 1933:5-14, 22-24 (Kousser Report ¶ 48 & n.35); 3 RT 692-693.)

[9] Citations in the form "_RT_" are to numbered pages of the Reporters' Transcript of Testimony at the two trials.

[10] See 10 AA 2330-43 (SOD). The CVRA directs the use of those methods for statistical analysis. (Elec. Code § 14026(e).)

those findings provide the basis for the remedy ordered by the trial court – the use of district-based elections.[11]

A. The City Does Not Dispute on Appeal That Asian American Voters Demonstrated a High Degree of Cohesion in Their Voting Patterns.

After reciting the applicable standards of the U.S. Supreme Court for the requirement of minority voter cohesion (10 AA 2327-29 (SOD)), the trial court found that Asian American voters demonstrated cohesion in voting in local elections. Specifically, the court found that Asian Americans voted cohesively in a majority of the City Council elections studied by the experts – including all five elections in which it found RPV

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[11] The results of the first by-district election ever conducted in the City in November 2018, following court-ordered by-district elections, dramatically illustrate how the elimination of at-large of district-based elections can help to overcome the dilution of minority voting strength and the barriers to the election of qualified minority-preferred candidates. In that election, an Asian American candidate, Raj Chahal, became the first Asian American candidate elected to the City Council in the City's history. See Respondents' Motion re: Request for Judicial Notice filed August 22, 2019 ("RJN"). Mr. Chahal was elected from District Two created by the Court's remedial order adopting a district map (24 AA 5215 (ASOD (Draft Plan 3)), with 53.35% of the vote (Declaration of Ginger Grimes in Supp. of Respondents' RJN, Ex. A). It is notable that District Two is not the majority-Asian American remedial district (District One) created by that map; rather, it has a combined Asian American and Latino CVAP majority (27% Asian American CVAP and 27% Latino CVAP (14 AA 3086-87)), forming a district in which minority "voting coalitions" could prevail (24 AA 5213 (ASOD.)) In striking contrast, Mr. Chahal ran and lost in the at-large election for Seat 4 held in 2016, just two years earlier; although he was the Asian American-preferred candidate with an estimated 59.6% of the Asian American vote, he finished third with only 27.0% of the city-wide vote. (9 AA 1966-67 (Kousser Report Table A-9).)

(see Argument section B below) as well as a sixth election (10 AA 2339 (SOD)), and also in the four local school district elections in which it found RPV (10 AA 2340 (SOD)). The court's finding was based on extensive evidence in the record: numerous statistical analyses by Dr. Kousser (9 AA 1959-77 (Kousser Report Tables A1-A19)), summarized in a charts admitted as a demonstrative exhibits (8 AA 1529-33; 3 RT 659-702; 5 RT 1337-1357), and evidence provided by Plaintiffs' expert, Dr. Ramakrishnan, an authority on Asian American political and civic participation.[12]

Dr. Kousser's statistical tables show that in the ten subject City Council elections, Asian American voters voted cohesively in at least six elections. (9 AA 1959-77 (Kousser Report Tables A1-A10); 3 RT 806:21-807:23; 8 AA 1531-32.) In four of those six elections, the Asian American-preferred candidate received over half of all Asian Americans' votes (*id.*); as Dr. Kousser explained, this level of cohesive support is particularly impressive since in most of the campaigns there were multiple candidates dividing the vote, not just two. (3 RT 732-33.)

Dr. Kousser's testimony included substantial additional support for

[12] Dr. Ramakrishnan provided non-statistical evidence in support of the finding that Asian Americans are politically cohesive in his expert report (4 AA 0893-95, 898 (Ramakrishnan Report ¶¶ 6-7, 9)) and testimony (4 RT 932-36, 981-83).

the court's finding. He testified that based on all 19 local elections he studied, "there was substantial cohesion among Asian Americans" (3 RT 700), and that the levels of cohesive voting he found were similar to those found to be sufficiently probative in the only two other recent at-large election challenges tried to a verdict in California (as of the time of trial) – those against the City of Palmdale and Kern County (*id.*, 701, 751-53).[13]

In addition, Dr. Kousser testified, with regard to a number of the methodological assumptions made by the City's expert that could affect the analysis of cohesion (and RPV) levels, that in every instance the City's expert had systematically chosen the method that would cause the finding of least cohesion (and RPV). (5 RT 1357:2-11.)[14] The trial court accepted Dr. Kousser's method choices with regard to each of the methodological issues raised by the City and its expert. (10 AA 2332-38 (SOD).)

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[13] See *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781 (*City of Palmdale*) (brought under the CVRA); and *Luna v. County of Kern* (E.D. Cal. 2018) 291 F.Supp.3d 1088 (brought under Section 2 of the FVRA).

[14] In the SOD, the trial court agreed with Dr. Kousser's positions and rejected the City's expert's with respect to all of the methodological disputes addressed in its opinion. (See 10 AA 2330-32 (use of trivariate analysis), 2333 (potential surname error), 2333-34 (degree of uncertainty caused by relative absence of racially homogeneous precincts), and 2335-36 (appropriate confidence interval).) The court did not find it necessary to resolve other methodology issues (10 AA 2333 n.6.)

In finding cohesion based on the opinion and analyses offered by Dr. Kousser, the trial court effectively chose to adopt his views and to reject the contrary views of the City's expert.

B. Although Asian American Voters Preferred Asian American Candidates in Numerous Elections for City Council, All of Those Candidates Lost Because They Did Not Command Support From Voters of the White Majority Group, and Only White Candidates Preferred by White Voters Won Elections.

As Dr. Kousser's Report and testimony established, the numerous Asian American-preferred candidates shared a common fate: they lost unless they also happened to be the preferred candidates of NHWB voters. Moreover, none of the successful Asian American-preferred candidates were Asian American.

Plaintiffs' Trial Exhibit 40, which compiles and displays data from the tables summarizing Dr. Kousser's analysis of the ten City Council elections (Tables A-1 to A-10 of the Kousser Report), summarizes this history. (8 AA 1532.) As it shows, of the ten Asian American-preferred candidates in those ten elections, with Asian American voter support levels ranging from 41.1% to 72.5% in the mostly multi-candidate fields,[15] only three – Moore (2004 Seat 4), Davis (2012 Seat 3), and Watanabe (2016

[15] In the six elections in which Asian Americans voted cohesively, there were three to five candidates running for the seat. Of the other four elections, only two involved two-candidate races. (9 AA 1959-68.)

Seat 6) – were elected. All three of them are white.[16] All seven of the remaining candidates preferred by Asian American votes lost. (See 8 AA 1532.)

Dr. Kousser summarized the overall import of this consistent pattern of election results: "an Asian preferred candidate could win only if that Asian preferred candidate was white." (3 RT 687). Or to put it another way, as Dr. Kousser testified, "It's white-black voting that keeps Asians from winning." *Id.*, p. 664. Plainly, the voting preferences of the white majority determined who won election to the City Council, without regard to the voting preferences of the Asian American minority.

C. Racially Polarized Voting Occurred in Numerous City Council Elections, as Well as in a Number of Other Non-Partisan Local Elections.

Dr. Kousser closely analyzed the results of all ten of the City Council elections in 2002-2016 in which there was an Asian American candidate, as well as six such local school board elections over the same period, using statistical techniques that the court accepted and found appropriate. (10 AA 2338-40 (SOD);[17] 9 AA 1959-77 (Kousser Report

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[16] Although Watanabe acquired an Asian surname through marriage, she is not Asian American but white. (9 AA 1937 n. 47.)

[17] Specifically, the court found that "the EI results presented by Dr. Kousser are less reliable than those generated in more segregated communities, but his EI results are nonetheless probative" (10 AA 2337 (SOD)); and that although "there is some uncertainty … the Court finds that Dr. Kousser's EI results are probative" (10 AA 2338.).

Tables A1-A19).) Based on that analysis, Dr. Kousser concluded, and the court found, that racially polarized voting had occurred in many of those elections. (9 AA 1937-51, 1957 (Kousser Report ¶¶ 57-76, 88-90).) The court agreed that "Dr. Kousser's analysis of election results support a finding that racially polarized voting occurred in City Council elections from 2002-2016." (10 AA 2344 (SOD).) The court based this overall finding on its more specific findings that, as reported by Dr. Kousser, RPV had occurred in five of the ten City Council elections he studied. In four of the five other elections, the Asian American candidate (Mr. Nadeem) was *not* preferred by Asian American voters for reasons described in detail by Dr. Kousser. (9 AA 1940-43 (Kousser Report ¶¶ 63-66).) The court concluded that those elections should be given "less weight" in the analysis. (10 AA 2344 (SOD).)[18]

[18] The court found RPV in school board elections held during the same period that, like city council elections, were local and non-partisan, but found them not to be "as probative as City Council elections." (10 AA 2344 (SOD); see 8 AA 1531, 1533; 9 AA 1945 (Kousser Report ¶ 69).) Moreover, Dr. Kousser did not analyze three of the nine school board elections because they were not probative of RPV. He found them to be non-probative because the Asian American candidate there (Song), ran as an incumbent in two election and in the third she ran unopposed. (9 AA 1946, 1948 (Kousser Report ¶¶ 72, 76).)

D. Other Evidence Supports the Conclusion that the City Maintained and Used an At-Large Election System that Diluted Asian Americans Voters' Ability to Elect Their Preferred Candidates.

1. The City Insisted on Retaining the Numbered Post Feature of the At-Large Election System, Which Exacerbated Asian American Vote Dilution.

The City's election system was not a "pure" at-large system in which all of the candidates ran for the total number of available seats, and voters could cast the same number of votes as the number of available seats. Instead, candidates ran city-wide for "numbered posts" on the Council, creating separate races for each seat, which were contested only by candidates for those particular seats. (10 AA 2322-23, 2342 (SOD), 9 AA 1931-32 (Kousser Report ¶ 47).) The well-recognized effect of this electoral device is to prevent minority voters from concentrating their votes on one or two preferred candidates alone, thereby magnifying the weight of their votes (known as "single-shot" voting) (10 AA 2342 (SOD); 9 AA 1931-32 (Kousser Report ¶ 47).)

A Charter Review Commission convened after Plaintiffs' counsel sent an initial demand letter to the City in June 2011 (10 AA 2322 (SOD)) recommended that the City abolish the numbered post feature of its election system, but the City Council rejected that recommendation. (10 AA 2322-23 (SOD); 9 AA 1951-57 (Kousser Report ¶ 77-87); 5 AA 1153-55.) The

trial court found that refusal an additional factor supporting its finding that the City violated the CVRA. (10 AA 2344 (SOD).)

2. As Late as 2016, the City Council Refused to Appoint Either of Two Well-Qualified Asian American Applicants to Fill a Council Vacancy.

In April 2016, after receipt of Plaintiffs' Counsel's second demand letter and its own demographer's warnings about its risk of being held liable for diluting Asian American voting preferences, the City Council had to fill a vacancy caused by a resignation. (8 AA 1601:24-1602:19 (Gilmor Deposition); 4 RT 983:21-985:12 (Ramakrishnan).) Although it received applications from two Asian Americans who were well-qualified (see 8 AA 1603:23-1604:2, 1604:6-24 (Gilmor Deposition)), the Council appointed a white candidate, who would thereby benefit from incumbency when she successfully stood for re-election in November 2016 (4 RT 984-85; 8 AA 1597:17-1598:17 (Caserta Deposition)); 4 AA 0895 (Ramakrishnan Report); 4 RT 983:21-985:12 (Ramakrishnan).

3. Historical Practices of Discrimination Against Asian Americans Provide Additional Support for the Trial Court's Finding of a CVRA Violation.

Plaintiffs' expert witness Dr. Ramakrishnan presented a Report (4 AA 0886) and extensive testimony (4 RT 908-88) showing that historical discrimination against Asian Americans at the national, state, and local level had negatively affected the ability of Asian Americans to participate effectively in political processes. The trial court noted this evidence (10

AA 2343 (SOD)) and found that it supports the conclusion that the City violated the CVRA. (10 AA 2343-45 (SOD).)

4. The City Steadfastly Avoided and Denied Recommendations to Consider Changing Its At-Large Election System.

After receiving the first demand letter from Plaintiffs' counsel, the City retained a demographic consultant, Dr. Gobalet, who a few months later prepared a report advising the City that analysis of its demographics, election outcomes, and voting patterns showed its at-large election system to be at serious risk of being held in violation of the CVRA. (See 10 AA 2342 (SOD); 6 AA 1230-62.) Instead of heeding those warnings and presenting the facts supporting them, the acting City Attorney suppressed them so that decision-makers would see only a watered-down version stripped of warnings of potential dire consequences of maintaining the at-large system. (10 AA 2342 (SOD); 9 AA 1951-57 (Kousser Report ¶¶ 77-87); 4 RT 1011-18.) Thereafter, for six years until after this suit was filed, the City Council took no action, and indeed made no proposal, to change its at-large election system in any way in response to its consultant's report. (10 AA 2342 (SOD).) When the City finally decided to propose an alternative in early 2018, in an effort to avoid adjudication of the illegality

of its existing at-large system, it merely proposed a variant at-large system, consisting of *two* at-large districts each containing three seats.[19]

IV. STANDARD OF REVIEW

The trial court's ruling must be affirmed unless it is clearly erroneous. Under the CVRA, courts look to "the methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act (42 U.S.C. §§ 1973 *et seq.*) to establish racially polarized voting" (Elec. Code § 14026(e).) Under the leading Supreme Court case that first described those methods, *Thornburg v. Gingles* (1986) 478 U.S. 30 (*Gingles*), "[t]he ultimate finding of vote dilution [is treated] as a question of fact," *id.* at 78, and the trier of fact, in making that determination, is required to engage in "an intensely local appraisal of the design and impact of the contested electoral mechanisms," *id.* at 79 (quoting *Rogers v. Lodge* (1982) 458 U.S. 613, 622 (internal quotation marks omitted).) *Gingles* further instructs that "the clearly erroneous test of Rule 52(a) [of the Federal Rules of Civil Procedure] is the appropriate standard for appellate review of a finding of vote dilution"

[19] The City put the proposed Charter Amendment embodying that system on the ballot as "Measure A" and sought the voters' approval at the June 2018 election, but it was defeated. Consequently, the trial court never ruled on whether that alternative at-large system, if implemented, would have violated the CVRA. 1 RT 34:9-13 (Jan. 4, 2019 CMC.)

(citing numerous other Supreme Court decisions in vote dilution cases). (*Gingles*, *supra*, at p. 79.)

Accordingly, on appeal, "[d]eference is afforded to the district court's findings due to its special vantage point and ability to conduct an intensely local appraisal of the design and impact of a voting system." (*Negron v. City of Miami Beach* (11th Cir. 1997) 113 F.3d 1563 quoting *Lucas v. Townsend* (11th Cir. 1992) 967 F.2d 549, 551; see also *League of United Latin American Citizens, Council No. 4434 v. Clements* (5th Cir. 1993) 986 F.2d 728, 773 ("[T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trail court's particular familiarity with the indigenous political reality without endangering the rule of law." (quoting *Gingles*, *supra*, 478 at p. 79), *cert. denied* (1994) 510 U.S. 1071; *Goosby v. Town Board* (2d Cir. 1999) 180 F.3d 476, 492; *Bridgeport Coalition for Fair Representation v. City of Bridgeport* (2d Cir. 1994) 26 F.3d 271, 273; *NAACP v. Fordice* (5th Cir. 2001) 252 F.3d 361, 364-65.)

Generally applicable principles of appellate review under California law require the same deferential approach to the Superior Court's ultimate fact finding that racially polarized voting occurred. "Since the trial court must weigh the evidence and may draw reasonable inferences from that evidence, such rulings are normally reviewed under the substantial evidence standard, with the evidence viewed most favorably to the

prevailing party." (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 369.) Under "substantial evidence review, the reviewing court *defers* to the factual findings made below. It does not weigh the evidence presented by both parties to determine whose position is favored by a preponderance. Instead, it determines whether the evidence the prevailing party presented was substantial – or, as it is often put, whether any rational finder of fact could have made the finding that was made below." (*Alberda v. Bd. of Retirement of Fresno County Employees' Retirement Ass'n* (2013) 214 Cal.App.4th 426, 435.) "[T]he power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support a finding of fact." (*Foreman & Clark Corp. v. Fallon* (1972) 3 Cal.3d 875, 881; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503.)

This is particularly true when the factual determination is principally based on conflicting testimony of expert witnesses:

> It is within the exclusive province of the trier of fact to determine the credibility of experts and weigh the weight to be given to their testimony. Where there is conflicting expert evidence, the determination of the trier of fact as to its weight and value and the resolution of such conflict are not subject to review on appeal. Such determination is had when the trier of fact accepts the proof presented by an expert on one side of the case and rejects that presented by an expert on the other side.

(*Francis v. Suave* (1963) 222 Cal.App.2d 102, 119-20 (citations omitted); see also *Pope v. County of Albany* (2d Cir. 2012) 687 F.3d 565, 581 (in an

FVRA vote dilution case, court observed that "[t]he question of what weight to accord expert opinion is a matter committed to the sound discretion of the factfinder, and we will not second guess that decision on appeal absent a basis in the record to think that discretion has been abused.").)

V. ARGUMENT

A. The Trial Court's Finding of Racially Polarized Voting in Santa Clara City Council Elections, Resulting in a Violation of the CVRA, Was Not Clearly Erroneous.

The CVRA prohibits an at-large election system that dilutes the ability of the protected class "to elect candidates of its choice" or "to influence the outcome of an election" due to the existence of racially polarized voting. (See Elec. Code §§ 14026, 14027, 14028; see also *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667, *petition for review denied*, 2007 Cal. LEXIS 2772 (Cal. Mar. 21, 2007, No. S149500), *cert. denied*, No. 07-88, 552 U.S. 974 (2007) (*Sanchez*).) In an at-large election system, if a racial majority group votes together and against the preferences of a minority, it can effectively prevent the minority communities from ever electing a candidate of their choice. While the Federal Voting Rights Act ("FVRA") also provides protections for minority voters against the discriminatory effects of at-large election systems (see *Gingles*, *supra*, 478 U.S. at p. 47), the CVRA expands on the federal protections in order to provide minority communities greater protection

against vote dilution. (See *Sanchez*, *supra*, 145 Cal.App.4th at pp. 669-70.)

A violation of the CVRA is established if "racially polarized voting" is found. (Elec. Code § 14028(a).) The CVRA defines RPV as

> voting in which there is a difference as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 *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.

(Elec. Code § 14026(e).)

The leading federal case law on RPV is *Gingles*. There, the United States Supreme Court set out three "preconditions" for an RPV finding. First, "the minority group must be sufficiently large and geographically compact to constitute a majority in a single member district." ("*Gingles* Prong 1"). Second "the minority group must be able to show that it is politically cohesive" ("*Gingles* Prong 2"). Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate ("*Gingles* Prong 3"). (*Gingles*, *supra*, 478 U.S. at p. 51.) The CVRA, though, specifically excludes *Gingles* Prong 1 from the determination of RPV. (Elec. Code § 14028(c).) The CVRA also specifically instructs that in determining whether there is RPV, a court should focus on voting patterns in elections with at least one minority

candidate, and the extent to which minority candidates have been elected. (*Id.* § 14028(b).)

The Superior Court correctly applied those definitions and criteria in finding RPV in Santa Clara's elections based largely on the analyses and testimony of Plaintiffs' expert witness Dr. Kousser. In doing so, the court rejected Appellant's attacks on Dr. Kousser's reported findings and conclusions, which were based on many of the same grounds raised in this appeal – specifically, that Dr. Kousser did not find RPV in a numerical majority of the elections he analyzed, that his findings of cohesive voting and Asian American voters' preferences were not reliable under a 95% standard of statistical significance, and that his analytical methods were not reliable. In making these arguments, Appellants relied in part on controverting expert witness testimony in the form of their expert's Report and his oral examination (5 RT 1208-1336.) The Superior Court carefully examined both reports, heard both experts' testimony, and asked both of them probing questions focused on the very points now raised by Appellants.[20] In the end, the court found that Dr. Kousser's findings and analysis supporting Plaintiffs' contention that RPV had been proved was persuasive. (10 AA 2336-41, 2344 (SOD).) And since "[a] violation of

[20] For example, see the questions posed by the court and related colloquy at 3 RT 678-79, 755-66, 782-86; 5 RT 1229-34, 1258-59, 1268-70, 1275-77, 1349-50, 1353-54.

Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body ... or in elections incorporating other electoral choices by the voters of the political subdivision" (Elections Code section 14028(a)), the court's finding that RPV occurred establishes that the City's use of an at-large election system violated the CVRA.

Appellant's attempt to make an end-run around the trial court's findings, by asserting that they were infected by an erroneous view of the legal standards under which the court made its findings, is a futile attempt to avoid the application of the clear principles limiting appellate review of fact findings. The ultimate findings under review here, that RPV and vote dilution occurred, must be upheld as they are supported by substantial evidence and not clearly erroneous.

B. Plaintiffs Showed That White Voters As a Block "Usually" Defeated the Asian American-Preferred Candidates.

1. The *Gingles* Requirement That White Voters "Usually" Defeat Minority-Preferred Candidates Is Not a Strict Mathematical Formula.

Plaintiffs must meet two of the three *Gingles* preconditions, Prong 2 and Prong 3, to show RPV. Appellant does not dispute that Plaintiffs have met *Gingles* Prong 2: that "the minority group must be able to prove that it is politically cohesive." (*Gingles, supra,* 478 U.S. at p. 51.)

Appellant only argues that Plaintiffs fail to meet Prong 3, which requires that "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, ... usually to defeat the minority's preferred candidate." *Id.* Appellant's argument rests entirely on a rigidly mathematical definition of the statutory term "usually," which is wrong.

In *Gomez v. City of Watsonville* (1988) 863 F.2d 1407 (*Gomez*), the Ninth Circuit recited facts strikingly similar to those presented here: no Hispanic candidate had ever been elected to the City Council under the at-large system although nine had run over a fifteen year period, whereas twenty-five out of fifty-one non-Hispanic candidates had been successful. *Id.* Based on those numbers, the court ruled that "it is clear that the non-Hispanic majority ... usually votes sufficiently as a bloc to defeat the minority votes plus any crossover votes. *Id.* at 1417. The Ninth Circuit thus did not recite or apply any mathematical rule requiring a showing of bloc voting more than half of the time.

The Second Circuit has adopted a flexible rule that is more consistent with both logic and the text and purposes of the CVRA than the one urged by Appellant. In its discussion of the "usually" test in *Pope v. County of Albany* (2d Cir. 2012) 687 F.3d 565, the court recognized that "the law ... recognizes the need for some flexibility. As the Supreme Court has observed, 'no simple doctrinal test' applies to the third *Gingles* factor

because racial bloc voting can 'vary according to a variety of factual circumstances'(*Gingles*, 478 U.S. at 58)." (*Id.* at 578.) Trial courts in the Second Circuit have wisely heeded this admonition in applying the "usually" test after the *Pope* opinion. (See *Pope v. County of Albany* (N.D.N.Y. 2015) 94 F.Supp.3d 302, 335 ("There is 'no simple doctrinal test' for the third *Gingles* precondition. ...'[T]he critical point is whether White voters are voting for other candidates to such a degree that [minority-] preferred candidates are consistently defeated'") (citations omitted); *Flores v. Town of Islip* (E.D.N.Y. 2019) 382 F.Supp.3d 197, 231 ("This determination [of *Gingles* Prong 3 precondition] is largely a fact-driven inquiry. As a result, courts have deviated from a bright-line rule.").)

The First Circuit likewise explained in *Vecinos de Barrio Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973,

> [W]e recognize that determining whether racial bloc voting exists is not merely an arithmetic exercise that consists of totting up columns of numbers, and nothing more. To the contrary, the district court should not confine itself to raw numbers, but must make a practical, commonsense assay of all the evidence.

(*Id.* at p. 989.)[21] The rigid and exclusively mathematical test advanced by Appellant is the opposite of the approach taken by those two Courts of Appeals.

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[21] The decision lends only superficial support to Appellant's proposition by including a passing comment interpreting the *Gingles* Prong 3 requirement as meaning "most of the time." But the more considered and thoughtful

The statutory language and purposes of the CVRA also support a flexible approach to applying the "usually" standard. A rigid reading, requiring that non-minority voters defeat minority-preferred candidates in 50+% of elections without consideration of factual circumstances, is inconsistent with language of the CVRA eschewing hard and fast rules for the determination of racially polarized voting, such as those of Elections Code sections 14026(e) (methods of proof approved in FVRA caselaw "*may* be used" to prove RPV) and 14028(b) ("One circumstance that *may* be considered" in determination a violation is "the *extent* to which" candidates preferred by protected class voters have been elected to the governing body in question) (emphases supplied). A rigidly mathematical approach would also contravene the Legislature's purpose in enacting the statute, which as recognized in *Jauregui v. City of Palmdale*, *supra*, 245 Cal.App.4th at page 806, was "to provide a broader basis for relief from vote dilution than available under the federal Voting Rights Act " (citing extensive legislative history).

Appellant's argument that RPV must be found to exist in a numerical majority of elections is not based on any considered decisions in reported caselaw. Appellant's principal cited authority, *Old Person v.*

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reasoning of the First Circuit that expands on that passing comment actually contradicts the proposition that Appellants advance.

Cooney (9th Cir. 2000) 230 F.3d 1113, contains no such holding. In that case, the district court had employed a two-step process in determining that white majority voters did not "usually" defeat the minority's preferred candidates, but the Court of Appeals reversed the lower court's finding and held its reasoning process erroneous. (*Id.* at p. 1122.) In explaining the two specific legal errors made by the district court, the Court of Appeals engaged in a lengthy discussion of the evidence and applicable legal standards without mentioning the word "usually" or focusing on whether the showing of white majority predominance in a majority of elections was a necessary element of the proof. (See *Ibid.*) Thus, the passing comment summarizing the standard applied by the district court, quoted by Appellant (AOB, p. 24), equating "usually" with "i.e., more than half the time," *Old Person v. Cooney*, *supra*, 230 F.3d at page 1122, is only dicta.[22] Appellants' other cited authority, *Lewis v. Alamance County* (4th Cir. 1996) 99 F.3d 600 (*Lewis*), likewise, loosely comments that "usually" means "something more than 51%" in dicta in a footnote; but its purported

[22] The district court in *Luna v. County of Kern*, *supra*, 291 F.Supp.3d at p. 1127, also without careful consideration or analysis, and in a context in which its view made no difference to the outcome of the case, mistook the *Old Person* dicta as a holding. The *Old Person* dicta are also difficult to reconcile with the Ninth Circuit's earlier statement in *Ruiz v. City of Santa Maria* (1998) 160 F.3d 543, 554, criticizing and reversing a trial court's ruling on the *Gingles* Prong 3 issue for "applying a simple mathematical approach" instead of the broadly fact-sensitive inquiry prescribed by *Gingles*.

standard is irrelevant to its decision in the case, which turned on the district court's error in assessing the proof on the *Gingles* Prong 3 test because the court failed to review the results of a sufficient number of elections.[23]

2. Regardless of the Legal Meaning Attributed to the Statutory Term "Usually," Plaintiffs Proved That Racially Polarized Voting Occurred in a Sufficient Number of the City Council Elections to Support the Court's Judgment Under the "Usually" Standard.

Even under Appellant's proposed mathematical interpretation of the "usually" standard, the record contains strong and sufficient evidence to support the trial court's judgment.

a. Plaintiffs Proved that the White Majority Voting Bloc Defeated the Asian American-Preferred Candidates in a Majority of City Council Elections.

Dr. Kousser's detailed analyses of ten City Council elections show which candidates were preferred by Asian American voters in each of those elections, by point-estimate percentages. (9 AA 1959-77 (Kousser Report

[23] The Fourth Circuit's holding was premised on its belief that the district court had erred in failing to consider many elections in which there was no minority candidate on the ballot, see *Lewis*, *supra*, 99 F.3d at p. 606 – reasoning which is directly contrary to the CVRA's explicit direction that elections involving a candidate of the protected group bringing the case are to be given particular weight. (Elec. Code § 14028(b).)

Tables A-1 to A-19); 8 AA 1532.)[24] Six of those ten preferred candidates were themselves Asian American.[25]

Only three of the ten Asian American-preferred candidates won their elections, and all three of them were white.[26] The other seven Asian American preferred candidates, lost to other white candidates; Asian American preferred candidates thus lost in a numerical majority of the ten elections. In every single one of those elections, the victorious candidate was the person preferred by NHWB voters.[27] By *any* definition of the word 'usually,' these results satisfied the *Gingles* Prong 3 required showing that the white voting bloc "usually" defeated the Asian American-preferred candidate.

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[24] Six of the ten were preferred by a statistically significant margin at the .05 level by one or more of the recognized regression methods Dr. Kousser used: Nguyen (2002 Seat 2), Nguyen (2004 Seat 3), Park (2014 Seat 5), Chahal (2016 Seat 4), Watanabe (2016 Seat 6), and Park (2016 Seat 7) – five of the six (all but Park) by at least two of the three methods.

[25] The non-Asian Americans who were preferred by Asian Americans were Moore (2004 Seat 4), Davis (2012 Seat 3), Hardy (2014 Seat 2), and Watanabe (2016, Seat 6). The last three were preferred over the perennially unpopular Asian American candidate Nadeem (see *infra* p. 23).

[26] Moore (2004 Seat 4), Davis (2012 Seat 3), and Watanabe (2016, Seat 6). See 8 AA 1532.

[27] See 8 AA 1532. In six of those ten elections, the preference of NHWB voters for the winning candidate over any other candidate was statistically significant at the .05 level by at least two of the three analytical methods.

b. The Trial Court Correctly Found That Racially Polarized Voting Occurred in a Majority of the City Council Elections.

Under the fact-intensive and flexible standards properly applied to both the *Gingles* factors and the broader language of the CVRA, not all elections carry equal weight in the RPV analysis. Instead, some warrant more weight than others as indicated by express statutory language and caselaw governing how RPV is shown. The trial court in this case properly determined that following FVRA standards it must "conduct 'a searching practical evaluation of the past and present reality'" of the local political process and that, accordingly, "[i]ndividual elections can be given more or less weight depending on the circumstances." (10 AA 2328 (SOD), citing and quoting *Gingles*, *supra*, 478 U.S. at p. 51.)

Section 14028 directs courts to give greater weight to certain types of elections than others: elections conducted prior to the filing of an action (§ 14028(a)), and elections in which a protected group member was a candidate (§ 14028(b)). FVRA caselaw, which is incorporated by Elections Code section 14026(e) into CVRA standards, also recognizes that some elections carry less weight, or no weight, because of "special circumstances" (*Gingles*, *supra*, 478 U.S. at p. 51.) The examples of such circumstances mentioned by the Supreme Court, such as a minority candidate without opposition or incumbency, cannot be taken as exhaustively listing all possible special circumstances; *Gingles* itself notes

that its list is "illustrative, not exclusive." (*Id.* at p. 57, fn. 26.) Other federal courts have identified a variety of such factors relating to particular elections or candidates that may explain results not typical of other elections under a challenged at-large system, and accordingly weighed them less heavily in deciding whether plaintiffs satisfied their burden of proof.[28]

Dr. Kousser identified four of the ten City Council elections he examined as affected by the special circumstance that an Asian American candidate, Nadeem, who ran in each of those elections, was uniquely unpopular among Asian American and other voters, and became more so in each successive election. (9 AA 1940-45 (Kousser Report ¶¶ 63-68); 3 RT

[28] See, for example, *Ruiz v. City of Santa Maria, supra,* 160 F.3d at pp. 553-54 (directing trial court to give certain elections more weight than others in applying *Gingles* Prong 3 test to evidence); *League of United Latin American Citizens, Council No. 4434 v. Clements*, *supra*, 986 F.2d at pp. 792, 797 (Court of Appeals declined to "reweigh the evidence" on appeal from a district court's decision based on weighing certain elections relied on by the plaintiffs more heavily than other elections relied on by the defendant); *Mo. State Conf. of the NAACP v. Ferguson—Florissant Sch. Dist.* (E.D. Mo. 2016) 201 F.Supp.3d 1006, 1054 (particular election given reduced weight but not completely discounted because of special circumstances). See also *Campos v. Baytown* (5th Cir. 1988) 840 F.2d 1240, 1247-48 (trial court properly discounted evidence of voting in one precinct that "was an aberration based on the witnesses' testimony"); *Jenkins v. Red Clay School Dist. Bd. of Ed.* (3d Cir. 1993) 4 F.3d 1103, 1126, *cert.* den. (1994) 512 U.S. 1252 (cautioning that in assessing minority vote cohesion, trial court should consider whether a particular minority candidate "may be viewed as outside the mainstream with no possible hope of success and may therefore be unable to garner minority support").

804:15-806:7.) Furthermore, Dr. Kousser explained in detail why he believed Nadeem's repeat-loser status and his own actions and positions engendered such negative voter reaction, for reasons having little to do with the ordinary functioning of Santa Clara's election system. (9 AA 1940-45 (Kousser Report ¶¶ 63-68); 3 RT 742-44, 804-05.)[29] Although the Superior Court did not find that Nadeem's election campaigns constituted "special circumstances" sufficient to warrant excluding them from any consideration, the court found that Nadeem's "poor track record as a candidate" and his opposition to even modest change in the election system when he served on the Charter Review Commission warranted giving the results of Nadeem's four elections "less weight." (10 AA 2341 (SOD).)

Putting the four Nadeem elections to the side, Plaintiffs demonstrated (3 RT 806), and the trial court found (10 AA 2344 (SOD)), that RPV existed in five of the remaining six City Council elections – a strong majority of the more heavily weighted elections.[30]

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[29] Those reasons included: possible Asian American voter antipathy due to Nadeem's favoring retention of numbered posts, his initial position on the unpopular side of issues relating to the San Francisco 49ers' building of Levi's Stadium in Santa Clara, his later flip-flopping on other 49ers'-related issues, and popular suspicions that his later campaigns benefitted from "dark money" sources outside the community. (See 9 AA 1941-45 (Kousser Report ¶¶ 65-68).)

[30] If only the last three of Nadeem's elections are separated out, as the court also considered doing (see 10 AA 2341 (SOD)), then five of the seven more heavily weighted elections showed RPV – still a strong majority.

The trial court did not completely disregard the Nadeem elections; rather, it treated them as deserving "less weight" in the RPV analysis. (10 AA 2341 (SOD).) Such weighting is completely consistent with caselaw following *Gingles* in which federal appellate courts discount the relative importance of certain elections in their RPV analyses based on findings – whether or not characterized as "special circumstances" – that their outcomes were not reflective of the underlying political reality of the challenged election system. (See *supra* fn. 32.) Although the court did not, and was not required to, specify in exact numerical terms the extent to which it de-valued the weighting of the four Nadeem elections, no such mathematical specificity is necessary here. Whatever the exact numbers based on the court's "weighted" election analysis, Plaintiffs proved and the court found RPV "usually" occurred, even as Appellant contends is necessary. Five of the ten elections, including the Nadeem elections, were racially polarized; therefore, any discounting or lesser weighting of the effect of any of the other five elections not found to be polarized, including Nadeem's four, would tip the strictly numerical scales out of equal balance and in the direction of a polarization finding. That appears to be exactly how the court reached its overall finding that "racially polarized voting occurred in City Council elections from 2002 to 2016." (10 AA 2344-45 (SOD).) Since the court had reasons well-founded in substantial evidence to give the Nadeem elections lesser weight than the other six elections at

the heart of this case, its ultimate finding satisfies even Appellant's contention of what "usually" means.

C. The Statistical Methods Used by the Trial Court in Reaching Its Ultimate Conclusion That RPV Occurred Were Not Clearly Erroneous or Violative of Any Applicable Legal Standards.

1. The Trial Court Did Not Err in Using an 80% Confidence Level Standard In Its Findings Regarding Voting Cohesion Among Asian-Americans, or In Calculating Whether That Standard Was Met.

In its finding that RPV occurred in five of the ten studied City Council elections (and five of the six more heavily weighted elections), the court determined that Asian Americans had voted cohesively in five elections, using an 80% confidence level standard (10 AA 2339 (SOD).)[31] Appellant challenges the court's finding with respect to two of those five elections on the grounds that its use of an 80% confidence level was an abuse of discretion.[32] Appellant's arguments are wrong for two distinct reasons. First, the voting patterns that Appellant points to, and to which the

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[31] In other words, the court found that the confidence intervals surrounding the point estimates of Asian American voter preference percentages for their "top two" candidates did not overlap when calculated at the .80 level; or to put it another way, the likelihood that the regression estimates were correct in determining that there was in actuality an Asian American preferred candidate exceeded 80%.

[32] The finding of RPV in three other elections, which met the 95% standard by all three analytical methods, is not challenged. Appellant's challenge to the use of the 80% confidence interval with respect to school board elections (AOB at 31) is irrelevant since the trial court found those not to be probative of City Council elections.

trial court applied the 80% standard, are not those that the law requires to be considered. Second, the court's use of the 80% standard was consistent with legal standards and well within the bounds of its discretion.

a. Appellant's Argument That Plaintiffs Failed to Prove Racially Polarized Voting in Two Elections is Based on a Legally Incorrect Comparison Method of Determining the Preferred Candidate of Asian American Voters.

Appellant's entire argument that Plaintiffs failed to show RPV in two of the five elections in which the trial court held that it occurred is based on Appellant's contention that the candidate preferred by Asian American voters could not be shown with sufficient reliability. That contention, which the court rejected, is founded on a legally erroneous method of assessing who the preferred candidate is. Appellants' analysis focused exclusively on the difference in Asian Americans' voting for their most-preferred and second-ranked candidates. (3 RT 671; 4 RT 945-46; 10 AA 2090-2100.) But the legally required analysis, which Dr. Kousser performed, compares the voting of Asian Americans for their preferred candidate to the voting of white voters for the same candidate. (3 RT 671:26-672:7.)

Elections Code section 14026(e) defines racially polarized voting as that "in which there is a *difference* ... in the choice of candidates ... that are preferred by voters in a protected class, and in the choice of candidates ... that are preferred by voters in the rest of the electorate" (emphasis

supplied). This language is most logically read as pointing to the comparison between the two racial groups in their voting behaviors, not the relative preferences given to different candidates by the protected class voters alone. As Dr. Kousser explained, he analyzed the difference in voting for and against the Asian Americans' preferred candidate by, on the one hand, Asian Americans and, on the other, by the NHWB group - not just voting for different candidates within the Asian American voting group (3 RT 736, 747.)[33]

This approach is consistent with the basic thrust of the CVRA, which is to provide a basis for challenging election systems that facilitate the dominance of a numerical majority of white voters over a less numerous racial minority. Consistent with the need to assess whether that usually occurs (*Gingles* Prong 3), it is logical to assess cohesion (*Gingles* Prong 2) by comparing the amount of minority voter group support for those preferred candidates to the amount of non-minority group support for them. This is also the approach that courts take in FVRA cases. (See *Gomez*, *supra*, 863 F.2d at p. 1415 (as to "what is meant by 'political cohesiveness'…[t]he inquiry is essentially whether the minority group has expressed clear political preferences that are distinct from those of the

[33] In his analysis, the Asian American preferred candidate was, logically, the one who by his estimate received the highest percentage of Asian Americans' votes.

majority"; *Sanchez v. State of Colorado* (10th Cir. 1996) 97 F.3d 1303, 1316 ("the legal standard for the existence of racially polarized voting looks only to the difference between how majority and minority votes were cast," quoting *Collins v. City of Norfolk* (4th Cir. 1987) 816 F.2d 932, 935).) Appellant cites no case that has used a comparison of how minority voters voted as among different candidates (rather than a comparison of minority to majority voters for the minority-preferred candidates) in determining RPV; and Plaintiffs are not aware of any such decisions.

In this case, the correct analysis comparing how the majority and minority votes, as Dr. Kousser testified, shows cohesive voting patterns among the two groups at a statistically significant (.95) level, in most elections. (8 AA 1532.) Thus, even if the reliability test of social science, rather than that of law, were applied to the evidence, Plaintiffs proved that Asian Americans voted differently from NHWB voters, and thus proved *Gingles* Prongs 2 and 3.

b. The Law Does Not Require Use of a 95% Confidence Level to Determine Racially Polarized Voting.

Appellant does not contend that the court's use of the 80% confidence level violated any standard of law, and it does not. Yet appellant contends that the 95% confidence level must be applied in statistical analyses of RPV, and accuses the trial court of having committed legal error by failing to apply the 95% standard in making his RPV finding.

But the use of a 95% confidence level for finding "statistical significance" is, as Dr. Kousser explained, "simply a convention." (5 RT 1346 (see also 9 AA 1916-17).)

The concept of statistical significance, although adopted by social scientists for their own purposes, is not equivalent to the test of "legal significance" that applies to the determination of racially polarized voting in voting rights litigation. *Gingles* formulates the test as follows: "the questions whether a given district experiences *legally* significant racially polarized voting requires discrete inquiries into minority and white voting practices." (*Gingles*, *supra*, 478 U.S. at p. 56.) The opinion continues by observing that "[a] showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim." (*Ibid.*) The opinion does *not* say or suggest that the regression results must be "statistically significant" or meet any other particular standard of certainty; and the fact that evidence relating to the number of votes for a minority candidate is only "one way" of proving voting cohesion suggests that any particular mathematical standard – such as correlations at a level of statistical significance –is not the only possible method of proof.

Instead, "legal significance" must be accorded to facts found to be "more likely than not" in civil litigation under the familiar preponderance of the evidence standard. "Statistical significance" is not the test for

whether a plaintiff carries the burden of proof in civil litigation, as the trial court correctly reasoned, citing *Turpin v. Merrell Dow Pharmaceuticals, Inc.* (6th Cir. 1992) 959 F.2d 1349, 1357, footnote 2 and the Federal Judicial Center's Reference Manual on Scientific Evidence (3d ed. 2011) at page 271, footnote 138. (10 AA 2335-38 (SOD).)[34] In *United States v. City of Euclid* (N.D. Ohio 2008) 580 F.Supp.2d 584, the district court made the following observations in a ruling on a dispute over statistical analysis methodologies in a FVRA at-large challenge:

> [T]he Court's job is to assess the broader legal principles described in *Gingles;* it is neither to be wedded to, nor hamstrung by, blind adherence to statistical outcomes. Statistics are tools to aid the Court's analysis. There are no bright line absolutes to which this Court must adhere in assessing the question of whether racial bloc voting existed.
>
> [A]n approach might yield an inexact result for purposes of a hypothetical mathematical challenge, but could still be correlative, probative, and sufficiently accurate to bear on the ultimate issue of racial bloc voting. The standard of proof here is preponderance, not mathematical certainty. Again, as noted above, the Court is to employ statistical analysis in aid of its own factfinding, not to adhere slavishly to it.

(*Id.* at pp. 596, 602; see also, *Toland v. Nationstar Mortg LLC* (N.D. Cal. July 13, 2018, No. 3:17-cv-02575-JD) 2018 US Dist. Ct. LEXIS 117394, at

[34] *Duran v. U.S. Bank N.A.* (2014) 59 Cal.4th 1 (*Duran)*, which Appellant relies on heavily, also cites and follows the guidance of the Reference Manual in identifying how to use inferential statistics correctly in deciding legal issues. (*Id.* at p. 38.)

*6 (preponderance of the evidence, not specific higher confidence level, required for proof of disputed fact).)

The court decided to apply as "sufficiently reliable" an 80% confidence level standard. (10 AA 2335-39 (SOD).) The relatively high degree of inherent uncertainty surrounding some of the estimates and correlations in this case are the unavoidable result of the relatively low levels of racial homogeneity in the precinct level data, as the court acknowledged. (10 AA 2333-34 (SOD); 3 RT 696.) That inherent uncertainty provides additional reason to find the trial court's choice of an 80% confidence level and its decision to not insist on a possibly unattainable 95% level for all elections eminently reasonable. In applying that standard in its role as the trier of fact, the court did not abuse its discretion.[35]

Appellant also argues that the trial court improperly made up its own standard and calculated its own results under the 80% standard without evidence in the record supporting either its choice of confidence level or the method of applying it. That contention is wrong on both counts. Although Dr. Kousser himself used the .95 convention in his calculations (and found it satisfied), he also testified that the cohesion correlations could be

[35] See also the authorities cited in Section IV, pp. 29-30, on the broad deference given to fact findings based on disputed expert witness testimony.

calculated using another standard, and specifically stated that the .80 or 80% level could be used. (3 RT 807-08, 810.) Dr. Kousser also specifically explained how the math would be done in order to determine reliability at the .80 confidence level – by multiplying the standard errors by a factor of 1.28, rather than 2 (or 1.96) as was done for calculations at the .95 confidence level. (*Id.*, 808.) Since the standard errors for each election were reported in Dr. Kousser's tables for both of the elections for which Appellant disputes the court's cohesion and RPV findings (2016 Seats 4 and 7, see 9 AA 1966-68 (Kousser Report Tables A-9 and A-10), all the court did was simple arithmetic following the expert's instructions: it multiplied the listed point estimates for the candidates by the factor 1.28 and looked at the resulting intervals to see if their ranges overlapped. (10 AA 2339 n.9 (SOD).)[36]

Appellant's complaint that the court's calculations weren't "vetted using the usual adversarial process" is disproved by the record. Within minutes after Dr. Kousser explained exactly how reliability would be determined at the 80% level in his redirect testimony, Appellant's lawyer conducted a brief recross examination of Dr. Kousser but did not ask him

[36] Notably, the simple arithmetic calculations done by the trial court used the same equation relating the standard error ("margin of error"), confidence interval, and point estimate that were used by the California Supreme Court itself in its own calculations, in *Duran*, which Appellant relies on in its argument. (See *Duran*, *supra*, 59 Cal.4th at p. 20, fn. 13.)

about the method he explained. (3 RT 812-13.) The next day, during the cross-examination of the City's expert, Plaintiff's counsel, asked him whether he had considered using an 80% confidence level (5 RT 1267-68), and the court interrupted with its own questions, including the specific question whether using a .80 level would be unreliable and pointing out that there were two elections in which that was the confidence level reported by the City's expert in testing voting cohesion. (*Id.* 1269-70.) Counsel for Appellant then conducted redirect examination of its expert (*id.* 1335-37), but again chose not to address the 80% standard or how it would apply to the determination of Asian American voting cohesion. Finally, Plaintiffs recalled Dr. Kousser for rebuttal testimony, and he again testified about the alternative of using the .80 standard (*id.* 1347); and once again, Appellant's counsel declined the opportunity to examine the witness about that topic (or any other) (*id.* 1357).

2. The Trial Court Properly Considered Point Estimates as an Alternative to Confidence Intervals as a Basis for Finding Racially Polarized Voting.

As the trial court noted (10 AA 2339 (SOD)), Appellant's challenge to the court's application of an 80% level in examining confidence intervals for overlap is directed primarily to only one alternative method of demonstrating RPV. While that challenge formed the basis for most of the City's cross-examination of Dr. Kousser and its evidence purporting to show the lack of proof in two of the five City Council elections in which he

found RPV, Dr. Kousser's findings were also based on a simpler, more direct method of proof. That method was direct comparison of point estimate values for the Asian American voters' votes for particular candidates compared to white voters' votes for the same candidates. (*See* 8 AA 1532.) The use of point estimates is supported by caselaw, and was proper.

As the trial court noted, courts have used point estimates as the basis for finding RPV. (10 AA 2339 (SOD).) In a case cited by the court, *Fabela v. City of Farmers Branch* (N.D. Tex. Aug. 8, 2012, No. 3:10-cv-01425-D) 2012 U.S. Dist. LEXIS 108086 (*Fabela)*, the district court relied exclusively on point estimates in finding racial bloc voting by both minority and non-minority voters. (See *id.* at *50-52.) It did so despite acknowledging that "the confidence intervals for Hispanic voting patterns are broad," because "a point estimate is the 'best estimate' for the data." (*Id.* at *53, fn. 33.)[37]

[37] Similarly, in *Benavidez v. City of Irving* (N.D. Tex. 2009) 638 F.Supp.2d 709, 724-25, the defendant challenged the plaintiffs' cohesion showing but the court, while recognizing that the confidence intervals were indeed "wide," found voter cohesion based on point estimates of Hispanic voter support for Hispanic candidates. In *Missouri. State Conference of the NAACP v. Ferguson-Florissant School District*, *supra*, 201 F.Supp. at pages 1041-42, the district court characterized the point estimate as "the value that is closest to the true value as one can get with the data, or statistically the best estimate of the true value," even while acknowledging the confidence interval as a measure of the uncertainty surrounding the point estimate.

Appellant specifically criticizes the trial court for finding cohesion in the 2016 Seat 4 election, in which candidate Chahal, who was the preferred candidate of Asian Americans, received slightly less than 50% of their votes in a four-candidate race – 49.0%, estimated by the EI method (but 58.4% and 59.6% by the other two methods Dr. Kousser used), more than double the estimated 23.0% received by the next most-preferred candidate. (9 AA 1966-67 (Kousser Report)). Appellant argues that considering him as "preferred" is therefore error, mistakenly citing *Fabela* as authority. *Fabela* states: "[U]nlike the first prong [of *Gingles*], which has an established bright-line test of 50%+, there is no cut-off for political cohesion." (*Fabela, supra,* 2012 U.S. Dist. LEXIS 108086, at *42.) In any event, *Fabela* is not controlling. *Ruiz v. City of Santa Maria, supra,* 160 F.3d at page 552 provides appellate authority squarely contrary to Appellant's contention: "the requirement ... that a candidate receive 50 percent or more of the votes cast by a minority group to qualify as minority-preferred can be too restrictive"). (See also *Citizens for a Better Gretna v. Gretna* (5th Cir. 1987) 834 F.2d 496, 501.)

Appellant's argument rests on the presumption that point estimates can never be used without consideration of their associated confidence intervals or standard errors. The trial court properly eschewed using such a rigid standard and considered both the point estimates and the confidence intervals in reaching the factual determinations that underlie its ultimate

finding of a violation. Nor did it consider the point estimates without giving consideration to their associated standard errors and confidence levels – it weighed both.[38]

In doing so, the court acted properly as a finder of fact weighing all the available evidence and giving the weight it deserves. Its ultimate findings as to racially polarized voting, based on consideration of point estimates as well as confidence intervals, were within the court's function and discretion as the fact finder.

D. The Trial Court's Ultimate Finding That Respondent Violated the CVRA Is Amply Supported by Its Findings Based on Non-Statistical Evidence of Actions and Practices That Caused Vote Dilution.

The CVRA Elections Code section 14028(e) lists additional factors that are treated as "probative, but not necessary factors to establish a violation," and among the factors highlighted in that section are dilution-enhancing "electoral devices or voting practices" as well as socio-economic factors. Moreover, under section 14028(b) "the extent to which candidates who are members of the protected class and who are preferred by voters of the protected class ... have been elected," constitutes an additional basis for finding a statutory violation. Here, Plaintiffs presented, and the trial court

[38] This distinguishes its method from the one used by the trial court in *Duran*, which the Supreme Court rejected precisely because it entirely ignored the wide margins of error in the calculations it relied on. (*Duran*, *supra*, 59 Cal.4th at pp. 48-49.)

found and relied on, a variety of non-statistical evidence that supports a finding of violation of the CVRA (see, Section D of Statement of Facts, *supra* pp. 24-27 above, and 10 AA 2344-2345 (SOD) – none of which the City disputes in this appeal.

An appellate court's role is to "review the [trial] court's result, not its reasoning .... [T]hat there might be contrary evidence that could support defendants' position is irrelevant. It is necessary only that there be sufficient evidence to support the judgment." (*HPT IHG-2 Properties Trust v. City of Anaheim* (2015) 243 Cal.App.4th 188, 203 (citing *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 101 Cal.App.4th 1317, 1325; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873).) The undisputed fact that no Asian American has ever been elected to or served on the Santa Clara City Council, despite the demonstrated fact that Asian American voters tend to support Asian American candidates, and other non-statistical evidence accepted as probative by the trial court, constitute such evidence sufficient to support the judgment appealed from, regardless of this Court's resolution of the statistical issues discussed sections A-C of this Argument.

1. The History of Exclusion and Defeat of Asian American Candidates.

The most significant non-statistical evidence in this case is that no Asian American was ever elected to, or served on, the City Council in the

pre-litigation history of the City, although many have tried. The Court took note of this dramatic fact in surveying the most significant background facts of the case, and listed it as its second conclusion in its overall evaluation of the evidence, after its findings on the statistical evidence (10 AA 2344.) In finding great significance in this fact, the court not only tracked the language of the CVRA's section 14028(b) but also echoed many other decisions in FVRA cases. (See *Gomez v. City of Watsonville*, *supra,* 863 F.2d at p. 1417 ("such a pattern over time of minority electoral failure strongly indicates racial bloc voting" (citing *Gingles, supra*, 278 U.S. at p. 57)).)

2. Use of the Numbered Post System.

It is well known that the use of numbered posts as part of an at-large election system can enhance the dilutive effect of the system by preventing minority voters from concentrating their votes and increasing their effectiveness by means of "single-shot voting." (See *Gingles*, *supra*, 478 U.S. at pp. 36-39, fns. 5 & 6 (discussing how numbered posts or seats increase the difficulty minority groups face in winning at-large elections by preventing them from concentrating their votes).) When in late 2011 the City convened a Charter Review Committee to consider the consultant's report that Committee recommended that the numbered post system be abolished; however, the City Council took no action then or over the next six years to modify its election system, as the Court also found. (10 AA

2344 (SOD); 5 AA 1154.) The court found the City's maintenance of numbered posts to be further evidence supporting its finding of a statutory violation. (10 AA 2344 (SOD).)

3. Disregard of Advice and Warnings About the Inequal Results of the At-Large Election System.

As shown in part D.1 of the Statement of Facts, for many years the City ignored its own consultant's advice and warning about the dilutive effects of its voting system and its vulnerability to a CVRA action like this one. And when finally forced to consider some change in the elections system, the City's response was to propose a variant of its at-large system.[39] The trial court noted these facts (10 AA 2342 (SOD)), and they provide further support to its judgment.

4. The Effects of Historical Discrimination Against Asian Americans.

Plaintiffs' evidence included expert witness testimony about historical, political, and socio-economic factors that constitute or exacerbated barriers to Asian Americans' political participation. The trial court noted these facts, and found them to provide additional support for its conclusion that Appellant violated the CVRA (10 AA 2344-45).

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[39] The City's failure to appoint well-qualified Asian American applicants to a vacant Council position in 2016 may also be considered evidence of its stubborn non-responsiveness to Asian Americans' aspirations to participate politically.

E. The CVRA Does Not Violate the Fourteenth Amendment's Equal Protection Clause.

The City's constitutional argument is a thinly veiled facial challenge to the CVRA – one that was already rejected by the Court of Appeal over a decade ago in *Sanchez, supra,* 145 Cal.App.4th at pages 680-81. A similar attempt to cast a facial challenge as an "as applied" challenge was recently rejected by the U.S. District Court for the Southern District of California in *Higginson v. Becerra* (S.D. Cal. 2019) 363 F.Supp.3d 1118, 1126, *appeal filed* (9th Cir. Mar. 11, 2019, No. 19-55275) (*Higginson*). The City argues that strict scrutiny should apply simply because, it claims, the CVRA as a whole is a race-based statute – an argument rejected squarely by both *Sanchez* and *Higginson*, and unsupported by U.S. Supreme Court decisions. The Court should determine that strict scrutiny does not apply and that the CVRA does not violate the Equal Protection Clause. Even if strict scrutiny did apply, the CVRA would satisfy that test too, as there is a clearly compelling state interest in combating vote dilution and other impediments to the fundamental right to vote and the CVRA calls for remedies narrowly tailored to addressing that interest.

1. The CVRA's References to Race Do Not Trigger Strict Scrutiny.

The City invokes the Equal Protection Clause, which applies strict scrutiny to a state's use of a suspect classification or burden on a fundamental right. (See *Sanchez, supra,* 145 Cal.App.4th at p. 678 (citing

Plyler v. Doe (1982) 457 U.S. 202, 216-18 & fns. 14 & 15).) "Race is a suspect classification." (*Sanchez*, *supra*, 145 Cal.App.4th at p. 678 (citing *Johnson v. California* (2005) 543 U.S. 499, 505).) Strict scrutiny requires that the state action be "narrowly tailored" to promote a "compelling government interest." (*Sanchez*, *supra*, 145 Cal.App.4th at p. 678 (citing *Johnson*, 543 U.S. at 505).) All other state actions are subject to a more relaxed rational basis review (*Sanchez*, *supra*, 145 Cal.App.4th at p. 678 (citing *Vacco v. Quill* (1997) 521 U.S. 793, 799).) Under rational basis review, the law need bear only a "rational relationship" to a "legitimate governmental interest." (*Sanchez*, *supra*, 145 Cal.App.4th at p. 678 (citing *Vacco*, 521 U.S. at 799).)

The City argues that the CVRA triggers strict scrutiny because the text of the statute contains reference to "race." As *Sanchez* found, the race-conscious provisions of the CVRA do not trigger strict scrutiny because the CVRA does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. (*Sanchez*, *supra*, 145 Cal.App.4th at pp. 665, 680-81; see also *Higginson*, 363 F.Supp.3d at p. 1126 (quoting *Adarand Constructors v. Pena* (1995) 515 U.S. 200, 227 and *Parents Involved in Community Schools v. Seattle School Dist.* (2007) 551 U.S. 701, 720).)

Sanchez involved a facial challenge to the CVRA[40] premised on the argument that the CVRA uses race to identify the polarized voting that causes vote dilution. (See *Sanchez*, *supra*, 145 Cal.App.4th at p. 666.) After rejecting the City of Modesto's argument that strict scrutiny should apply, *Sanchez* held that the CVRA is not facially unconstitutional as it "readily" passes rational basis review: "Curing vote dilution is a legitimate government interest and creation of a private right of action like that in the CVRA is rationally related to it." (*Id.* at p. 680.) The court noted, however, that its decision on Modesto's facial challenge left open the possibility of an as-applied challenge after the liability and remedies stages of the case. (See *id.* at pp. 665-66.) As *Sanchez* contemplated the as-applied challenge, a voter could assert under the U.S. Supreme Court's decisions that a trial court's selected remedy involved racial gerrymandering, in which districts drawn using race as the "predominant" factor triggers strict scrutiny. (See *id.* at pp. 668, 688; see also *Bush v. Vera* (1996) 517 U.S. 952, 958-59 (plurality) (Bush).) Both the California and the U.S. Supreme Courts refused to disturb the ruling in *Sanchez*.

[40] A facial challenge is one in which a defendant must show that "the CVRA can be validly applied under no circumstances." (*Sanchez*, *supra*, 145 Cal.App.4th at p. 679.) An as-applied challenge involves the specific application or remedy of the CVRA. (*Ibid.*)

The plaintiff in *Higginson* pursued the as-applied challenge left open by *Sanchez* hoping that his facts would trigger strict scrutiny. As a voter in a city that moved to district-based elections following the threat of a CVRA lawsuit, the plaintiff alleged that the CVRA and its safe harbor provision caused the city to engage in racial gerrymandering (*i.e.* that race was the predominant factor in the drawing of district lines) in violation of the Equal Protection Clause. (*Higginson*, *supra*, 363 F.Supp.3d at pp. 1120-22.) However, the court held that Higginson failed to allege that he or other individual voters were classified by their race at all, let alone in an unconstitutional manner, and failed to trigger strict scrutiny. (See *id.* at pp. 1126-27.) Therefore, he failed to state a claim for unlawful racial gerrymandering and the court dismissed the complaint. (See *id.* at p. 1128.)

Sanchez and *Higginson* agree that race conscious anti-discrimination statutes are not necessarily racially discriminatory. If they were, many important civil rights statutes would be constitutionally vulnerable – a drastic alteration of the state of the law. (See *Higginson*, *supra*, 363 F.Supp.3d at p. 1127 (citing *Reno v. Shaw* (1993) 509 U.S. 630, 642; *Doe ex rel. Doe v. Lower Merion Sch. Dist.* (3d Cir. 2011) 665 F.3d 524, 548, fn. 37; *Parents Involved in Community Schools v. Seattle Sch. Dist.*, *supra*, 551 U.S. at p. 720; *Chen v. City of Houston* (5th Cir. 2000) 206 F.3d 502); *Sanchez*, *supra*, 145 Cal.App.4th at p. 681.)

The Supreme Court "has never held that race-conscious state decision-making is impermissible in *all* circumstances." (*Reno v. Shaw*, *supra*, 509 U.S. at p. 642.) *Sanchez* underscores this point:

> What the [Supreme Court] cases do not hold is that a statute is automatically subject to strict scrutiny because it involves race consciousness even though it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups.... If the CVRA were subject to strict scrutiny because of its reference to race, so would every law be that creates liability for race-based harm, including the FVRA, the federal Civil Rights Act, and California's Fair Employment and Housing Act.

(145 Cal.App.4th at p. 681; see also *Raso v. Lago* (1st Cir. 1998) 135 F.3d 11, 16 ("Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause.").) Civil rights statutes like the CVRA are not and should not be subject to strict scrutiny solely because they mention race as a way of identifying a serious societal harm like discrimination.

2. Appellant Fails to Show Any Basis for the Court to Treat This as an As-Applied Challenge, to Apply Strict Scrutiny Review, or Even to Address Any Constitutional Issues in This Case.

The City's constitutional challenge is a weak attempt to recast a facial challenge to the CVRA as an as-applied challenge and fails for similar reasons that the plaintiff's claim in *Higginson* failed. Like the

plaintiff in *Higginson*, the City fails to point to any facts in the record to support its argument that the application of the CVRA to the City was unconstitutional, but instead points to the text of the statute that references race: "The CVRA unquestionably classifies individuals by race" (AOB at 34); "The CVRA classifies all individuals who may sue on the basis of race" (*id.*); "[T]he CVRA invalidates at-large systems *solely* on the basis of race, *i.e.*, a finding by a court that RPV usually occurs in the jurisdiction" (*id.*); "RPV is an express racial classification that explicitly distinguishes between individuals on racial grounds" (*id.* at 35). The City's argument is essentially the same facial challenge that was rejected in *Sanchez*. The Court should follow the well-reasoned decision in *Sanchez* to hold that the race-conscious provisions of the CVRA on their face do not trigger strict scrutiny and the CVRA is not facially unconstitutional.

The only statement in the City's brief that comes close to stating an as-applied challenge is a single sentence in which the City asserts that the maps proposed by the parties in the remedial phase of trial "all took race into account." (*Id.* at 35.) In this sentence, the City suggests only that race was *considered*, not that it was the predominant factor used in drawing district lines.

The mere consideration of race in the drawing of district lines is *not* enough to trigger strict scrutiny. (See *Bush*, *supra*, 517 U.S. at pp. 958, 1051, fn.5 (principal & conc. opn. of O'Connor, J.) ("Strict scrutiny does

not apply merely because redistricting is performed with consciousness of race.").) Race must have been the "predominant" factor. (See *Sanchez*, *supra*, 145 Cal.App.4th at p. 668 (citing *Bush*, *supra*, 517 U.S. at pp. 958-59 ("Later cases explained that a finding that race was the 'predominant' factor in creating a district – to which other factors were subordinated – is what triggers strict scrutiny.")); *Miller v. Johnson* (1995) 515 U.S. 900, 916 (requiring proof that "race was the predominant factor" in drawing district lines for racial gerrymandering claims); *Cooper v. Harris* (2017) 137 S.Ct. 1455, 1464 (*Cooper*) ("[I]f racial considerations predominated over others, the design of the district must withstand strict scrutiny.").)

The City does not argue that race was the predominant factor in drawing district lines; nor does it cite to any evidence to that effect. Indeed, to do so would put the City in an awkward position, since *the trial court adopted the City's proposed district map*. The record shows that race was not the predominant factor in the creation or adoption of the court's chosen remedial plan. The City's map was drawn by its own demographer after she conducted City-sponsored community meetings to obtain public input, based on which she modified an earlier version. (11 RT 3009-3010, 3028; 15 AA 3139-3143, 3146, 3150.) The City's demographer testified that she adhered to traditional districting factors including making compact and contiguous districts with regular boundary lines, respecting geographical features like major thoroughfares; and although she also gave consideration

to the racial composition of the proposed districts, her map was "not gerrymandered." (11 RT 3012.) Far from ordering a race-based map, she testified, the City never explicitly instructed her, to achieve any particular remedial effect or level of minority representation. (*Id.*, 3035, 3037.)

The City also tries and fails to distinguish this case from *Sanchez* and *Higginson* by reasserting the "usually" argument addressed in section B(1) above, contending that if Plaintiffs have not proved that the majority voting bloc usually defeats the preferences of minority voters, then the court-imposed remedy is unconstitutional under strict scrutiny review. The Court need not address Appellant's strained argument as a constitutional matter. The City's contention fails because Plaintiffs proved that the NHWB voting bloc usually defeats the preferences of Asian American voters, as the trial court found in its liability determination. Therefore, the City's argument is purely hypothetical, and calls for what would be an advisory opinion. (See *Sanchez*, *supra*, 145 Cal.App.4th at p. 829 (court should avoid making an unnecessary decision on a constitutional issue.)

3. The Trial Court's Chosen Remedy Would Pass Strict Scrutiny if it Applied.

Even if the Court were to accept the City's argument that the trial court's imposed remedy involved predominantly racial considerations and was subject to strict scrutiny, the Superior Court's adoption of a map which

enhances minority voters' opportunity to elect candidates of choice is narrowly tailored to remedy racial vote dilution caused by Santa Clara's at-large election system. (See *City of Palmdale*, *supra*, 226 Cal.App.4th at pp. 798-802 (concluding that the CVRA was "narrowly drawn and reasonably related to elimination of dilution of the votes of protected classes" in evaluating whether the CVRA addressed a matter of statewide interest); see also *Abbott v. Perez* (2018) 138 S.Ct. 2305, 2315 (assuming that if a state has "good reasons" to believe it needed to comply with the federal VRA, then using race as the predominant factor in drawing district lines may be narrowly tailored and satisfy strict scrutiny); see e.g. *Goosby v. Town Board, supra,* 180 F.3d at p. 498 ("[E]ven if the [trial court's remedial] six-district plan required strict scrutiny, it is in any event narrowly tailored to the goal of remedying the vote dilution found here.").) There must be a strong basis in evidence for using race-based districting. (*Cooper, supra*, 137 S.Ct. at p. 1464 (citing *Alabama Legislative Black Caucus v. Alabama* (2015) 135 S.Ct. 1257).) Here, there was strong evidence that the City's at-large election system diluted the votes of the Asian American voters in the presence of racially polarized voting, and the CVRA itself requires such evidence before any remedy "tailored to the violation" may be imposed. (See Elec. Code § 14029.)

Additionally, the CVRA advances a compelling and constitutionally based state interest in protecting the right to vote and integrity in elections.

(See *City of Palmdale*, *supra*, 226 Cal.App.4th at p. 800 (holding that the California Constitution, Article 1, section 2, like the Fourteenth Amendment of the U.S. Constitution, protects voters against dilution of their votes); see also *Cooper, supra*, 137 S.Ct. at p. 1464 ("This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965."); *Williams v. Rhodes* (1968) 393 U.S. 23, 30-31 ("[T]he right of qualified voters ... to cast their votes effectively" is one that "rank[s] among our most precious freedoms."); *Reynolds v. Sims* (1964) 377 U.S. 533, 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").) Because the CVRA protects such fundamental rights and approves remedies that are appropriately "tailored to remedy the violation," both the trial court's decision and the CVRA would pass strict scrutiny if it applied. (See Elec. Code § 14029.)

F. The CVRA's Application to Santa Clara Does Not Violate the California Constitution's Reference to a Charter City's Plenary Authority.

Defendant's "plenary authority" argument is based on the unremarkable premise that unless Plaintiffs can show entitlement to relief under the CVRA, the City's status as a charter city will override the CVRA.

Nothing in this argument, or the factual circumstances of this matter, though, suggests that a different analysis be adopted here than in the well-reasoned opinion of the Court of Appeal in *City of Palmdale, supra.* Repeatedly citing to and quoting from the California Supreme Court's decisions in *State Building & Construction Trades Council, AFL- CIO v. City of Vista* (2012) 54 Cal.3d 547 and *California Federal Savings & Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1, the *City of Palmdale* court engaged in a four-step analysis to determine whether the CVRA preempted Palmdale's charter:

> First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a "municipal affair." Second, the court must satisfy itself that the case presents an actual conflict between local and state law. Third, the Court must decide whether the state law, addresses a matter of "statewide concern." Finally, the court must determine the law is "reasonably related to... resolution" of that issue of that concern and narrowly tailored to avoid unnecessary interference in local governance.
>
> After engaging in that analysis, our Supreme Court has delineated how we resolve the ultimate preemption question: "If the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a "municipal affair" pro tanto and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments."

(*City of Palmdale, supra,* 226 Cal.App.4th at pp. 795-96 (citations and brackets omitted).)

Applying these four steps here gives the same results as in Palmdale. First, the manner of selecting Santa Clara city council members is a municipal affair. Second, there is an actual conflict between the CVRA and Santa Clara's mode of electing city council members, since the findings of RPV and of a violation of the CVRA require remedial change to that system. Third, the dilution of votes of a protected class is matter of statewide concern, as the Legislature expressed when it enacted the CVRA. (See *Sanchez*, *supra*, 145 Cal.App.4th at p. 830; *City of Palmdale*, *supra*, 226 Cal.App.4th at pp. 799-801.) Fourth, the CVRA's provisions are reasonably related to the issue of vote dilution and section 14028 authorizes narrowly drawn remedies which do not unnecessarily interfere in municipal governance. Thus, Article XI, section 5 of the California Constitution does not bar the enforcement of the CVRA and its remedial provision.

The City argues that *City of Palmdale* should not apply here because it "ignored the plenary powers granted by Section 5(b)(4) of Article XI." AOB 37. That could not be further from the truth. The *City of Palmdale* court specifically discussed, and rejected, Palmdale's "plenary authority" argument. Citing the Supreme Court's decision in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591,600, the *City of Palmdale* court ruled that "The plenary authority identified in article XI, section 5, subdivision (b) can be preempted by a

statewide law after engaging in the four-step evaluation process" set forth above. (*City of Palmdale, supra,* 226 Cal.App.4th at p. 803.)

For the same reasons here, Santa Clara's charter is preempted by the CVRA because its at-large election system violates the CVRA's prohibition on vote dilution.

G. The Award of Costs and Attorneys' Fees to Plaintiffs Should Be Affirmed and the Case Remanded for Additional Awards for Post-Judgment Proceedings.

Appellant's only argument against the Superior Court's award of costs and attorneys' fees to Plaintiffs is that the court erred in finding that Plaintiffs were prevailing parties entitled to such an award under Elections Code section 14030. Unless this Court reverses that finding, the basis for the award stands unchallenged. However, since the entry of the award, Plaintiffs have expended substantial time and some costs on this appeal and other case-related work. This Court should remand the case to the Superior Court with instructions to determine the amounts of reasonable costs and fees due to Plaintiffs for that additional work.

VI. CONCLUSION

The Judgment of the Superior Court should be affirmed and the case remanded for additional awards of costs and attorneys' fees.

Respectfully submitted,

Dated: August 22, 2019

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CERTIFICATE OF WORD COUNT

I, the undersigned appellate counsel, certify that this brief consists of 12,842 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.204(c)(3), relying on the word count of the Microsoft Word 365 computer program used to prepare the brief.

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12-08-20

ITEM #7
RTC#20-1267

H046105 / H046696

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

LADONNA YUMORI-KAKU, ET AL.
Plaintiffs-Respondents,
v.
CITY OF SANTA CLARA,
Defendant-Appellant.

Appeal from an Amended Statement of Decision Regarding Remedies Phase of Trial; Judgment
Superior Court of California, County of Santa Clara
Honorable Thomas E. Kuhnle, Judge
Superior Court No. 17-CV-319862

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SUMMARY OF REPLY

In its opening brief, the City of Santa Clara ("City" or "Appellant") showed that the trial court found only five out of 10 city council elections involved racially polarized voting. The City also showed why this finding precluded Plaintiffs and Respondents Yumori-Kuku et al. ("Plaintiffs" or "Respondents") from making the required showing that the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances such as a minority candidate running unopposed—**usually** to defeat the minority's preferred candidate." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 51 ("*Gingles*"), bold added.)

Plaintiffs offer three novel arguments in response. Each of these arguments is either unsupported by the applicable case law or unsubstantiated by any evidence in the record and, therefore, should be rejected.

First, Plaintiffs contend that they can meet the "usually" standard if the Court ignores four non-polarized city council elections in which Dr. Mohammed Nadeem, an Asian candidate, ran and lost. Plaintiffs say that the trial court gave these four elections "little weight based on Plaintiffs' showing that they were marked by 'special circumstances.'" (Respondents' Brief ("Resp. Br.") at p. 11.) But the trial court expressly found that Plaintiffs' expert's speculation about these elections did *not* rise to the level of "special circumstances." (Appellant's Appendix ("AA"), Vol. 10, 2341:11-14 [Statement of Decision re: Liabilities, issued June 6, 2018 ("SD-L")].) Further, Plaintiffs have not cited a *single case* that has ever used the "special circumstances" doctrine to give less weight to a non-polarized election that a minority candidate *lost.* Rather, the "special circumstances" doctrine has always been used to explain isolated instances of *success* by minority-preferred candidates. There simply is no support in

the case law for giving less weight to an election under these circumstances.

Second, Plaintiffs say that the third *Gingles* precondition is not "a strict mathematical formula." (Resp. Br. at p. 33.) Plaintiffs, however, fail to cite a single case that has found the "usually" requirement to be met when the plaintiffs failed to prove racially polarized voting in more than 50% of the elections at issue. Accordingly, the trial court's factual finding that there was no racially polarized voting in five out of the 10 elections here makes it impossible for Plaintiffs to prove that the majority "usually" voted as a bloc to defeat the minority's preferred candidates.

Third, Plaintiffs ask the Court to simply ignore their failure to establish precondition 3 of *Gingles* and, instead, consider the "totality of the California Voting Rights Act's ("CVRA") requirements. (Resp. Br. at pp. 55-56.) Specifically, Plaintiffs ask the Court to consider various other factors referenced in Elections Code sections 14028(b) and 14028(e)[1] such as whether an Asian American had previously been elected to the city council or whether there were "[e]lectoral devices ... that enhance the dilutive effect of at-large elections" or a "history of discrimination" against the protected class. These factors, while probative, cannot save Plaintiffs' case. The plain language of the CVRA requires Plaintiffs to prove the second and third *Gingles* preconditions. This result is consistent with the legislative history and the California appellate decisions that have considered claims under the CVRA. Plaintiffs cite no authority for using other factors to excuse a failure to prove the second or third *Gingles* preconditions. Moreover, the trial court largely dismissed their impact on

[1] All references to "Section" or citations to "§" are to the Elections Code, unless otherwise indicated.

the recent elections in Santa Clara that were reviewed at trial. (AA, Vol. 10, 2343:16-27.)

The trial court's decision rests on errors of law that led the trial court to erroneously conclude that Plaintiffs had satisfied *Gingles'* third precondition. This Court should correct those errors and reverse the trial court's judgment.

I. ARGUMENT

A. Errors of Law Are Reviewed De Novo.

Plaintiffs argue that the "clearly erroneous" standard of review should apply to the "ultimate findings" that racially polarized voting and vote dilution occurred. (Resp. Br. at p. 33.) There is no support for this claim.

The case law is consistent that in a Voting Rights Act case, findings of fact are subject to the "clearly erroneous" standard of review, but the underlying interpretations of law and the resolution of mixed questions of law and fact are reviewed de novo. (*See, e.g., Thomas v. Bryant* (5th Cir. Sept. 3, 2019, No. 19-60133) 2019 WL 4153107 at *13 ["clearly erroneous" standard of review for factual findings "does not inhibit an appellate court's power to correct errors of law ... or a finding of fact that is predicated on a misunderstanding of the governing rule of law"], quoting *Gingles, supra*, 478 U.S. at p. 79; *Missouri State Conf. of the Natl. Assn. for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.* (8th Cir. 2018) 894 F.3d 924, 931–32, cert. denied *sub nom. Ferguson Florissant Sch. Dist. v. Missouri State Conf. of N.A.A.C.P.* (2019) 139 S. Ct. 826 ("*Ferguson-Florissant Sch. Dist.*") ["Legal questions and mixed questions of law and fact are ... reviewed de novo."].)

In short, where the "ultimate finding" of dilution or racially polarized voting is based on a "misreading of the governing law," ordinary principles of appellate review require de novo review of the underlying legal interpretations. (*Ferguson-Florissant Sch. Dist.*, *supra*, 894 F.3d at p. 932, internal citations and quotations omitted; see also *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 384-86 ["usually the application of law to fact will required the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles"], internal citations and quotations omitted.) This Court should not defer to a trial court's "ultimate findings" that were "predicated on a misunderstanding of the governing rule of law." (*Gingles*, *supra*, 478 U.S. at 79.)

Thus, the trial court's finding that five out of 10 ("5/10") elections exhibited racially-polarized voting, which the City does not challenge, would be judged using the clearly erroneous standard. On the other hand, the trial court's determination that 5/10 met the "usually" standard, as set forth in federal case law, is a legal issue that this Court reviews de novo. Similarly, whether trial courts are permitted to give less weight to elections that do not rise to the level of "special circumstances" is a legal question that this Court reviews de novo.

B. The Trial Court Erred as a Matter of Law in Giving Less Weight to Elections Involving Dr. Mohammed Nadeem.

Plaintiffs admit they presented evidence about only 10 Santa Clara City Council elections between 2002 and 2016, and that the trial court found no racially polarized voting in five out of those 10. (Resp. Br. at p. 11.) They admit that federal case law is incorporated into the CVRA's definition of racially polarized voting. (Resp. Br. at p. 40.) And they admit that, under federal law, the third *Gingles* "precondition" required them to

prove that the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances such as a minority candidate running unopposed—**usually** to defeat the minority's preferred candidate." (*Gingles, supra,* 478 U.S. at p. 51, internal citations omitted, bold added; Resp. Br. at pp. 31, 34.)

Yet, despite the trial court's findings that there was no racially polarized voting in five out of 10 elections (AA, Vol. 10, 2339:18-19.), Plaintiffs argue that they somehow have satisfied the "usually" standard, because the "trial court correctly found that racially polarized voting occurred in a majority of the city council elections." (Resp. Br. at p. 40.) Plaintiffs' claim that there was racially polarized voting in a "majority" of the elections depends on accepting their novel argument that this Court should simply exclude four elections in which Asian candidate Dr. Mohammed Nadeem ran and lost.[2] This Court should reject Plaintiffs' argument, because it would require ignoring both the trial court's findings of fact, as well as the federal case law that created and has defined the "special circumstances" doctrine over many years.

First, Plaintiffs' argument is not supported by the trial court's findings of fact. Plaintiffs allege the trial court gave four elections "little weight based on Plaintiffs' showing that they were marked by 'special circumstances.' " (Resp. Br. at p. 11.) But the trial court's finding says just the opposite: "The Court does not believe Dr. Kousser's speculation about Dr. Nadeem's voting record rises to the level of 'special circumstances' that warrant disregarding Dr. Nadeem's election losses." (AA, Vol. 10,

[2] Alternatively, Plaintiffs say that the Court could include *one* of Dr. Nadeem's elections and just ignore the other three. (Resp. Br. at p. 42, fn. 30.)

2341:11-13.) Thus, the trial court expressly found that Plaintiffs' expert's "speculation" about the reasons for Dr. Nadeem's lack of success did not rise to the level of "special circumstances." Plaintiffs may not challenge this finding, because they did not appeal any part of the trial court's judgment.

Second, the trial court's decision to give "less weight" to some non-polarized elections where an Asian candidate lost, in the absence of a finding of "special circumstances," is not supported by the federal case law that governs the definition of what constitutes racially polarized voting. (§14026, subd. (e).) Thus, the trial court's decision to give these elections "less weight" was an error of law that requires reversal of the judgment.

The trial court stated that individual elections "can be given more or less weight depending on the circumstances, including 'the absence of an opponent, incumbency, or the utilization of bullet voting.'" (AA, Vol. 10, 2328:13-15, 2340:22-24.)[3] Both times the trial court made this statement it quoted *Gingles*. But *Gingles* makes clear that the "special circumstances" doctrine was created to avoid overemphasizing isolated successes of a minority-preferred candidate, not to allow non-polarized elections where one minority candidate performed poorly to be ignored. In *Gingles*, the Court stated:

> "Furthermore, the **success of a minority candidate** in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet

[3] Despite finding a lack of "special circumstances," the trial court decided to give three of the elections involving Dr. Nadeem "less weight," because his "attractiveness as a candidate dimmed" in 2012, 2014 and 2016 "among Asians and all other voters." (AA, Vol. 10, 2341:13-15.) The trial court stated that "Dr. Nadeem's poor track record as a candidate is a reasonable explanation for the lack of Asian support." (*Id.* at 2341:17-18.)

> voting, may explain minority electoral success in a polarized contest."

(*Gingles*, *supra,* 478 U.S. at p. 57, emphasis added.)

The Supreme Court did note that the examples given were "illustrative, not exclusive." (*Id.,* fn. 26.) However, "special circumstances" must be those that "may explain minority electoral **success** in a polarized contest." (*Ibid,* bold added.)

Out of the hundreds of cases citing *Gingles*, neither Plaintiffs nor the trial court cited a single case that applied the "special circumstances" doctrine to give less weight to a non-polarized election involving an unsuccessful minority candidate. Plaintiffs include a footnote in their brief purporting to give examples where courts have "weighed" certain elections "less heavily" than other elections, but *none* of these cases involved explaining away a lack of success by a minority candidate in a non-polarized election. (Resp. Br. at p. 41, fn. 28.) Rather, most of Plaintiffs' cases involve courts giving more weight to those elections that involved a minority candidate as compared to those elections that involved only candidates from the majority group.[4] The cases cited by Plaintiffs found

[4] *See Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 552 ["An election pitting a minority against a non-minority, however, is considered more probative and accorded more weight."]; *Jenkins v. Red Clay Consol. School Dist. Bd. Of Ed.* (3d Cir. 1993) 4 F.3d 1103, 1128 ["white versus white elections tend to be less probative"]; *League of United Latin American Citizens, Council No. 4434 v. Clements* (5th Cir. 1993) 986 F.2d 728, 748 [district court properly gave "more weight to the elections analyzed by Plaintiffs' experts" because "the evidence most probative of racially polarized voting must be drawn from elections including both [minority] and white candidates"; quotation and citation omitted]; *Campos v. City of Baytown* (5th Cir. 1988) 840 F.2d 1240, 1245 ["The district court was warranted in its focus on those races that had a minority member as a candidate."].

that elections involving a minority candidate were more probative, but there has been much debate among the federal cases about this issue. (*See, e.g.*, *Lewis v. Alamance County* (4th Cir. 1996) 99 F.3d 600, 605 ("*Lewis*") ["by considering only elections in which a black candidate was on the ballot, the district court failed to analyze a sufficient number of elections to enable it to determine whether white bloc voting usually operates to defeat minority-preferred candidates"]; *Natl. Assn. for the Advancement of Colored People v. City of Niagara Falls* (2d Cir. 1995) 65 F.3d 1002 ["Courts have long grappled with the appropriate weight to afford white-white elections in § 2 cases."].)

In any event, the cases giving less weight to elections that did not involve a minority candidate do not support Plaintiffs' position here. Rather, Plaintiffs' expert offered testimony about only 10 city council elections over a 16-year period, all of which involved at least one Asian candidate. Accordingly, the cases cited by Plaintiffs provide no support for excluding four of the 10 elections that Plaintiffs' own expert chose to study precisely because he believed elections involving an Asian candidate were the most relevant.

Plaintiffs' remaining cases likewise do not support their argument for ignoring the Nadeem elections. For example, in *Campos v. City of Baytown, supra,* 840 F.2d at pp. 1247-48, the district court rejected certain expert analysis of one precinct because that precinct was "extremely small," "overwhelmingly Black," and "controlled by one man" who had been "the first Black principal at a local high school." (*Id.* at p. 1247.) The appellate court held that the district court "could properly conclude that Precinct 248 was an aberration based both on testimonial and statistical evidence." (*Id.* at p. 1248.) Neither the district court nor the appellate court gave less weight to any of the elections that involved a minority candidate.

In *Missouri State Conf. of the Natl. Assn. for the Advancement of Colored People v. Ferguson-Florissant School District* (E.D. Mo. 2016) 201 F.Supp.3d 1006, 1061, the district court found that two elections where minority candidates prevailed were entitled to "slightly less weight" because there were "special circumstances" surrounding those two elections. This is a straightforward application of the "special circumstances" doctrine from *Gingles* to give less weight to isolated instances of electoral success by minority-preferred candidates. It does not support Plaintiffs contention that non-polarized elections, in which a minority candidate was defeated, should be ignored by the court.

Under a proper application of the "special circumstances" doctrine, there is no basis for giving less weight to any of the elections involving Dr. Nadeem. Accordingly, the trial court's factual findings that five of the 10 elections at issue did not involve racially polarized voting precluded Plaintiffs from proving that the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances such as a minority candidate running unopposed—usually to defeat the minority's preferred candidate." (*Gingles*, *supra*, 478 U.S. at p. 51, internal citation omitted.)

C. Plaintiffs Failed to Prove That the "Rest of the Electorate" Voted as a Block "Usually" to Defeat the Asian-Preferred Candidate. This Alone Requires Reversal.

Precondition 3 of *Gingles* required Plaintiffs to prove that the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as a minority candidate running unopposed—usually to defeat the minority's preferred candidate." (*Gingles, supra*, 478 U.S. at p. 51, internal citation omitted.) The trial court acknowledged this requirement (AA, Vol. 10, 2327:27-2328:3), but then failed to apply it to

the evidence of racially polarized voting in the 10 city council elections on which the Plaintiffs submitted evidence. If the trial court had correctly applied the "usually" standard from federal case law to the evidence submitted at trial, it would have concluded that the Plaintiffs' failed to meet their burden under precondition 3 of *Gingles*.

Plaintiffs mischaracterize the City's argument as resting "entirely on a rigidly mathematical definition of the statutory term 'usually'." (Resp. Br. at p. 34) On the contrary, the City cites decades of federal precedent that—in every case—has applied the "more than half" threshold that Plaintiffs must meet in order to hold a defendant liable.

In *Old Person v. Cooney* (9th Cir. 2000) 230 F. 3d 1113, 1122 (*"Old Person I")*, the Ninth Circuit recognized that "usually" means "more than half the time." Plaintiffs have no meaningful critique of that standard. Instead, they resort to calling the Ninth Circuit's statement on the meaning of "usually" dictum, because it was not the *central* holding of the case. There is no indication in *Old Person* that the Ninth Circuit was making a meaningless reference when it equated "usually" as meaning more than half the time. Plaintiffs cite no contrary Ninth Circuit authority.

Nor do Plaintiffs offer any reasonable basis for this Court to distinguish the Fourth Circuit's clear pronouncement in *Lewis, supra,* (4th Cir. 1996) 99 F. 3d at p. 606, fn. 4, that the terms "usually," "normally," and "generally" as used by the Supreme Court in *Gingles* mean "something more than just 51%." Again, Plaintiffs do not directly dispute the Fourth Circuit's conclusion on the meaning of those key terms. Plaintiffs again can only resort to calling the Fourth Circuit's discussion of this critical part of a Plaintiff's prima facie case (i.e., precondition 3) dictum.

In *Lewis*, the Fourth Circuit was not persuaded that the trial court had been presented with a sufficient cross-section of election results to

determine whether the black-preferred candidates "usually" were defeated by bloc voting of the white majority. The Fourth Circuit's discussion of the meaning of "usually" in *Lewis* was certainly not a loose comment as Plaintiffs suggest. The meaning of "usually" was central to the *Lewis* Court's decision and is a clear and well-considered interpretation of the meaning of the "usually" requirement in *Gingles*. Therefore, like the Ninth Circuit's guidance in *Old Person*, the Fourth Circuit's analysis regarding the meaning of "usually" is a solid interpretation and certainly not dictum.

Plaintiffs' suggestion that the pronouncements in *Old Person* and *Lewis* regarding the meaning of "usually" are meaningless dicta also is contradicted by the discussion of the "usually" requirement in *Pope v. County of Albany* (N.D.N.Y. 2015) 94 F.Supp.3d 302, 335, a case actually *cited by Plaintiffs*. In *Pope*, the district court cited *Old Person* and *Lewis* as reflecting "acceptable thresholds of minority success" for purposes of the "usually" requirement. Although the district court in *Pope* stated that the Second Circuit had recognized the need for some flexibility in this assessment, the district court actually found that "white bloc voting in the County usually defeats minority-preferred candidates in a **great majority of elections**." (*Id.* at p. 340, bold added.)

Flores v. Town of Islip (E.D.N.Y. 2019) 382 F.Supp.3d 197 also is of no help to Plaintiffs. In *Flores*, the District Court evaluated evidence concerning 14 Town Board elections and nine Town-wide elections in which Hispanic candidates lost nearly every election. The issue before the Court was whether the white "crossover" votes were sufficient to constitute a white bloc that "regularly defeats" the minority preferred candidate.[5] (*Id.*

[5] A "crossover" vote—in the voting rights context—is one cast by a minority voter for a majority candidate or vice-versa. (*See, generally, Barlett v. Strickland* (2009) 556 U.S. 1, 22-23.)

at p. 232.) The *Flores* court went on to describe the critical point in the analysis as being "whether white voters are voting for other candidates to such a degree that Hispanic-preferred candidates are consistently defeated." (*Id.* at 233, citing *U.S. v. Village Of Port Chester* (S.D.N.Y., Jan 17, 2008, No. 06 CIV. 15173 (SCR)) 2008 WL 190502 at *26.)

Plaintiffs' reliance on *Vecinos de Barrio Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973 is equally misplaced. In *Holyoke*, the First Circuit found lacking the lower court's finding of vote dilution in a case where the lower court found evidence of racially polarized voting in at most 3 or 4 out of 11 elections. (*Id.* at p. 989.) In describing precondition 3 of *Gingles* (i.e., the third precondition in a federal case), the *Holyoke* court noted that it "embodies a showing that the majority votes sufficiently as a bloc to enable it, in the ordinary course, to trounce minority-preferred candidates most of the time." (*Id.* at p. 980.)

Finally, Plaintiffs argue that because the Ninth Circuit did not articulate a "usually" standard in *Gomez v. City of Watsonville* (1988) 863 F.2d 1407 (*"Gomez"*), that somehow the Ninth Circuit's clear statement 12 years later in *Old Person*—that "usually" means more than half the time—is of less significance. Plaintiffs' argument is without merit. The largely stipulated factual record before the court in *Gomez* showed that eight Hispanic candidates ran unsuccessfully for the Watsonville City Council in eight elections between 1971 and 1985. During that time, 25 non-Hispanic candidates were elected to the City Council. The data was not, however, broken down by election. Hispanic voters supported Hispanic candidates at the 95% level in elections involving a Hispanic candidate. (*Id.* at p. 1417.) In those elections, only 13% of White voters voted for the Hispanic candidate. (*Ibid.*) As a result, racially polarized voting occurred in at least 8 of 8 elections involving Hispanics. (*Ibid.*) As a result, "usually" standard

was easily met and the Ninth Circuit had no reason to elaborate on the type of showing that would be insufficient to satisfy the "usually" standard.

The *Gomez* case is neither "strikingly similar" to the present facts, as suggested by the Plaintiffs (Resp. Br. at p. 34), nor is it instructive at all as to the proper interpretation of "usually." Instead, *Gomez* was decided on an evidentiary record where there was a strongly cohesive minority, and where the plaintiffs had no trouble showing who the minority-preferred candidates were or that those candidates were usually defeated by the majority. Here, by contrast, Plaintiffs failed to prove racially polarized voting in five of the 10 elections at issue because their expert often could not determine which candidate Asian voters preferred.

Plaintiffs offer no authority whatsoever for the proposition that the "usually" requirement *Gingles* is met if the rest of the electorate defeats the minority-preferred candidates in only 50% of the elections in the record. Every federal circuit that has considered the issue has concluded that there must be evidence of racially polarized voting in *more than* 50% of the elections at issue in order to meet precondition 3 of *Gingles*.

Plaintiffs all but concede that they could not show who the Asian-preferred candidates were with sufficient reliability in the majority of the elections at issue. They say the trial court "rejected" the idea that Plaintiffs needed to identify the Asian-preferred candidate (Resp. Br. at p.44.) The trial court, however, recognized the need to determine the identity of the Asian-preferred candidate in each election, as evidenced by its decision to reduce the confident interval from 95% to 80% in the two elections where a preferred candidate could not be determined at the 95% confidence level. (AA, Vol. 10, p. 2339, fn. 9.)

Without identifying the Asian-preferred candidate, Plaintiffs cannot show that the "rest of the electorate" voted as a bloc against the Asian-

preferred candidate. Moreover, the CVRA speaks directly about identifying the candidate "preferred by voters in a protected class." (§ 14026, subd. (e).) Only then, can a plaintiff proceed to determine whether there is a legally significant difference between the support for the minority-preferred candidate and the support for the candidate "preferred by voters in the rest of the electorate." (*Ibid.*)

In the present case, the trial court was able to identify the Asian-preferred candidate in 5 of the 10 city council elections only by *lowering* the confidence level used by the Dr. Kousser in his report from 0.95 to 0.80. But this Court need not reach that issue. Whether it is 5/10 or 3/10, Plaintiffs' *own evidence* of racially polarized voting failed to meet the "usually" test in the city council elections they presented. Therefore, they failed to establish precondition 3 of *Gingles*. This alone requires reversal of the trial court's decision that the City violated the CVRA.

D. The Trial Court Abused Its Discretion by Conducting Its Own Statistical Analysis Using an 80 Percent Confidence Level.

The City showed in its opening brief that Plaintiffs' expert, Dr. Kousser, performed a complex statistical analysis called "ecological inference," using a standard 95% confidence level, to estimate how different racial groups voted in Santa Clara elections. (Appellant's Brief ("App. Br.") at pp. 26-27.) The City also showed why the choice of an appropriate confidence level and the development of a proper statistical method for analysis is the role of an expert witness, with proper statistical training, not the role of a trial court judge. (App. Br. at pp. 28-32.)

The City cited California Supreme Court precedent that delineates the proper role of the expert witnesses and the separate role for the trial court. A trial court evaluates expert testimony and must not "substitute its

own opinion for the expert's opinion." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 772.) The trial court may not conduct its own expert analysis, unvetted by the adversarial process. (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 41, 49.)

Plaintiffs do not cite *Sargon* at all, much less distinguish it. As for *Duran*, Plaintiffs say the alternative statistical method that the trial court improperly devised there was somehow different because the trial court here supposedly considered both point estimates and the associated standard error. (Resp. Br. at p. 55, fn. 38.) Plaintiffs say the Supreme Court rejected the trial court's analysis in *Duran* "precisely because it entirely ignored the wide margins of error." (*Ibid.*) Plaintiffs thus imply, incorrectly, that the trial court's analysis here did not have a wide margin of error.

Plaintiffs' argument does not distinguish *Duran*. Here, the trial court's switch to "an alternative of its own devising"—an "80 percent confidence interval" (AA, Vol. 10, 2339:12-15)—made it much more likely that the true level of Asian support for a candidate would fall outside the range indicated by the trial court's statistical method, as compared to Dr. Kousser's method. (App. Br. a p. 30, fn. 13.) Plaintiffs do not deny that, under the trial court's method, the risk that the estimate of Asian support for a particular candidate is wrong was increased by 400%! Nor do they dispute that, under "ecological inference," the probability distribution is not a bell curve and thus each point in the confidence interval is equally likely to be the true answer. (RT, Vol. 3, 717:22-28.)

Instead, Plaintiffs say "all the court did was simple arithmetic." (Resp. Br. at p. 51.) It is not the arithmetic that the City challenges. It is the complex statistical judgment about which statistical method is appropriate and whether a 400% jump in potential error would be acceptable in statistician's ordinary work outside the courtroom. There is a reason why

Dr. Kousser did not put forward the 80 percent confidence level in his own report.

The trial court erred by straying into a field that should properly be reserved for expert testimony vetted through the adversarial process. The California Supreme Court has made clear that trial courts should not substitute their own statistical methods for the analyses offered by qualified expert witnesses. (*Duran*, *supra*, 59 Cal.4th at pp. 41, 49.) This Court should reject the trial court's unsupported statistical analysis and conclude that Plaintiffs were able to show racially polarized voting in only three of the 10 elections at issue, which falls far short of meeting the "usually" standard required under the third *Gingles* precondition.[6]

E. Plaintiffs' "Totality of the CVRA" Argument Has No Support in the Law.

Plaintiffs appear to argue that their failure to prove *Gingles* precondition 3 can be disregarded based on a review of the "totality of the CVRA." (Resp. Br. at pp. 12, 55-58.) There is no support in the statute or the case law for this position.

Section 14028(a) informs Plaintiffs exactly what they must prove to win a CVRA case:

> "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."

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[6] As the City showed in its opening brief, the trial court did not use Dr. Kousser's "point estimates" to find racially polarized voting in either of the two elections that are in dispute. (App. Br. at pp. 32-33.) Plaintiffs argue that the use of "point estimates is supported by caselaw, and was proper." (Resp. Br. at p. 53.) Plaintiffs simply ignore that the trial court did not use Dr. Kousser's point estimates to reach its decision.

Section 14026(e), in turn, defines "racially polarized voting." Racially polarized voting requires a "difference ... in the choice of candidates ... that are preferred by voters in a protected class, and in the choice of candidates ... that are preferred by voters in the rest of the electorate." The "difference" must be of the type that is "defined in the case law regarding enforcement of the federal Voting Rights Act." (*Ibid.*)

The plain language of the CVRA requires a plaintiff to prove the second and third *Gingles* preconditions in order to show the required legally significant racially polarized voting based on the difference between the voting behavior of the minority group and the voting behavior of the rest of the electorate. Accordingly, California courts have treated *Gingles* precondition 3 as a requirement necessary to establish liability. (*See Wilson v. Eu* (1992) 1 Cal.4th 707, 748; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 789 ("*Palmdale*"); *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 668 ("*Sanchez*"); *Nadler v. Schwarzenegger* (2006) 137 Cal.App.4th 1327, 1342.)

The legislative history of the CVRA also is clear that the second and third *Gingles* preconditions must be proven. The Senate Floor Analysis says:

> As noted above, the Supreme Court in Gingles established three **conditions** that a plaintiff must meet in order to prove that at-large districts diluted the voting strength of minority communities. This bill **requires that only two of those conditions be met** ... .

(AA, Vol. 10, p. 2192, bold added.)

Plaintiffs did not prove precondition 3 of *Gingles*. Therefore, Plaintiffs failed to establish liability.

F. Applying the CVRA Without the "Usually" Standard Would Violate the Equal Protection Clause

As the City demonstrated in its opening brief, applying the CVRA without the "usually" standard would raise serious constitutional concerns. In response, Plaintiffs say that the City's argument under the Equal Protection Clause was "already rejected" by *Sanchez, supra,* 145 Cal.App.4th 660. *Sanchez*, however, did not consider or resolve whether the CVRA would be constitutional if it were applied without the critical safeguard of the "usually" standard, which exists for the important purpose of distinguishing "structural dilution from the mere loss of an occasional election." (*Gingles*, *supra*, 478 U.S. at p. 51.) Moreover, Plaintiffs do not deny that *Sanchez* left open a pathway to make "similar arguments" to show "*as-applied* invalidity later." (*Sanchez, supra,* Cal.App.4th at p. 665.) That is exactly what the City does here. Thus, statements in *Sanchez* that the CVRA is, on its face, "race neutral" and could give rise to claims by members of any racial group, have no relevance here. (*Id.* at p. 666.)

Plaintiffs' brief amply demonstrates that no "race neutral" application of the CVRA was involved here. For example, according to Plaintiffs, "the voting majority" in Santa Clara "was almost entire [*sic*] comprised of white persons," and supported candidates who "were themselves white." (Resp. Br. at pp. 16-17.) Thus, according to plaintiffs, "white voters' preferences determined who won, regardless of which candidates Asian American voters preferred." (Resp. Br. at p. 17.) And, Plaintiffs' theory was that "an Asian preferred candidate could win only if that Asian preferred candidate was white." (Resp. Br. at p. 22.) Plaintiffs chose which elections to study on the basis of the race of the candidates. And, when facts showed five of the 10 of the elections studied were non-polarized, Plaintiffs advocated ignoring four of the 10 elections chosen by

their own expert on the basis of the race of one of the candidates and that he was "uniquely unpopular" among Asian Americans (Resp. Br. at p. 41) or that he was "*not* preferred by Asian American voters" (Resp. Br. at p. 23). Alternatively, Plaintiffs appear to argue that their failure to establish the third *Gingles* precondition should be excused because of the "totality of the CVRA's requirements" (Resp. Br. at p. 12), including "the long history of discrimination against Asian Americans on a national, state, and local level" (Resp. Br. at pp. 17, 25). Based on racial arguments like these, the trial court adopted what Plaintiffs call a "majority-Asian American remedial district (District One)." (Resp. Br. at p. 18, fn. 11.)

The CVRA, when considered on its face, may "not deny standing to anyone." (*Sanchez*, *supra*, 145 Cal.App.4th at p. 685.) But, as the statute was applied to Santa Clara, there was only one "voting majority," and according to Plaintiffs, it "was almost entire [*sic*] comprised of white persons." (Resp. Br. at p. 16.) Plaintiffs do not deny that the majority (and all voters in Santa Clara) used to be able to vote for all of the city council members, and, under the trial court's remedy, would be limited to voting for one council member and the mayor. Plaintiffs seek to justify the burden on everyone's right to vote for the entire council by pointing to the benefit that will supposedly fall to the Asian American voters. This is the kind of race-based governmental action that is "presumptively invalid and can be upheld only upon an extraordinary justification." (*Shaw v. Reno* (1993) 509 U.S. 630, 643-44 (citations omitted).)

Plaintiffs say the Court should ignore all of the explicitly racial arguments that led the trial court to create what Plaintiffs call a "majority-Asian American remedial district" because race was supposedly not the "predominant" factor in drawing the district boundaries. (Resp. Br. at pp. 18, fn. 11, 64-66.) But showing that race was a "predominant" factor in

drawing district boundaries is not the only way to invoke strict scrutiny. Rather, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." (*Adarand Constructors v. Pena* (1995) 515 U.S. 200, 227; see also *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 493-94; *Wygant v. Jackson Bd. of Educ.* (1986) 476 U.S. 267, 273.) Under these precedents, the application of the CVRA to require Santa Clara to adopt districts affected by racial considerations is subject to strict scrutiny.

Finally, Plaintiffs argue that applying the CVRA to abolish at-large elections in Santa Clara and to impose districts with boundaries affected by racial considerations would pass strict scrutiny. (Resp. Br. at pp. 66-68.) The application of the CVRA to Santa Clara, without proper consideration of the "usually" standard, however, would fail strict scrutiny because it is not narrowly tailored to advance a compelling government interest.

The parties agree that strict scrutiny requires state action to be "narrowly tailored" to promote a "compelling government interest." (Resp. Br. at p. 60; App. Br. at p. 34.) Imposing race-based districts where a plaintiff has failed to show that minority-preferred candidates are "usually" defeated by majority bloc voting is not narrowly tailored to preventing vote dilution or any compelling government interest. Rather, finding liability where a plaintiff cannot meet the "usually" test would risk labeling "the mere loss of an occasional election" as though it were "structural dilution." (See *Gingles*, *supra*, 478 U.S. at p. 51.) As the multitude of decisions applying the "usually" test demonstrate, there are less restrictive ways to target vote dilution. Allowing unprecedented and unbridled flexibility to ignore whatever elections do not fit Plaintiffs' narrative would burden other citizens' fundamental rights to vote for the council members who will represent them, without sufficient justification.

The Court should avoid these difficult constitutional issues by reversing the judgment on the ground that Plaintiffs failed to show the majority bloc voting "usually" defeated the minority's preferred candidates. (See *People v. Morera-Munoz* (2016) 5 Cal.App.5th 838, 856-57.)

G. Santa Clara's Plenary Authority Over Its Elections May Not Be Impinged Upon by Application of the CVRA, Unless the "Usually" Standard is Met.

The City agreed in its opening brief that its plenary authority over the manner and method of electing its officers may have to yield to a remedial statute implementing the Equal Protection Clause and constitutional voting rights of a protected class. (App. Br. at pp. 36-37) The City argued, however, that this is the case with regard to the CVRA, *only* if it is fairly applied to remedy actual vote dilution. By failing to apply the "usually" standard in federal case law to its findings that 5/10 city council elections exhibited racially polarized voting in the 10 elections chosen by Plaintiffs, the lower court's decision unnecessarily impinged upon the City's plenary authority, set forth in the Article XI, section 5, subdivision (b)(4), of the California Constitution, to decide how to run its elections.

Plaintiffs attempt to counter this argument by citing *Palmdale*, *supra*, 226 Cal.App.4th 781. (Resp. Br. at p. 69) But *Palmdale* actually supports *the City's* position. In *Palmdale*, the defendant City's expert *agreed* racially polarized voting occurred and the defendant City did not appeal any of the trial court's findings regarding vote dilution. (*Id.* at pp. 790-792.) Unlike the present case, there was no question regarding the city's liability.

Moreover, the fourth requirement of the California Supreme Court's four-part test for deciding whether a state statute may override a charter city's law provides:

> "Finally, the court must determine the law is 'reasonably related to … resolution' of the issue of that concern **and narrowly tailored to avoid unnecessary interference in local governance**."

(*Palmdale*, supra, 226 Cal.App.4th at p. 795-96, bold added; citations omitted].)

By failing to apply the "usually" standard, the trial court's application of the CVRA was *not* narrowly tailored to avoid unnecessary interference in the governance of the City of Santa Clara. Therefore, the statute, as applied, violated Article XI, Section 5, subdivision (b)(4) of the California Constitution.

II. CONCLUSION

For the reasons stated above, the City of Santa Clara requests that the trial court's judgment regarding the City's liability under the California Voting Rights Act be reversed, the dependent award of attorneys' fees and costs to Plaintiffs be reversed, and that the trial court be directed to enter a new judgment in favor of the City.

DATED: September 18, 2019

Respectfully submitted,
Churchwell White LLP

By /s/ Steven G. Churchwell
Steven G. Churchwell,
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STATEMENT OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, the enclosed "Appellant's Reply Brief" was produced using 13-point Roman type, and including footnotes, but excluding the tables and this certificate, contains 6,501 words. Counsel relies on the word count of the computer software used to prepare this brief.

DATED: September 18, 2019 CHURCHWELL WHITE LLP

By /s/ Steven G. Churchwell
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CERTIFICATE OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed by Churchwell White LLP and my business address is 1414 K Street, 3rd Floor, Sacramento, CA 95814. I caused to be served the following document(s):

APPELLANT'S REPLY BRIEF

☒ By United States Mail. I enclosed the DOCUMENTS in a sealed envelope or package addressed to the PERSON's at the addresses set forth below.

☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☒ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepared.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 18th day of September 2019, at Sacramento, California.

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