City Council Special Meeting

Item # 7 – Public Hearing to Receive Input on Potential District Maps for the Election of Council Members

July 16, 2018

City of Santa Clara
The Center of What's Possible

Background

- On June 26, the City received a Court Order regarding its current election system that requires the City to take the following actions (dates slightly modified based on Court direction from July 2):

  a) Hold two public hearings before July 9th

  b) July 6th the parties shall serve and file proposed district maps

  c) Between July 11th and July 22nd, hold two additional public hearings

  d) Court will hold an evidentiary hearing on remedies commencing July 18th

  e) Court expects to make a final decision on remedies on or before July 23rd

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Previous Public Meetings

- **Tuesday, July 3, 2018** – 6:00 p.m. Council Chambers, 1500 Warburton Avenue, Santa Clara
- **Thursday, July 5, 2018** – 4:30 p.m. Central Park Library, Redwood Room, 2635 Homestead Road, Santa Clara
- **Wednesday, July 11, 2018** – 6:00 p.m. Council Chambers, 1500 Warburton Avenue, Santa Clara

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Districting: Statutory Criteria

- Districts shall contain a nearly equal population;
- Complies with the Federal Voting Rights Act and the Equal Protection Clause of the U.S. Constitution; and
- In establishing boundaries of the districts, the council may give consideration to the following factors: (1) topography, (2) geography, (3) cohesiveness, contiguity, integrity, and compactness of territory, and (4) community of interest of the districts.

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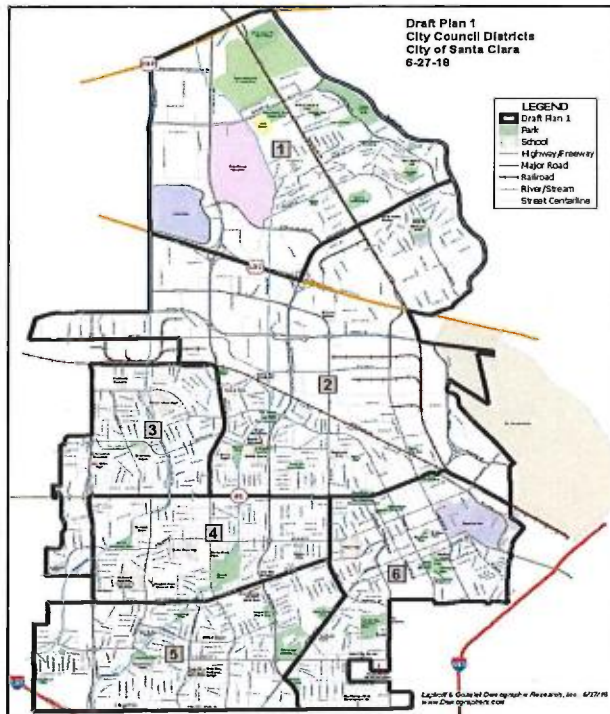
Draft Plan 1
6 Council Districts

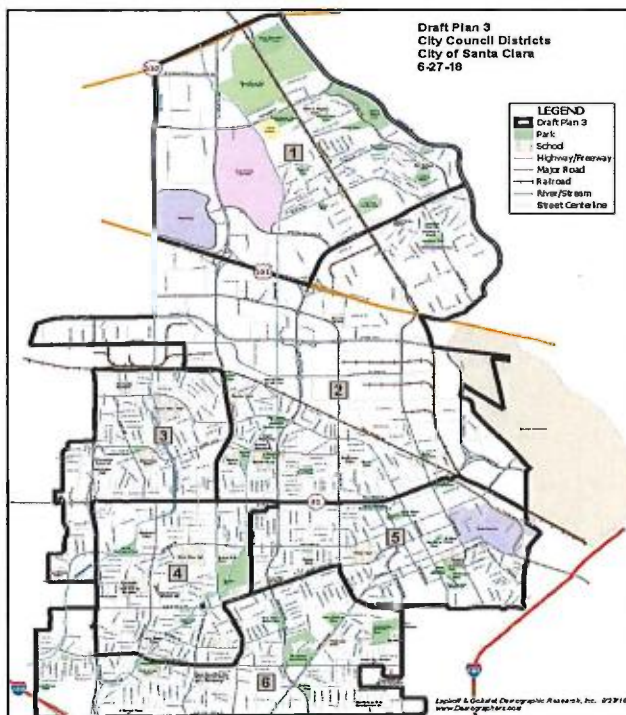Note boundary between D1 and D2 (in the north) – Draft Plan 2 shows a different possibility

2 of these 3 seats could be open for the Nov 2018 election (Districts 1, 5, and 6 have incumbents with terms expiring in 2020):
- *District 2*
- *District 3*
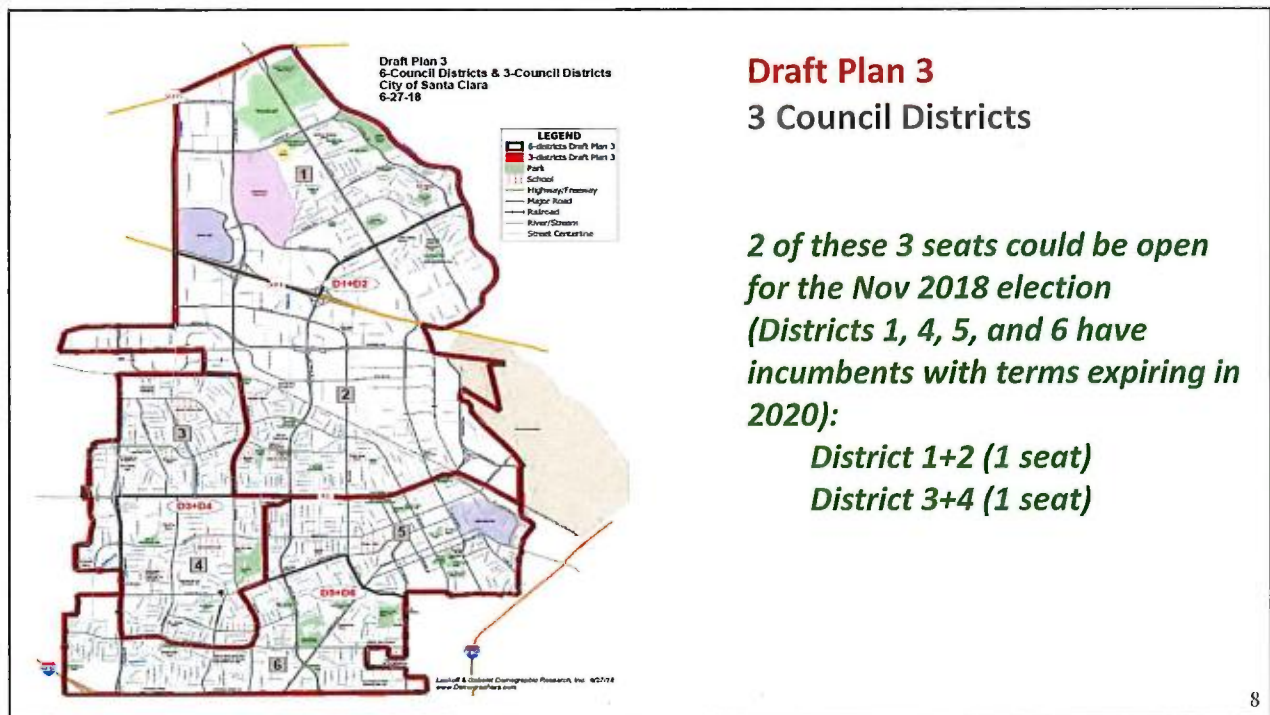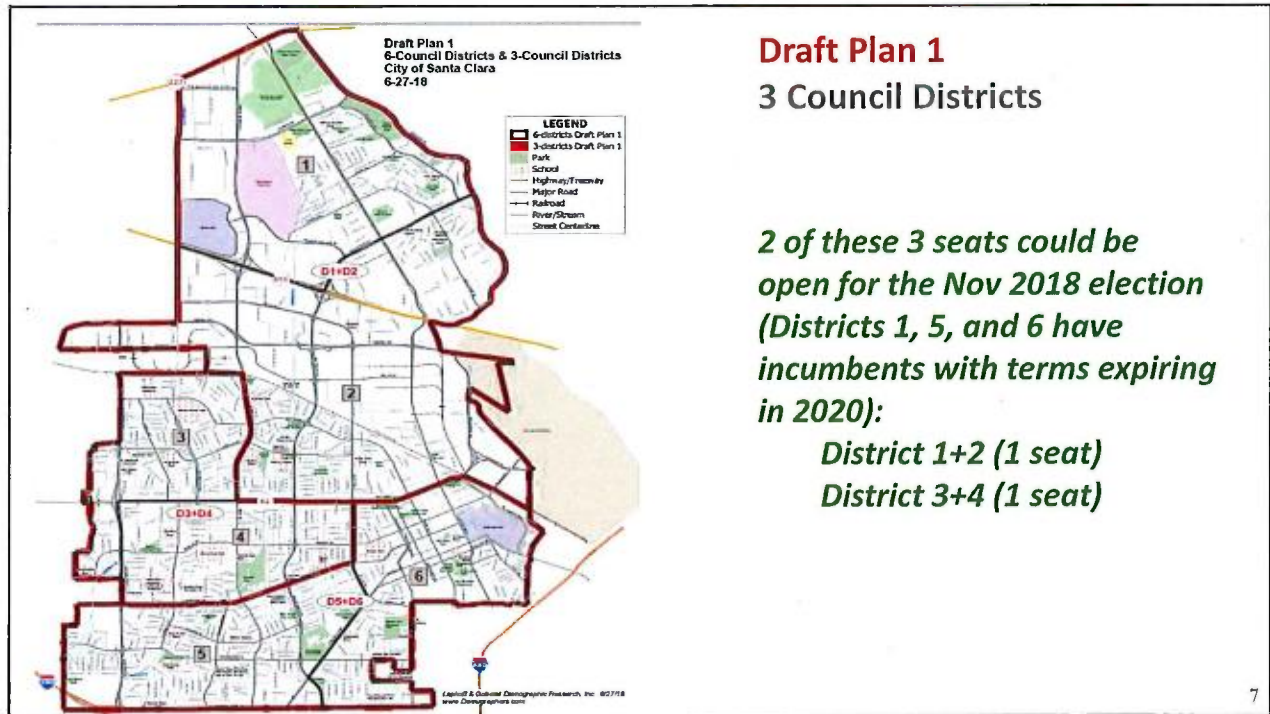- *District 4*

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Draft Plan 3
6 Council Districts

Nextdoor neighborhood boundaries used to the extent possible

Same D1 and D2 as Draft Plan 1 D4, D5, and D6 from the differ from the other plans

District 2 or 3 could be open for the Nov 2018 election (Districts 1, 4, 5, and 6 have incumbents with terms expiring in 2020)

6

Draft Plan 1
3 Council Districts

2 of these 3 seats could be open for the Nov 2018 election (Districts 1, 5, and 6 have incumbents with terms expiring in 2020):
District 1+2 (1 seat)
District 3+4 (1 seat)

Draft Plan 3
3 Council Districts

2 of these 3 seats could be open for the Nov 2018 election (Districts 1, 4, 5, and 6 have incumbents with terms expiring in 2020):
District 1+2 (1 seat)
District 3+4 (1 seat)

Plaintiff Plan 1
7 Council Districts

Plaintiff Plan 2
7 Council Districts

Draft Plan 3.1
6 Council Districts

D6 includes all of the City's Cupertino and Campbell Union School Districts' territory

District 2 or 3 could be open for the Nov 2018 election (Districts 1, 4, 5, and 6 have incumbents with terms expiring in 2020)
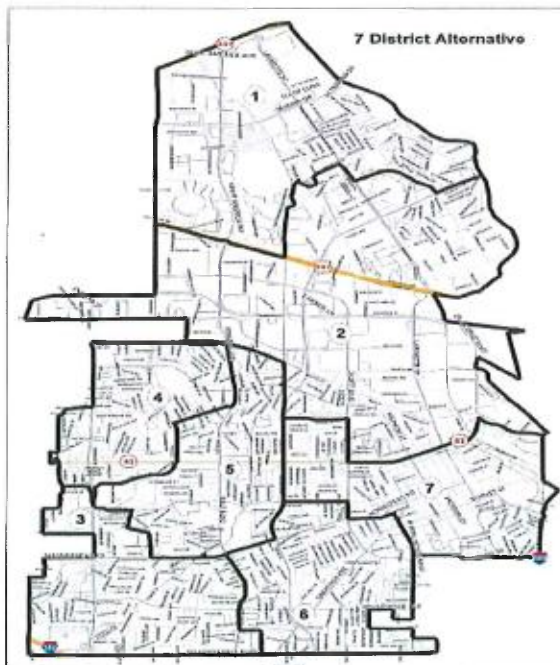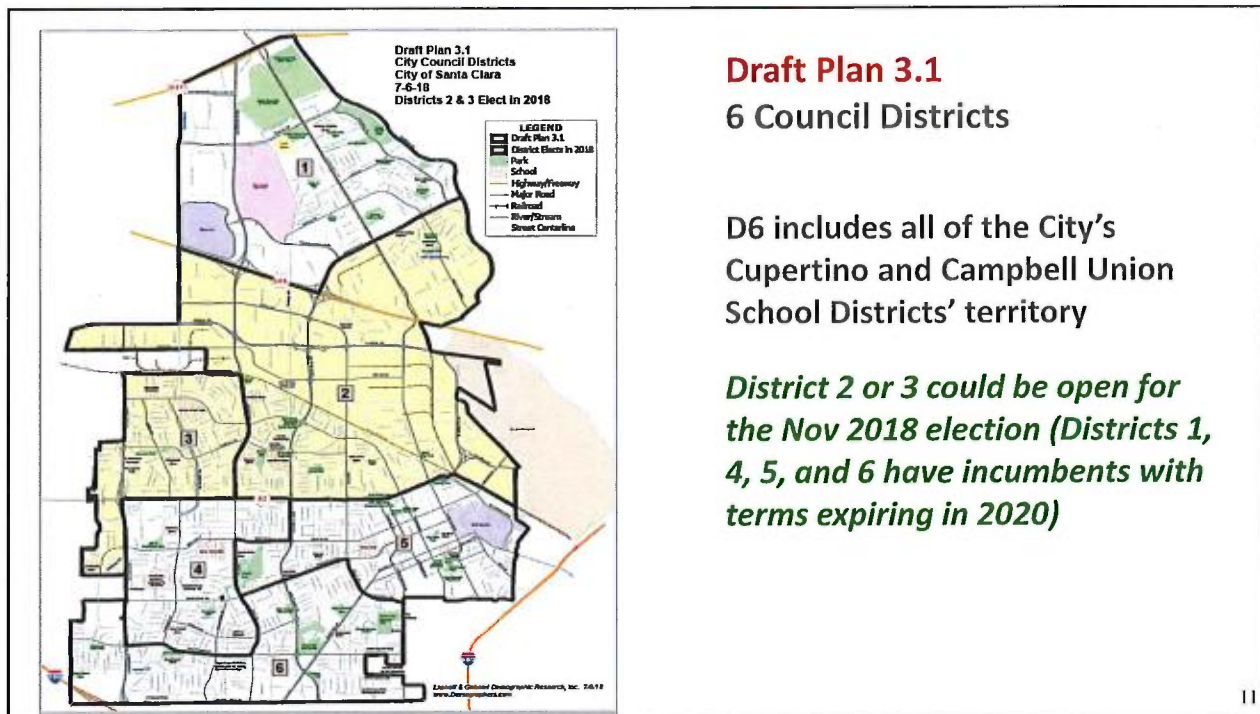
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Ad-hoc Advisory Districting Committee Recommendations

- At the July 11 meeting, the Ad-hoc Committee took the following actions:
  - Recommended the Amended Six-District Draft Plan 3
  - Emphasized that an at-large Mayor is very important, as expressed by the citizens of Santa Clara
  - Sequencing recommendation utilizing the Amended Six-District Draft Plan 3, wherein Districts 2 and 3 would be up for election in November 2018 and Districts 1,4,5 and 6 would be up for election in November 2020

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Genevieve Yip
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From:	Steve Chessin <steve.chessin@gmail.com> on behalf of Steve Chessin <steve.chessin@cfer.org>
Sent:	Monday, July 16, 2018 8:15 AM
To:	Mayor and Council; Districts; City Attorney
Subject:	Comments re: Items 7 and 6 on the July 16, 2018 City Council agenda
Attachments:	1.FairVoteAmicusBrief.pdf; 2.AppendixA-FacePage.pdf; 3.AppendixA-TuftsStudy.pdf

To the Santa Clara Mayor, City Council, Ad Hoc Advisory Districting Committee, and City Attorney:

This communication is in regards to items 7 (Public Hearing to Receive Input on Potential District Maps for the Election of Council Members) and 6 (Action on Submitting a Ballot Measure(s) for a Charter Amendment on the November 6, 2018 Election regarding District Elections) on the July 16, 2018 City Council agenda.

Please consider the substance of the attached amicus curiae brief that FairVote submitted to the Court last week. It highlights the importance of considering the election method when deciding whether to draw districts and, if so, how many districts to create and how to draw their boundaries. In part, that is because different election methods have different thresholds to ensure winning. Because of this dependency, district CVAP percentages can not be evaluated without considering the election method that would be used. This is particularly important for remedies that can support multi-winner elections.

Nothing in the court order prevents you from considering election methods when evaluating proposals. Nor does the court order prevent you from mentioning or recommending specific election methods when proposing or recommending remedial districting proposals to the City or the Court.

As the FairVote brief indicates, none of the proposed single-winner proposals from the City or the plaintiff offer as good of a remedy as those possible remedies that use better election methods with multi-winner elections. For example, the single-vote method for three winners at-large would have an election threshold of just 25%. It would be a better interim remedy for November 2018 than any of the six-district or seven-district proposals and could be more easily implemented as well, while allowing even better remedies for the longer term.

For that reason, it is also too soon to decide to put specific district proposals as charter amendments on the November ballot. It is important to see if the Court will accept FairVote's proposed interim remedy first. If you must put anything on the November ballot, Alternative 1 (an Advisory Vote on Council Districts) is much preferable to Alternative 2 (one or more Charter Amendments for Council Districts).

If Santa Clara is the center of what is possible, I encourage you to include in your considerations some of the much better remedies that are possible for the City.

Sincerely,
--Steve Chessin
President, Californians for Electoral Reform www.cfer.org steve.chessin@cfer.org
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POST MEETING MATERIAL

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5   FAIRVOTE

6

7

8   SUPERIOR COURT OF CALIFORNIA

9   COUNTY OF SANTA CLARA

10

11 LADONNA YUMORI KAKU, et al.,   CASE NO. 17-CV-319862

12   *Plaintiff,*   **BRIEF OF *AMICUS CURIAE* FAIRVOTE**

13   vs.   Hearing Date: July 18, 2018, 8:30 am

14 CITY OF SANTA CLARA, et al., et al.,   Dept.: 5 (Hon. Thomas E. Kuhnle)

15   *Defendants.*

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1.2 Types of voting systems

Districted systems

Municipalities across California are being sued under the CVRA. Pressure to move to a districted system comes from two sources. On one hand, districting has been a traditional remedy when minorities are found to be fenced out from representation. Secondly and importantly, the CVRA's "Safe Harbor" provision signed into law in 2016 caps attorneys' fees at $30,000 if municipalities quickly move to a districted system.

However, districted systems have the inherent disadvantage of requiring line-drawing, which can be delicate, time-consuming, liable to manipulation, and often produces boundaries that are subject to challenge. If the lines must be carefully crafted to produce certain desirable outcomes, then the properties are also unstable over time as demographics shift. And Santa Clara's unique geography (§1.1) also makes division into two, three, or six districts extremely awkward. Since North Santa Clara has about one-fifth of the city population, any such districting plan has to jump the population gulf and combine populations separated by several miles. This goes against traditional redistricting principles (namely, respect for communities and political geography).

More than that, we will argue below that the moderate level of clustering of the Asian population—as opposed to more extreme housing segregation of a minority subgroup found in other jurisdictions—means that districts work especially poorly in the standard remedy, where they elect a single member by plurality vote. This is discussed below in §3.2, with the conclusions supported in the Appendix by algorithmic sampling techniques.

The Santa Clara Charter Review Committee expressed other reservations about single-member districts. Among other things, the committee worried that splitting the City into six districts and requiring the candidates from each district to reside there would unnecessarily limit the talent pool, since no two people from the same neighborhood could be elected simultaneously. Although CVRA compliance is paramount in this analysis, this is a legitimate concerns that should be taken into account.

Transferable vote systems

Below we will use the umbrella term **transferable vote** for systems that are sometimes called single transferable vote (STV) or instant-runoff voting (IRV)—those terms are nearly interchangeable, except that STV selects multiple members and IRV selects one. Transferable vote systems require voters to rank candidates in the order of their preference, so that winner selection may take into account second choices and beyond. Several California municipalities already use transferable vote, including San Francisco, Oakland, Berkeley, and San Leandro. There are several different mathematical possibilities for exactly how to conduct the vote transfers, but none of those precise differences will matter in the analysis below.

The major advantage of transferable vote systems is clear: they are designed to produce outcomes that are in better proportional correspondence with the preferences of the population. In the presence of racially polarized voting, therefore, transferable vote can be expected to significantly improve minority representation.

The main drawback commonly cited is the burden on voters, as it is sometimes argued that ranked choice voting is confusing or overwhelming. For instance, Santa Clara voters now face two to five choices on their ballot, of whom they must select one person; in a citywide at-large transferable system (§3.4) they might face as many as eighteen choices on the ballot, among whom they can rank six or more. Learning about all the candidates running for six seats at once may be a daunting task and demand more time and effort than many people are able to commit. However, a frequent finding in public opinion research is that American voters tend to like the voting system they are accustomed to. We feel that the voter burden problem can be mitigated by an education campaign (telling people for instance that ranking just two or three candidates is still a valid ballot, though more likely to result in a wasted vote) and a careful transitional period.

Voting literature from New Zealand offers some insight into the challenges of introducing transferable vote into a new jurisdiction. In 2004, some local elections commenced transferable voting while others retained a plurality system with multi-member districts. Vowles shows that STV had no impact on the proportion of valid votes cast in 2004 [3]. Although these elections continued a trend of lower turnout for local than for statewide elections, Zvulun concludes that there was no significant difference in jurisdictions using STV, and in some elections STV stopped the decline compared to the traditional system [4].

We note that districting and transferable voting are not mutually exclusive, and several systems discussed below combine them (§3.3,3.5,3.6).

I. Introduction

The City of Santa Clara presents an unusual and challenging case for remedying vote dilution. Our analysis of Santa Clara's demographics and the parties' proposed single-winner district maps suggests that *no single-winner district map can effectively remedy* the vote dilution at issue. However, there are effective remedies available to Santa Clara—they take the form of multi-winner voting methods that promote the principle of proportional representation. Specifically, the single-transferable vote ("STV") – a proportional form of multi-winner, ranked choice voting – presents the most appropriate voting method to use as part of an effective remedy to the City's violation of the California Voting Rights Act.

To facilitate the adoption of an effective remedy for the City of Santa Clara (the "City"), FairVote asks that the Court consider an interim remedy in 2018 that will not only remedy the vote dilution suffered by the City's Asian American voters, but also provide flexibility in the choice of a *permanent* remedy for 2020 and thereafter. Accordingly, FairVote asks the Court to consider the single (non-transferable) vote system in at-large elections as an interim remedy in 2018, and the single-transferable vote in elections beginning in 2020.

Accordingly, FairVote asks that the Court order the City to conduct an election for three special two-year city council positions in an at-large election using the single-vote method – namely, three seats to be elected, with voters casting only one vote each – in 2018. This method would provide the City's Asian American community the opportunity to elect one of the three seats, and mean that the City could return to a separately elected mayor with all six city council positions up for election in 2020, when Santa Clara County will have voting equipment ready to run an STV election for the City.

II. Analysis

The California Voting Rights Act ("CVRA") exists to remedy vote dilution.[1] The CVRA does not single out the use of at-large elections as automatically suspect. Instead, the CVRA only does so when exclusionary, winner-take-all aspects of such elections lead to vote dilution.[2] Similarly, the use of single-winner districts as a remedy is not out of a preference for such

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[1] *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781, 788–89 (*Jauregui*).
[2] *Id.* at p. 798 ("Citywide elections where there is no vote dilution are not in actual conflict with section 14027. But if there is a dilution of a protected class's voting rights, then defendant's at-large electoral system actually conflicts with section 14027. Section 14027 applies only when there has been vote dilution."); see also *Whitcomb v. Chavis* (1971) 403 U.S. 124, 158–59.

districts per se, but because, in many cases, they can effectively provide minority groups the opportunity to elect candidates of choice. In circumstances where single-winner districts do not effectively remedy vote dilution, they should not be applied to remedy claims of vote dilution simply because they are districts. Likewise, when a non-winner-take-all voting method applied to at-large elections *does* effectively remedy vote dilution, it should not be rejected simply because it is at-large. In short, a remedy under the CVRA must be chosen based on whether it effectively remedies the injury, not based on mere technicalities.[3]

The City of Santa Clara stands as a test of this principle. As this Court has already found, the use of the City's numbered post system in at-large elections dilutes the votes of its Asian American population in violation of the CVRA. However, due to the geographic dispersion and non-monolithic political preferences of the Asian American population, single-winner districts with single-choice plurality voting would not provide an adequate remedy. In contrast, the single transferable vote (STV) in multi-winner elections would provide all groups of City voters the opportunity to elect candidates in rough proportion to their support among the voters, and in so doing would provide a superior remedy to vote dilution of both the City's Asian American and Latino populations.

The use of STV as a remedy would provide the Court with a legal and effective way to remedy vote dilution. In the short-term, however, STV is not a feasible option for the upcoming November election. Fortunately, there is a simple and easily-implemented voting method that the City can use as an interim measure: the single vote method. Both voting methods represent far more effective remedies for the City's vote dilution than single-winner districts.

A. Single-winner districts would not remedy vote dilution in the City of Santa Clara

The most common remedy in CVRA cases has been to divide a liable jurisdiction into single-winner districts.[4] While this has proven effective in some circumstances, single-winner districts have inherent limitations and are not always able to secure minority groups the power to elect their candidates of choice. A study conducted by the Claremont McKenna College Rose Institute of State and Local Government noted: "Overall, the move to by-district elections has increased the number of Latinos elected to city councils, but that change has been driven by

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[3] See *Jauregui, supra*, 226 Cal. App. 4th at 808 ("[S]ection 14029 [of the CVRA] must be *broadly construed as it is a remedial statute*") (italics added).
[4] Levitt & Johnson, *Quiet Revolution in California Local Government Gains Momentum* (Nov. 3, 2016) Claremont McKenna College Rose Institute of State and Local Government p. 1 <http://roseinstitute.org/wp-content/uploads/2016/11/CVRA-White-Paper.pdf> [as of July 10, 2016] (hereafter Levitt & Johnson).

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significant gains in a few cities . . . . that offset a lack of any increase in others . . . ."[5]

According to the Claremont McKenna Rose Institute study, Escondido, Wildomar, Modesto, Chino, Patterson, Riverbank, Visalia, Merced, and Turlock, all had no net gain in Latino candidates elected to their city councils after adopting single-winner districts in response to an actual or threatened CVRA lawsuit.[6] This demonstrates how a switch to a district map without a more probing inquiry into available remedies does not always accomplish the goals of the CVRA. The City of Santa Clara represents such a situation.

1. The City's Asian American population is too geographically dispersed to be effectively consolidated into a majority-minority district

The ability to create a majority-minority district is relevant under the CVRA when fashioning a remedy.[7] In order to effectively confer the power to elect a candidate of choice, a single-winner district must necessarily contain enough voters of a particular minority group to elect that group's candidate of choice—ordinarily a majority.[8] As the Tufts Study noted: "the moderate level of clustering of the Asian population—as opposed to more extreme housing segregation of a minority subgroup found in other jurisdictions—means that districts work especially poorly in the standard remedy, where they elect a single member by plurality vote."[9]

As the City has acknowledged in its filings, no City precinct has an Asian American population greater than 42 percent.[10] Indeed, the Metric Geometry and Gerrymandering Group concluded that "it is likely not possible to create one of six districts with 50%-plus-one Asian voter share."[11]

Some of the maps produced by the parties so far do include majority-Asian districts by citizen voting age population ("CVAP"), though these districts are unlikely to be ones where Asian American voters make up a majority of the electorate. For instance, in 2018 FairVote estimated that the City as a whole is about 29% Asian American by CVAP, but that Asian American voters were about 22% of the electorate in 2016 and about 19% of the electorate in

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[5] *Ibid.*
[6] Levitt & Johnson, *supra*, tables T2 & T3, at pp. 3–4.
[7] *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 670 (*Sanchez*).
[8] *Thornburg v. Gingles* (1986) 478 U.S. 30, 56–57.
[9] Tufts University Metric Geometry and Gerrymandering Group, *Study for Voting Systems in Santa Clara, CA*, (2018) p. 3 <https://sites.tufts.edu/gerrymandr/files/2015/11/MGGG-SantaClara.pdf> [as of July 10, 2018] (hereinafter "Tufts") (attached as Appendix A).
[10] Statement of Decision at 14.
[11] Tufts, *supra*, at p. 6.

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2014.[12] Turnout estimates by ethnicity are imprecise, but they consistently find that Asian American voters make up a smaller share of the electorate than their CVAP numbers alone would suggest. Although this trend should abate in the future following the implementation of an effective remedy, in the short-term, a district should be considerably more than 50% Asian American by CVAP for it to constitute a district where Asian American voters have the power to elect a candidate of choice under conditions of racially-polarized voting.

Vote-splitting may also undermine the utility of a single-winner district remedy that does not include ranked choice voting. The Tufts Study emphasized distinctions in political behavior between the City's South Asian and East Asian populations. The Tufts Study determined: "there is high potential for vote-splitting in the likely case that multiple Asian candidates run in the most heavily Asian district. Since plurality systems shut out communities that split their votes among subgroups, we conclude that this [districts] remedy may be ineffective overall."[13]

Troublingly, the district maps introduced by the parties all suffer from these defects. The plaintiffs have introduced two district maps. The second, "7 District Alternative," does not contain any districts that are majority Asian American by CVAP, let alone by voter share. The first, "7 District Proposal," has one district that is barely majority Asian American by CVAP (by plaintiff expert's CVAP estimates), at about 50.5%. The defendants have introduced five proposed maps. The two single-winner district maps, "Draft Plan 1" and "Draft Plan 3," contain no districts that are majority Asian American by CVAP by our calculations.

Furthermore, the effectiveness of the single-winner district plans proposed by the parties could be undermined as a remedy for the upcoming November elections because the most heavily Asian American district in each plan includes the residence of a popular white incumbent, Kathy Watanabe. Councilmember Watanabe's term ends in 2020. However, should her district be up for election in 2018, she will have a strong incentive to seek election as the favored incumbent in the new district right away, even if she must resign her current seat to do so. That means that the 2018 election could feature two incumbents and only one open seat, rather than only one incumbent and two open seats. Conversely, if the most successful Asian American candidate in the City's recent elections, Kevin Park, runs again, he will see his election prospects diminish due to his residence being outside of the most heavily Asian American districts in the City.

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[12] FairVote, *Santa Clara's Measure A and Impact on Communities of Color*, (2018) p. 7 <https://fairvote.app.box.com/v/MeasureAReport> [as of July 10, 2018]. (hereafter FairVote Measure A Report).
[13] Tufts, *supra*, at p. 6.

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2. Multi-winner districts depend on choice of voting method for analysis

The City is correct that multi-winner district maps are not per se unacceptable remedies.[14] However, that does not mean that any multi-winner district map is an acceptable remedy. Like any other proposed plan, a multi-winner district map must be assessed based on the demographics of the districts. Even more importantly, the way in which analysis proceeds depends on the nature of the voting method to be applied.

The City has not specified the voting method to be applied in the multi-winner districts. To the extent this assumes that the City will use either its current numbered post method or the at-large "vote-for-n" plurality method, the proper analysis is the same as for single-winner districts: a group of voters *must* constitute a majority of the electorate to have the opportunity to elect under conditions of racially polarized voting. Because those methods use winner-take-all voting methods, if a single majority group votes as a bloc, it will be able to elect *every* seat. None of the City's multi-winner district maps include a district that is majority Asian American, and so these maps would not be effective remedies under winner-take-all voting methods.

B. The single vote method in an at-large election for three seats is an effective interim remedy

The weakness of winner-take-all, district-based remedies for The City necessitates looking beyond the single-winner district as a remedy. In the long term, STV will be an important part of an effective remedy. However, due to limitations in Santa Clara County's current voting machines, ranked choice voting will only be available for City elections taking place beginning in 2020, when Santa Clara County will upgrade its equipment. Therefore, the best interim remedy consists of the following elements: an at-large election using the single vote method for three special two-year term council positions, with the office of mayor awarded to the highest vote earner until the 2020 elections.

In 2018, two city council seats and the mayor will be up for election. Any interim remedy must promote the opportunity of the City's Asian American population to elect a candidate of choice, while setting up the 2020 election for the implementation of an effective permanent remedy. This approach will provide the Court and the parties with time to choose a final remedy that best meets fits the City, regardless of what that final remedy will ultimately be.

Against this backdrop, a form of modified at-large voting presents the most effective

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[14] Defendant City of Santa Clara's Response to Plaintiff's Brief Regarding a Multi-Member District Remedy, at 4-5.

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remedy for the City's upcoming 2018 election. Specifically, the most appropriate method is a version of "limited voting" known as the "single vote" system. Under this system, the candidates for all three council positions appear together on the ballot in a single contest. Each voter may cast exactly one vote. The three candidates with the most votes are elected.[15] The single vote system has been used to remedy vote dilution in Section 2 voting rights cases in 26 jurisdictions total in Alabama, Florida, North Carolina, Ohio, and Texas, with other forms of limited voting used in many more jurisdictions.[16]

Unlike numbered posts and vote-for-n plurality elections, the single vote system is *not* winner-take-all. Any candidate that earns more than 25% of the votes cast will be *guaranteed* to win one of the three seats. Under the single vote system, voters who are part of a minority group consisting of more than 25% of the electorate may therefore elect a candidate of choice by concentrating their votes on a single candidate.[17] Just as 50% is the benchmark for power to elect in a single-winner district, 25% is the benchmark for power to elect in a three-member election with the single vote method.[18] This would provide the City's Asian American voters with a much better chance to elect a candidate of choice than splitting the City into two, six, or seven winner-take-all districts, in which Asian American voters may not be able to elect a candidate of choice unless they comprise a majority of the voters in that district.

Asian Americans make up 27% of the City's CVAP. That puts them further over the benchmark for power to elect in an election using the single vote method than in any of the single-winner districts in any of the district plans proposed by the parties. Unlike the proposed district plans, it does not create any incentive for an incumbent to seek election in 2018 rather than 2020. Actually achieving representation will require reasonably strong turnout and, importantly, coordination to avoid vote-splitting. For these reasons, the single vote method is not an effective long-term remedy in a city as diverse as the City. As an interim remedy, however, it stands out as an effective, remarkably simple and easy-to-implement option. A reasonable path forward, then, is to proceed as follows:

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[15] Engstrom, *Modified Multi-Seat Election Systems As Remedies For Minority Vote Dilution*, (1992) 21 Stetson L. Rev. 743, 757–62.

[16] FairVote, *Jurisdictions Using Fair Representation Voting* <http://www.fairvote.org/jurisdictions_using_fair_rep> [as of July 10, 2018]; Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More* (2010) 30 St. Louis L. Rev. 97.

[17] Richie & Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, From City Councils to Congress*, (2013) 473 Rich. L. Rev. 959, 987.

[18] Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies* (1998–99) 77 N.C. L. Rev. 1867.

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Instead of eliminating the position of a separately elected mayor or removing any sitting councilmembers from their seats,[19] the mayor's seat could also be temporarily converted into a city council seat, so there would be three council seats up for election. At least three seats must be elected at once in order for the threshold of election to be within reach of the City's Asian American population.[20] The office of mayor could then be awarded to the candidate who earns the most votes in the city council election, a practice used in other jurisdictions, including Portsmouth, New Hampshire.[21]

The city council seats filled in November and the mayor would serve two-year terms, after which all council seats and the mayor's office would be up for election in 2020.[22] The council could then return to its present configuration of six members and a separately-elected mayor, with the council members elected using a method that would not dilute the votes of the City's Asian American and Latino communities. With this interim solution in place, the parties would have more time to find a comprehensive and permanent solution to implement well in advance of the 2020 election. Because of the simplicity of the single vote method, voters would not be confused by the short-term use of an interim system, which would be easy to implement as it neither requires any new ballot type nor the implementation of any district plan.

There is precedent for using single voting as an interim method in this manner in federal Voting Rights Act cases. In *United States v. City of Calera, Alabama*, a three-judge panel approved a consent decree that temporarily changed Calera, Alabama's voting method from single-winner districts to at-large limited voting until the 2010 Census results were released,

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[19] FairVote takes no position as to whether such remedies would be permissible under state or federal law.

[20] The threshold for election in limited voting elections is $V/(V+N)$, where "V" is the number of votes a voter may cast and "N" is the number of seats to be filled. In a single vote election for three seats, the threshold would be 25% $(1/(1+3))$, within the CVAP of Santa Clara's Asian American population. If only two seats are up at once, it would 33.33% $(1/(1+2))$. (Pildes & Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 253 fn.47.)

[21] Portsmouth, New Hampshire City Charter, article IV, section 4.3. Alternatively, the position of mayor could be temporarily converted to a position appointed by the city council on an interim basis, if the Court determines that such an approach is appropriate. Additionally, under either approach, whichever elected candidate becomes mayor could have their term extended to four years in order to maintain the present practice of electing the mayor in gubernatorial election years. Any of these approaches would be in tension with the Santa Clara charter – but unlike with a seven-district plan, that tension would only exist for the two-year interim period. While there are approaches that are less in tension with the Santa Clara charter, FairVote has not identified any such approaches that also create an effective remedy for Asian-American voters *in 2018*.

[22] Holding municipal elections at the same time as presidential elections would have the added benefit of increased voter turnout, since presidential election years typically see not only increased turnout generally but also an increase in the share of non-white voters. (McDonald, *Voter Turnout Demographics*, United States Elections Project, <http://www.electproject.org/home/voter-turnout/demographics> [last visited July 10, 2018].). This is also the case in Santa Clara's elections. (FairVote Measure A Report, *supra*, at 7–8.)

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allowing Calera to draw new districts.[23] Calera's interim use of single voting resulted in the election of an African-American candidate—the same candidate whose loss was a result of the districting plan that triggered the Voting Rights Act suit.[24]

Because the City is a very diverse jurisdiction, making vote-splitting a serious concern, FairVote does not recommend a non-transferable system as a permanent remedy. The Metric Geometry and Gerrymandering Group noted the very real risk of vote-splitting among the City's Asian American voters, observing that "Indian and East Asian voters have very different voting patterns" and that "there is not a monolithic Asian voting bloc."[25]

C. The single-transferable vote offers the most effective long-term solution to vote dilution in the City of Santa Clara

Following the implementation of an interim remedy, the Court should consider holding additional hearings in 2019 to determine the best approach for a permanent remedy. The best option for a long-term remedy will be one that gives as many voters as possible the opportunity to elect candidates of choice irrespective of where they live, and which protects against the loss of representation through vote-splitting. There is one voting method with a history of use in local elections in the United States that meets these standards: the single-transferable vote form of ranked choice voting.

Although we recommend further deliberation on the particular form that the final remedy will take, we ultimately recommend that STV be part of the permanent remedy, and we present two options (described in subsections C.III and C.IV, *infra*) that we believe offer the best long-term solutions for Santa Clara when considering its unique characteristics.

1. How the single transferable vote works

The single transferable vote is particularly well-suited for remedying vote dilution in the City. The Tufts Study determined that STV presents the best remedy in this case, stating: "We therefore endorse either **citywide at-large transferable voting** or a **custom transferable voting plan** as the best remedy for the alleged CVRA violations in Santa Clara City Council elections."[26] This method is presently used to elect the city council and school board for the city of Cambridge, Massachusetts, as well as multi-seat boards in Minneapolis, Minnesota, and has a history of use in

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[23] Judgment and Order Modifying Consent Decree (N.D. Ala. Oct. 23, 2009) CV-08-BE-1982-S <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/calera_cd_mod.pdf> [as of July 10, 2018].
[24] Scottie Vickery, *Calera finally has six new council members* (Nov. 10, 2009) The Birmingham News <http://blog.al.com/spotnews/2009/11/calera_finally_has_six_new_cou.html> [as of July 9, 2018].
[25] Tufts, *supra*, at pp. 2, 5.
[26] Tufts, *supra*, at p. 9 (emphasis in original).

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two dozen United States cities.[27] The U.S. Department of Justice denied preclearance for an attempt to repeal the use of STV in elections for New York City's 32 Community School Boards in 1999.[28] This is the method that Measure A would have adopted in two multi-winner districts.[29]

With STV, the ballot allows voters to rank the candidates in order of preference. The votes are then counted in rounds. In the first round, every vote counts for its first choice. Then, in each subsequent round, candidates are elected or eliminated. Votes for elected or eliminated candidates count for each voter's next choices in all following rounds.

To win, a candidate must pass a specific threshold of votes. The threshold is the number of votes that guarantees that the candidate cannot lose. That threshold depends on the number of winners that will be elected. Stated generically, the threshold is always the number of votes cast divided by the sum of one and the number of seats to be elected. That is, it is a proportion of the vote equal to 1/(number of seats + 1). If a candidate receives even one vote in excess of this threshold, they will win one of the seats. In a six-seat election, the threshold would be approximately 14.3%.

If all six councilmembers were elected simultaneously (with a separately elected mayor), and if more than 14.3% of voters ranked the same candidates (in any order) as their top choices, then at least one of those candidates would win. Any group that constitutes more than 14.3% of the electorate would have the opportunity to elect a candidate of choice, even under a worst-case-scenario in which every other voter voted as a bloc against their candidates of choice.

If a candidate earns a number of votes in excess of the threshold, then in the next round, the *surplus* votes they received will count for their next choices. That is, if a candidate needs 800 votes to win election and received 1,000, then 200 of their votes will count for their voters' next choices in the following round. However, rather than choosing 200 of their votes, this is ordinarily accomplished by counting a fraction of each vote for its next choice (in this case, 20% of each vote would count for its next choice).[30] This ensures that if a community large enough to elect two candidates of choice does not strategically divide their support evenly between two candidates, the extra support earned by one will help support the election of the other.

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[27] Spencer et al., *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis*, 46 Cumb. L. Rev. 377.

[28] *Id.* at p. 404.

[29] FairVote Measure A Report, *supra*, at p. 1. FairVote supported the passage of Measure A in Santa Clara and contributed to the campaign as a major donor committee.

[30] The formula for determining what percentage of each vote to transfer is: the number of votes awarded to a candidate in excess of the threshold divided by the total number of votes awarded to that candidate.

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Similarly, if no candidate earns a number of votes in excess of the threshold, then the weakest-performing candidate is eliminated. Each voter's ballot counting for an eliminated candidate will be added to the totals of that voter's next choice in the following round. This ensures that if a community is large enough to elect a candidate of choice, but divides its support among multiple candidates, then its votes can be consolidated behind the strongest candidate of choice as weaker candidates are eliminated.

This round-by-round system operates to promote the election of candidates in proportion to their support in the community. Consider how this system would operate from the perspective of Asian American voters in the City if all six seats are elected simultaneously. If the Asian American community were at least 28.6% of voters and ranked at least two candidates ahead of others, two should pass the 14.3% threshold and be elected. The Asian American share of eligible voters in Santa Clara is 30.5%. That is more than double the threshold of election, and so they would have the power to elect two candidates of choice even without support from non-Asian American voters. If the Asian American community does not divide its support evenly between two candidates, then in successive rounds the transfers of surplus votes from one candidate and the transfer of votes from eliminated candidates will serve to consolidate their votes and elect two of their candidates of choice, provided the Asian American community mostly ranked the same group of candidates highest (as long as it is at least two candidates, regardless of the order each member of the community ranks them). There is no need for strategic coordination among the voters to elect candidates of choice. If the voters rank their favorite candidates, they will elect candidates of choice in rough proportion to their numbers.

Similarly, the Latino share of eligible voters is 15.0%.[31] That exceeds the threshold of election, and so Latino voters would also have the power to elect a candidate of choice.

2. Experience from ranked choice voting in practice

Ranked choice voting is used in single-winner districts in four cities in California: San Francisco, Oakland, Berkeley, and San Leandro.[32] Because the threshold for election in a single-winner ranked choice voting election is 50%, we would expect minority-preferred candidates of choice to win election at higher rates in majority-minority districts with ranked choice voting

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[31] Statement of Decision at 2.

[32] In this brief, "ranked choice voting" or "RCV" is used to describe ranked methods of voting generally, regardless of whether it is used to elect a single winner, as in San Francisco, or multiple winners, as in Cambridge, Massachusetts. The "single transferable vote" or "STV" is used to describe the proportional, multi-winner form of RCV that is used in Cambridge (and internationally in countries like Australia and Ireland) that FairVote recommends Santa Clara adopt as a permanent remedy.

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when compared to majority-minority districts without ranked choice voting. In fact, that is exactly what has occurred. In a report published May 15, 2018, FairVote found that representation of people of color has increased significantly in all four Bay Area cities with ranked choice voting, and the largest increase has occurred in plurality (but not majority) white districts.[33]

Ranked choice voting used in multi-winner elections—STV—has a proven track-record of increasing representation for racial minority communities and improving the diversity of elected bodies. In the first half of the Twentieth Century, several American cities adopted STV for local elections. These cities all began to elect members of minority groups in far greater numbers after they adopted STV. In Ohio, Cincinnati (which adopted STV in 1925), Hamilton (1926), and Toledo (1935) all elected their first African-American city council members after adopting STV.[34] Cleveland had only elected a single African-American to its city council before adopting STV in 1924, but elected three in the years following adoption—a number that proportionately reflected the city's African-American population at the time.[35]

In 1950, while only 15% of Cincinnati's population was African-American, 22% of its council members were African-American because of STV elections. In 1956 STV was repealed, and so in 1957 the first non-STV election in 30 years was held. The city at that time was 35% black, but elected zero African-American council members.[36] In 1945, Toledo had an African American population of 7% and was able to elect the first black member to city council in the city's history to the nine member council. This gave them roughly proportional representation, until the repeal of STV in 1951 resulted in that council member losing his seat.[37]

Other cohesive minority groups at the time, such as Irish Catholics and Polish Americans, were also able to secure greater representation under STV.[38] Ultimately, the success STV had in securing minority representation became a factor in its undoing. As minority groups gained electoral power in proportion to their numbers—and as more members of those groups were elected to office—opponents of reform were able to exploit racial anxieties, leading to STV's repeal.[39]

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[33] FairVote, *RCV and Racial Minority Voting Rights in the Bay Area*, (2018) <https://fairvote.app.box.com/s/npiujexebhl8ari7c61v90af3wwwfqvq> [as of July 10, 2018].
[34] Barber, Proportional Representation & Election Reform in Ohio (1995) p. 301. (hereafter Barber).
[35] *Id.* at pp. 301–2.
[36] Barber, *supra*, at 171–74.
[37] *Id.* at pp. 242–57.
[38] Barber, *supra*, at p. 302.
[39] *Id.* at p. 292 ["Most significantly in the long run, the political climate of the first half of the twentieth century did not favor the outcome that PR/STV was designed to produce - precisely, the representation of minorities"].

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One of the early cities to adopt STV has continued to use it. Cambridge, Massachusetts adopted STV in 1940 and has continued to use it ever since. Ever since Cambridge's African-American population grew large enough to reach the threshold of election there has been an African-American member on the city council. A FairVote report on Cambridge's elections found: "The demographics of Cambridge have evolved over the years, and the Cambridge system has ensured that the City Council reflects these changes. The low threshold has helped African Americans to win representation on the Council in every election since 1969, despite making up just 7% to 12% of the city's population over this period."[40] Cambridge's Asian American and Latino populations have also been able to elect candidates of choice once they became a similar share of the electorate.[41]

STV will not depress turnout or confuse voters. In recent elections using ranked choice voting, voter turnout was consistently higher than in previous elections and incidents of undervotes were consistently low. To date, there have been three RCV elections in 2018, in Santa Fe (NM), San Francisco (CA), and statewide in Maine. All demonstrated higher turnout than expected.[42] This continued a pattern from other recent RCV elections: In 2017, four cities held RCV elections (including Cambridge, which used the at-large single transferable vote form of RCV), and all four had higher turnout than expected.[43]

In San Francisco's most recent mayoral election, the city's fourth using RCV, voter turnout reached 52.61%.[44] Voters cast more ballots for mayor than for any other race on the ballot, including the statewide primary races, none of which use RCV.[45] The mayor's race had fewer undervotes than any other race on the ballot and fewer overvotes than the primary races for governor and U.S. senator.[46] Only one academic study that we are aware of has purported to show

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[40] Douglas, *The Effect of Fair Representation Voting on 2013 Cambridge, Massachusetts Municipal Elections* (2014) FairVote p. 11 <https://fairvote.app.box.com/v/fair-rep-cambridge-effects> [as of July 10, 2018].
[41] *Ibid.*
[42] In San Francisco, turnout was 52.6% of registered voters, compared to the 29.7% turnout in the last midterm primary in June 2014, and this year's state average of 38%. (Landsman et al., Ranked Choice Voting in 2018: A Mid-Year Report (2018) FairVote p. 4 <https://fairvote.app.box.com/s/038bz15b80dlsc0mcsgtzxvs2yh4sfp7> [as of July 10, 2018]) (hereafter Landsman.) In Maine, this year's Democratic primary had more votes cast than in any prior Democratic primary election in state history. (*Id.* at 5.) In Santa Fe, 20,604 voters cast a valid vote for mayor, the highest turnout of any mayoral election since 2006. (*Id.* at 5.)
[43] Penrose, *Voter turnout surges in all four cities with ranked choice voting* (Nov. 8, 2017) FairVote <http://www.fairvote.org/voter_turnout_surges_in_all_four_cities_with_ranked_choice_voting> [as of July 11, 2018].
[44] The City and County of San Francisco, *Consolidated Statewide Primary Election Official Summary Report* (2018) p. 1, <https://sfelections.org/results/20180605/data/20180627/summary.pdf> [as of July 10, 2018].
[45] *Id.* at pp. 1, 3.
[46] *Ibid.*

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declines in turnout associated with ranked choice voting, and it has been contradicted not only in contemporaneous academic literature, but also by the experience of cities with ranked choice voting after its publication, all of which showed strong turnout in subsequent elections.[47] A 2014 Rutgers-Eagleton poll commissioned by FairVote found majority support for RCV across all California cities with it.[48] Asian American respondents expressed the highest levels of support for RCV across all racial groups.[49]

3. STV At-Large

Holding at-large elections using STV presents the most straightforward use of STV to remedy the vote dilution of the City's Asian American voters. FairVote's May 2018 analysis of this option uses CVAP numbers that are less favorable to the City's Asian American population than those cited by the Court in its liability decision, but we use them here regardless.[50]

According to FairVote's analysis, the Asian American share of CVAP in the City is 29%.[51] Because the threshold for a six-seat STV election is 14.3%, white voters would be just barely over the threshold to elect three seats. Asian American voters would have the opportunity to elect two candidates of choice under a straightforward CVAP analysis. Further, the Latino CVAP is 17%, which is above the threshold for one of the six seats as well.[52] Consequently, the six seats would be projected to go to two Asian American candidates of choice, one Latino candidate of choice, and three white candidates of choice. Under STV, each candidate is likely to be elected by a distinct bloc of voters, so the two Asian American candidates of choice would be more likely to reflect subgroups of Asian American voters, as would the three white candidates of choice.

FairVote's analysis also considers estimates of 2016 and 2014 voter shares for these groups as well as CVAP. Under 2014 turnout estimates, Asian American voters would be more likely to only elect one candidate of choice, likely reflecting both the smaller share of Asian American voters in the past as well as less equitable turnout in gubernatorial election years. This

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[47] See Kimball & Anthony, *Voter Participation with Ranked Choice Voting in the United States* (Oct. 2016) Dept. of Political Science, Univ. of Missouri-St. Louis pp. 17–21 <http://www.umsl.edu/~kimballd/KimballRCV.pdf> [as of July 11, 2018].

[48] John & Tolbert, *Socioeconomic and Demographic Perspectives on Ranked Choice Voting in the Bay Area* (2014) FairVote p. 27 <https://fairvote.app.box.com/v/perspectives-on-rcv-bay-area> [as of July 11, 2018].

[49] *Id.* at pp. 28–29.

[50] In fact, there are several conflicting accounts of CVAP estimates being used by different parties in this case. As an *amicus*, we do not intend to introduce new expert testimony on this matter, but we do ask that the Court scrutinize the estimates introduced by the parties.

[51] FairVote Measure A Report, *supra*, at p. 7.

[52] *Ibid.*

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demonstrates a benefit of eliminating staggered elections: consolidating all elections with the presidential election and thus promoting greater and more equitable turnout. Under 2016 turnout estimates, Asian American voters would again be projected to elect two candidates of choice.[53]

Because of the way STV encourages collaborative campaigning, and because modified at-large systems have historically resulted in increases in turnout among communities of color, we feel confident that a six-winner STV election at-large would provide Asian American voters the opportunity to elect two winners and would provide Latino voters the opportunity to elect one winner. It therefore stands out as a markedly superior remedy to any of the district maps introduced by the parties.

In addition to the advantages already discussed, STV would serve the City well as a remedy for other reasons. First, the City would not need to undergo the complex and politically-fraught process of drawing districts. Drawing districts inherently creates winners and losers long before any election takes place, which means that each instance of districting or redistricting involves substantial cost and controversy. If the City does adopt a district map for the 2018 and 2020 elections, it will presumably need to then draw a new district map for 2022 using the new 2020 census data, so the process will start over again. With each instance of districting or redistricting is a new risk that the particular map developed will not serve the communities the CVRA seeks to protect from vote dilution.[54]

An effective district map in 2018 also carries no guarantee of effectiveness into the future, given the unpredictability of demographic shifts over time. If a part of the City becomes more or less heavily populated by any particular group of voters in an unexpected way, the district map may not continue to work as projected. STV, however, is sensitive to only one thing: the votes that are cast. The system operates to promote fair representation of groups based on their share of the electorate, irrespective of what part of the City they occupy.

Furthermore, it is the nature of districts that their representatives tend to only represent the interests of those within the district. Consequently, even if Asian American voters were able to elect a candidate of choice in one or two districts, in practice it is highly probable that those one

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[53] Applying the same methodology for estimating turnout rates for Asian Americans in prior elections to the "7 District Proposal" map introduced by the plaintiffs suggests that the most heavily Asian American district had only about 40% Asian American share of the electorate in 2016.

[54] Remedies adopting STV at-large rather than single-winner districts would carry the added benefit of shielding jurisdictions from suits alleging that district plans adopted to comply with the CVRA are impermissibly based on racial classification, such as the one currently proceeding against Poway in the U.S. District Court for the Southern District of California. (*Higginson v. Becerra*, S.D. Cal. Case No. 3:17-cv-2032.)

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or two districts will contain only a small portion of the City's Asian American voters. Indeed, according to the total population numbers provided by Plaintiff's expert witness, the most heavily Asian American district in the "7 District Proposal" map contains just under 22.8% of the City's Asian American population. The two most heavily Asian American districts combined contain a total of 42.8% of the City's Asian American population.[55] Those outside of those districts— 57.2% of the City's Asian American population—still would not have the opportunity to influence outcomes. With STV, it is possible to give every Asian American voter the opportunity to help elect a candidate of choice, along with every Latino voter.

Finally, although FairVote does not take a position on the legal questions involved in the inclusion of a separately elected mayor, we do highlight that six winners in an STV election provides Asian American voters the opportunity to elect two candidates of choice and Latino voters the opportunity to elect one. In March of 2018, FairVote conducted polling on various questions in the City, and among them was the following question: "Some people would like to have the city council pick the councilmember to be mayor rather than have voters elect the mayor directly. Do you think this would be a very good thing, a somewhat good thing, a somewhat bad thing or a very bad thing?" Respondents reacted more negatively to this idea than to any other question in the poll, with 79% saying it would be a bad thing, and 56% saying it would be a "very bad" thing.[56] This suggests that the long-term elimination of a separately elected mayor would be very unpopular in the City, and should only be part of the long-term remedy if legally necessary.

4. Two multi-winner districts (the Measure A approach)

STV for all six seats with no stagger is the simplest and most effective approach to remedying vote dilution in the City. However, an alternative that would also be effective while permitting the retention of staggered elections is the approach taken by Measure A, the City ballot measure for the June 5, 2018 election. That is, an approach in which two districts each elect three winners by STV.

Under the Measure A approach, a candidate seeking election in one of the districts would win a seat by earning just over 25% of the vote in that district, or about one-eighth of the citywide electorate. Analysis of the map proposed for Measure A demonstrates that it would likely result in the election of two Asian American candidates of choice and one Latino candidate of choice.[57]

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[55] Plaintiffs' Expert Witness Disclosures p. 13.
[56] Penrose, *Santa Clara Votes on Measure A* (July 10, 2018) FairVote <http://www.fairvote.org/santa_clara_votes_on_stv> [as of July 10, 2018] (hereafter Penrose Measure A).
[57] FairVote Measure A Report, *supra*, at p. 7.

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This approach has the added value of candidates having a smaller area to campaign in as well as a smaller number of votes needed to win election (25% of half of the City, rather than 14.3% of the entire city). However, both the Asian American and Latino candidates would require some degree of crossover voting from other groups of voters in order to achieve fair levels of representation. Notably, as supported by the findings of ranked choice voting in Bay Area elections with majority-minority districts, STV makes that cross-over voting more likely for two reasons: (1) voters can still rank an in-group candidate first and then include a coalition candidate as a second or later choice, and (2) candidates have incentives to campaign collaboratively, signaling to voters who they should rank as their back-up choices. This approach would also require the drawing of a single district line, which, though easier than the complex task of drawing six or seven districts, should be done with care.

Although FairVote does not enter this case to weigh in on the question of whether multi-winner districts are "districts" or "at-large" or both under the CVRA, we do wish to state that the formalistic invocation of one category or another should not weigh strongly on the question of what remedy to implement. All remedies should be judged on their merits, not on the words that describe them, including single-winner district remedies.

The recent narrow defeat of Measure A - which would have established STV in two multi-winner districts - does not undermine STV's appropriateness as a remedy in this case. While some may be skeptical of the adoption of a legal remedy that had previously been rejected by voters, there are some important considerations to bear in mind.

First, judicial adoption of a voting rights remedy that had been rejected at the ballot is neither unlawful nor unusual. For example, a judge imposed a district-based remedy on Highland, California in a CVRA case after voters had rejected adopting districts just over a year earlier.[58]

Second, the City's voters have not had the opportunity to weigh in on Measure A as compared to any particular alternative. Some voters may have voted no on Measure A because they preferred the City's current election method and did not want it to change. Others may have voted no because they wanted single-winner districts or did not agree with the district line that

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[58] Emerson, *Election 2014: Highland still facing litigation, despite voter rejection of by-district election system* (Nov. 5, 2014) Redlands Daily Facts <https://www.redlandsdailyfacts.com/2014/11/05/election-2014-highland-still-facing-litigation-despite-voter-rejection-of-by-district-election-system/> [as of July 10, 2018]; Folmer, *Judge: Highland Must Vote by Districts* (Jan. 19, 2016) Highland Community News <https://www.highlandnews.net/news/breaking_news/judge-highland-must-vote-by-districts/article_4efa94d0-bf0f-11e5-a6f9-8777e65a49c4.html> [as of July 10, 2018].

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was created for two districts.[59] Given the lack of finality of this lawsuit, voters did not fully understand what the alternative to Measure A would be. FairVote's own polling on the question found that voters did not favor a district plan of any sort and strongly opposed the elimination of a separately elected mayor.[60]

Third, while the electorate as a whole rejected Measure A, evidence indicates that it was supported by the City's Asian American community. Support for Measure A was much higher at the three precincts with the highest proportion of Asian American registered voters than in the City overall.[61] Northern Santa Clara, which has the City's highest concentration of Asian Americans, supported Measure A 54.7% to 47.8%.[62]

D. Alternative at-large election methods are lawful remedies under the CVRA and the federal Voting Rights Act

Each of the remedies discussed in this brief are legally acceptable remedies under the CVRA. Both the statutory language and legislative history of the CVRA support the conclusion that the Court has broad authority to implement an array of appropriate remedies, including the single transferable vote form of ranked choice voting. The CVRA does not compel local governments to abandon at-large systems that do not dilute the votes of protective classes nor does it compel the adoption of districts as an exclusive remedy for vote dilution.

Both the single vote and STV satisfy the statutory requirements for a valid remedy under the CVRA, which obligates courts to order "appropriate remedies . . . tailored to remedy the violation" when they find unlawful election practices.[63] On its face, the CVRA permits the imposition of alternative at-large voting systems, including ranked choice voting and other alternative election methods described in this brief, so long as they do not involve racially polarized voting that results in minority vote dilution.[64] Section 14027 of the Election Code establishes that "[a]n at-large method of election may not be imposed . . . in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election."[65]

The qualifying phrase, "in a manner that", serves to limit the way in which an at-large

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[59] See City of Santa Clara, *Ad Hoc Advisory Districting Committee Public Hearing #2* (July 6, 2018) YouTube at 2:37:24–2:41:29 <https://youtu.be/M0-VLoxQq0k?t=9443> [as of July 11, 2018].
[60] Penrose Measure A, *supra*.
[61] See Penrose Measure A, *supra*.
[62] *Id*.
[63] Elec. Code § 14029.
[64] See *id*.
[65] Elec. Code § 14027

method of voting may be implemented; the provision forbids only at-large elections that are conducted in a discriminatory manner.[66] The expression of such a limitation was only necessary because the legislature intended for at-large methods of election to be generally permissible.

The fact that Section 14029 identifies district-based elections as a possible remedy does not foreclose courts from ordering other remedies, including the ranked choice and single transferable vote systems discussed in this brief. Under the language of Section 14029, courts "shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation."[67] The use of the term "including" and the nesting of the clause mentioning district-based elections indicates that the reference to district-based elections merely illustrates one example of possible "appropriate remedies."[68] The legislature intended Section 14029 to be construed broadly to remedy vote dilution.[69] Reading Section 14029 to *only* allow districts as a remedy would not only go against the statute's plain language, but also run counter to the legislature's intention that it be a broad and flexible tool to combat vote dilution.

California courts have recognized that the California legislature intended the CVRA to "provide a broader basis for relief from vote dilution than available under the federal Voting Rights Act."[70] The use of modified at-large voting methods is well-established as a remedy for VRA violations.[71] As noted earlier, forms of limited voting (such as single voting) are not only permissible under the VRA but have also been used as remedies in VRA cases.[72]

Finally, there is nothing inherently unconstitutional about the use of STV. The U.S. Court

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[66] See, e.g., *Sanchez, supra*, 145 Cal.App.4th at p. 666 ("[The CVRA] simply gives a cause of action to members of [a protected class] that can establish that its members' votes are diluted through the combination of racially polarized voting and an at-large election system.").

[67] Elec. Code § 14029.

[68] *Id.*; see *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717 ("As this court has affirmed, the word 'including' in a statute is 'ordinarily a term of enlargement rather than limitation.'" [quoting *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101]).

[69] *Jauregui, supra*, 226 Cal.App.4th at pp. 807–08 ("remedial legislation is to be liberally or broadly construed. Sections 14025 through 14032 in general and section 14029 specifically fall within the definition of remedial legislation . . . . Thus, section 14029 is to be broadly construed to remedy dilution of the votes of protected classes, not narrowly as asserted by defendant.").

[70] *Jauregui, supra*, 226 Cal.App.4th at p. 806.

[71] *League of United Latin American Citizens v. Clements* (5th Cir. 1993) 986 F.2d 728, 814–15, revd. on other grounds, (5th Cir. 1993) 999 F.2d 831 (en banc); *United States v. Marengo County Com.*, (11th Cir. 1984) 731 F.2d 1546, 1560 fn.24; *United States v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 448; *United States v. Euclid City School Bd.* (N.D. Ohio 2009) 632 F.Supp.2d 740, 770–71; *Dillard v. Chilton County Bd. of Education* (M.D. Ala. 1988) 699 F.Supp. 870, 876.

[72] E.g., *Moore v. Beaufort County* (4th Cir. 1991) 936 F. 2d 159, 164; *United States v. Euclid City School Bd.* (N.D. Ohio 2009) 632 F.Supp.2d 740, 770–71 ("[A]fter a searching inquiry into the totality of the circumstances, it is clear that the Board's limited voting proposal remedies the violation of Section 2 of the Voting Rights Act that this Court has found and does not, itself, violate that Act."); *Dillard v. Town of Cuba* (M.D. Ala. 1988) 708 F.Supp. 1244, 1246.

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of Appeals for the Ninth Circuit has found that San Francisco's use of single-winner RCV is constitutional in *Dudum v. Arntz* (9th Cir. 2011) 640 F.3d 1098, 1117, holding that it violated neither voters' First Amendment rights nor the constitutional guarantee of "one person, one vote." In reaching this conclusion, it joined other courts that have come to the same conclusion, including the Supreme Court of Minnesota, which found that Minneapolis' use of RCV did not violate voters' right to equal protection (*Voters Alliance v. Minneapolis* (Minn. 2009) 766 N.W.2d 683, 698), and the Supreme Judicial Court of Massachusetts, which found Cambridge's system of STV elections permissible under the U.S. Constitution (*Moore v. Elec. Cmrs. of Cambridge* (Mass. 1941) 35 N.E.2d 222, 241).

III. Conclusion

Due to the City's unique demography and geography, single-winner districts will *not* guarantee Asian American voters the power to elect candidates of their choice. Because single-winner districts cannot provide an effective remedy for the City's CVRA violation, the most effective and expeditious remedy for the upcoming November election is to elect three council seats at-large, using the single-vote method described earlier.

Beyond November, the Court must decide upon a permanent solution. Public hearings and further deliberations among parties are essential to ensuring the ultimate remedy is the appropriate one for the City of Santa Clara. While there are many options available, we believe the remedy that provides the City's Asian American voters with the most power to elect is to use the single transferable vote (STV) to elect the entire city council at-large – and we urge the parties to consider STV as the solution. STV provides a legal, effective, and *proven* way to end unlawful vote dilution. STV would further the goals of the CVRA in the City of Santa Clara far better than single-winner districts could, without requiring the City to undergo the politically disruptive and contentious process of districting.

For these reasons, FairVote respectfully asks the Court to consider (1) the single-vote method as an interim remedy for the November election, and (2) the single transferable vote as a long-term remedy thereafter. FairVote also requests the opportunity to participate in oral arguments at the next scheduled hearing so it can directly respond to the parties' arguments and any questions the Court may have.

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DATED: July 11, 2018

BUSINESS, ENERGY, AND ELECTION
LAW, PC

By: /s/ Gautam Dutta

GAUTAM DUTTA, ESQ.

Attorneys for *Amicus Curiae*

FAIRVOTE

AMICUS BRIEF

Electronically filed
by Superior Court of CA,
County of Santa Clara,
on 7/12/2018 8:11 AM
Reviewed By:R. Walker
Case #17CV319862
Env #1715273

PROOF OF SERVICE

I, Gautam Dutta, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above entitled action. My business address is Business, Energy, and Election Law, PC, 1017 El Camino Real # 504, Redwood City, CA 94063.

On July 11, 2018, I served the following document(s) via electronic mail pursuant to CCP §1010.6 and CRC 2.251:

Brief of *Amicus Curiae* FairVote

on the following persons at the locations specified:

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Following ordinary business practices, I sealed true and correct copies of the aforementioned documents in addressed envelopes and placed them, postage prepaid, for collection and mailing with the U.S. Postal Service.

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

Executed in Redwood City, California.

_/s/ Gautam Dutta_____

Gautam Dutta

AMICUS BRIEF

APPENDIX A

Fairvote's Amicus Brief

Study of voting systems for Santa Clara, CA

Metric Geometry and Gerrymandering Group

February 2018

Contents

1 Introduction

LaDonna Yumori-Kaku ("Plaintiff"), an Asian-American citizen of Santa Clara, CA, is suing the City of Santa Clara ("City") for violating the California Voting Rights Act of 2001 (CVRA) through its current election system for City Council. Elections in Santa Clara are currently held at-large, with a Mayor (Seat 1) and six City Councilmembers (Seats 2–7) with four-year terms. Candidates choose an individual seat to run for with no geographical restrictions, and the elections alternate between mayor plus two seats and the four remaining seats. The winner of each seat is selected by plurality. This voting system is well known to disadvantage minority populations, and Plaintiff claims that because of racially polarized voting patterns, the City's Asian population is systematically blocked from electing a candidate of their choice. As evidence, Plaintiff cites the fact that Santa Clara has never had an Asian City Councilmember, despite the fact that nearly 40% of the City's population is Asian (as opposed to 36% White) and Asian candidates regularly run for Council seats.

The Plaintiffs are requesting a remedy that instead creates six single-member districts, each holding plurality elections. The City has proposed an alternative remedy that some call 2×3: in this system, Santa Clara would be cut into two districts, and each would elect three candidates by transferable vote.

Below, we will refer to these as the Current System, the Standard Remedy, and the 2×3 System. After conducting a racially polarized voting analysis (§2), we will argue that all three of these are inferior to several other transferable-vote options, which we call 1×6, 6×1, $1 + 4 + 1$, and $5 + 1$.

While much of this discussion is particular to Santa Clara, we present an Appendix using algorithmic sampling to draw some general conclusions that suggest that jurisdictions with polarized voting and with no extreme patterns of housing segregation should fare better with transferable vote systems than with fully districted plurality systems.

1.1 Demographics of Santa Clara

Two aspects of Santa Clara geography and demography are crucial for the analysis below.

- There is a large swath of non-residential area (negligible census population) cutting through the middle of Santa Clara, dividing the City into two residential areas that are disconnected from each other, as seen in this choropleth. We will refer to the populated areas as North Santa Clara and South Santa Clara.

North Santa Clara contains 20.25% of the City's Census population, but with a much higher concentration of Asian/Pacific Islander (API) population as well as Asian proportion of citizen voting-age population (CVAP). The relevant population statistics are summarized in the table below, which shows data from the 2010 Census (Census) and the 2012–2016 American Community Survey (ACS).
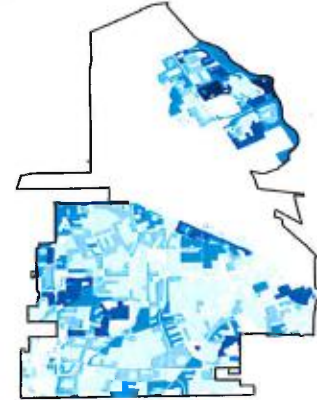
	North Santa Clara	South Santa Clara	Entire city
Total population (Census)	23,354	93,114	116,468
% API in population (Census)	57%	33%	38%
Total population (ACS)	–	–	122,725
% API in population (ACS)	–	–	41%
CVAP (ACS)	12,385	58,912	71,297
% API in CVAP (ACS)	47%	27%	31%

- Secondly, Santa Clara's API population is extremely heterogeneous. The next table shows the breakdown by country of origin from the Census data. In this report we refer collectively to several subgroups as *East Asian*. As we will see below (§2.2), Indian and East Asian voters have very different voting patterns, which will be significant for our analysis. Importantly, CVRA litigation and case law does not differentiate between Asian subgroups. Below, we will discuss significant differences in voting patterns between voters of East Asian and Indian origin; this has no legal impact on findings of a CVRA violation, but is of considerable interest in devising an effective remedy once a violation has been found.

Census population by API subgroup	North Santa Clara	South Santa Clara	Entire city
Indian	21%	11%	13%
East Asian	36%	22%	25%
Chinese	9%	7%	7%
Filipino	14%	4%	6%
Japanese	1%	2%	2%
Korean	3%	3%	3%
Vietnamese	5%	4%	4%
other EA	3%	2%	2%
Pacific Islander	0.2%	0.3%	0.3%
Total API	57%	33%	38%

There is also a significant Hispanic share of Census population in the City (19%), as well as an estimated 3% Black and about 2% American Indian, Mixed Race, or Other, leaving 36% non-Hispanic White residents. (We note that other demographic analyses include residents identified as both White and Asian in the Asian category, thus obtaining slightly higher numbers of Asians.) Asian share of population increased dramatically between the 2000 and 2010 Censuses and may do so again in 2020.

In what follows, we will use the term White as shorthand for non-Hispanic White. It is possible to include Hispanic voters as a separate group in our polarized voting analysis (§2), but we have found qualitatively similar results. The current lawsuit is focused on Asian voters, so we have not included the details on Hispanic voters here, but these results are available upon request.

1.2 Types of voting systems

Districted systems

Municipalities across California are being sued under the CVRA. Pressure to move to a districted system comes from two sources. On one hand, districting has been a traditional remedy when minorities are found to be fenced out from representation. Secondly and importantly, the CVRA's "Safe Harbor" provision signed into law in 2016 caps attorneys' fees at $30,000 if municipalities quickly move to a districted system.

However, districted systems have the inherent disadvantage of requiring line-drawing, which can be delicate, time-consuming, liable to manipulation, and often produces boundaries that are subject to challenge. If the lines must be carefully crafted to produce certain desirable outcomes, then the properties are also unstable over time as demographics shift. And Santa Clara's unique geography (§1.1) also makes division into two, three, or six districts extremely awkward. Since North Santa Clara has about one-fifth of the city population, any such districting plan has to jump the population gulf and combine populations separated by several miles. This goes against traditional redistricting principles (namely, respect for communities and political geography).

More than that, we will argue below that the moderate level of clustering of the Asian population—as opposed to more extreme housing segregation of a minority subgroup found in other jurisdictions—means that districts work especially poorly in the standard remedy, where they elect a single member by plurality vote. This is discussed below in §3.2, with the conclusions supported in the Appendix by algorithmic sampling techniques.

The Santa Clara Charter Review Committee expressed other reservations about single-member districts. Among other things, the committee worried that splitting the City into six districts and requiring the candidates from each district to reside there would unnecessarily limit the talent pool, since no two people from the same neighborhood could be elected simultaneously. Although CVRA compliance is paramount in this analysis, this is a legitimate concerns that should be taken into account.

Transferable vote systems

Below we will use the umbrella term **transferable vote** for systems that are sometimes called single transferable vote (STV) or instant-runoff voting (IRV)—those terms are nearly interchangeable, except that STV selects multiple members and IRV selects one. Transferable vote systems require voters to rank candidates in the order of their preference, so that winner selection may take into account second choices and beyond. Several California municipalities already use transferable vote, including San Francisco, Oakland, Berkeley, and San Leandro. There are several different mathematical possibilities for exactly how to conduct the vote transfers, but none of those precise differences will matter in the analysis below.

The major advantage of transferable vote systems is clear: they are designed to produce outcomes that are in better proportional correspondence with the preferences of the population. In the presence of racially polarized voting, therefore, transferable vote can be expected to significantly improve minority representation.

The main drawback commonly cited is the burden on voters, as it is sometimes argued that ranked choice voting is confusing or overwhelming. For instance, Santa Clara voters now face two to five choices on their ballot, of whom they must select one person; in a citywide at-large transferable system (§3.4) they might face as many as eighteen choices on the ballot, among whom they can rank six or more. Learning about all the candidates running for six seats at once may be a daunting task and demand more time and effort than many people are able to commit. However, a frequent finding in public opinion research is that American voters tend to like the voting system they are accustomed to. We feel that the voter burden problem can be mitigated by an education campaign (telling people for instance that ranking just two or three candidates is still a valid ballot, though more likely to result in a wasted vote) and a careful transitional period.

Voting literature from New Zealand offers some insight into the challenges of introducing transferable vote into a new jurisdiction. In 2004, some local elections commenced transferable voting while others retained a plurality system with multi-member districts. Vowles shows that STV had no impact on the proportion of valid votes cast in 2004 [3]. Although these elections continued a trend of lower turnout for local than for statewide elections, Zvulun concludes that there was no significant difference in jurisdictions using STV, and in some elections STV stopped the decline compared to the traditional system [4].

We note that districting and transferable voting are not mutually exclusive, and several systems discussed below combine them (§3.3,3.5,3.6).

Optimal ballot size for transferable vote

Because the burden on voters under ranked-choice voting increases with the number of choices, most jurisdictions around the world have districts that elect only three to five candidates. Still, systems with more choices are sometimes successfully implemented: for instance, Cambridge, MA uses ranked-choice voting to elect all nine of its Councilmembers at once.

Political scientists John Carey and Simon Hix argue that the optimum number of representatives per district is three to eight when prioritizing proportional outcomes, but three to six when considering voter experience [1]. They base their conclusions on an analysis of 609 elections in 81 countries from 1945 to 2006. Citing work by cognitive psychologists, they concede that voters' ability to rank candidates diminishes dramatically once the number of members to be elected becomes too large, but assert that voter behavior in districts with up to six members elected should resemble those for voters in single-member districts.

We conclude that asking voters to rank choices for six seats at once is feasible but on the high end of the preferred range.

Predicting system performance: the problem of second choices

A major confounding issue in predicting the outcomes of various voting systems is that past Santa Clara election returns only report one vote per voter, so it is impossible to infer how voters' second choices behave, which is essential to any detailed predictive analysis of transferable vote systems. We investigated election outcomes from some Bay Area transferable vote races, such as the Oakland mayor's race, but these were inconclusive because we could not find examples with leading API candidates from different Asian subgroups in order to study how the votes were reallocated when one candidate was eliminated. (For instance, the most recent Oakland mayoral race had one viable Chinese-American candidate, and then more minor candidates of Chinese and Iranian ancestry.)

One hypothesis is that voters from different Asian subgroups are likely to rank candidates from their own subgroup first, followed by candidates from other Asian subgroups, followed by White and Hispanic candidates. Another hypothesis is that White candidates would be frequent second choices for Korean voters, say, rather than Chinese or Filipino alternatives. And similar questions about Hispanic voters, who make up nearly 20% of voters, could have a very significant impact; if Hispanic voters are likely to prefer Hispanic, then Asian, then White candidates, this will sizably boost Asian performance in transferable vote systems. The analysis below is made with conservative assumptions about second choices and we look forward to more data in the future as transferable vote systems catch on in local elections around the country.

2 Racially polarized voting

2.1 Ecological Inference

The leading technique for establishing racially polarized voting is Gary King's Ecological Inference (EI) method, which produces numerical estimates for the levels of voting by subgroup as well as confidence intervals.

The standard way of reporting EI outcomes when studying voting patterns of a group within a larger population is to make binary divisions: consider whether voters belong to the group or not, and consider candidates one at a time to see whether the precincts with higher levels of voters from the group being considered tended to support a given candidate at a higher rate. This is sometimes called 2×2 EI. Of the City Council races we analyzed in this way using Census race data (with surname analysis of voters as a secondary data source), Seat 2 2014 and Seat 5 2014 show statistically significant polarization effects. This diagram shows estimated preferences in those two races.

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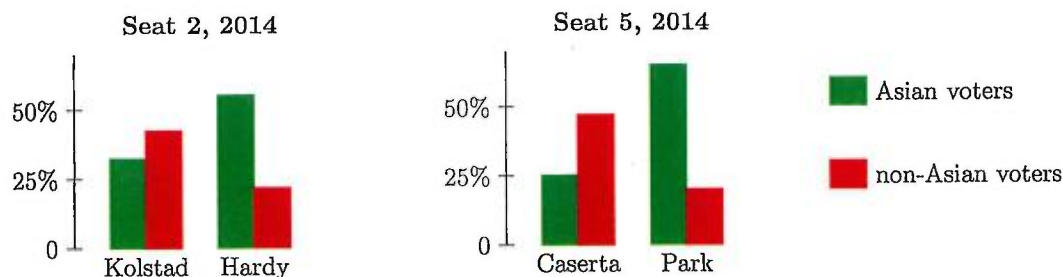
In both cases, the Asian-preferred candidate is not elected. In Seat 2 2014, the Asian voters prefer one White candidate while the non-Asian voters prefer another White candidate. This is notable as an instance of Asian voters not being able to elect their candidate of choice even when the candidate is White.

Though this is enough to assert racially polarized voting in many expert analyses, there is good reason to think that it actually understates the extent of racial polarization in this case. This way of grouping the voters makes it hard to detect the major differences in voting patterns by subgroups, particularly between Indian and East Asian voters. When we attempt a three-group $R \times C$ EI analysis, the error bars overwhelm the differences in findings. (This is because of the structure of EI, and not because the polarization has disappeared.) We thus turn to a second method to corroborate the findings of polarized voting by studying it at the subgroup level. As noted above, the subgroup analysis has no legal bearing on the success of a CVRA challenge, but will be of considerable value in devising an effective remedy.

2.2 Ecological Regression

We analyzed results from the six most recent elections using Goodman's Ecological Regression (ER), which is a second common technique cited to establish racially polarized voting. One well-known difficulty with ER is that it does not give good numerical estimates for the voting preferences of a particular group when the proportion of that group has low variance across precincts. This may cause ER-based estimates to indicate that over 100% or under 0% of a certain group voted for a particular candidate. Therefore we do not report specific numerical estimates, which may be specious, but only report a difference when we can be confident at a statistically significant level. For example, ER can give only a very rough estimate of what percentage of East Asian voters voted for each candidate in the election for Seat 2, but we can be confident that more of them voted for Hardy than for any other candidate. When it is uncertain which of two candidates was the most frequent choice of a group, we report both; for instance, the table below reports that Indian voters for Seat 7 might have preferred Rafah or O'Neill first overall, but clearly chose each of those two in greater numbers than they chose Park.

In order to consider East Asian and Indian subgroups separately, we used the detailed breakdown by country of origin provided in the Census, as well as surname data on voters from the Statewide Database. All entries in the following table are based on comparisons that are statistically significant at the $p < .05$ level. In all six cases, the preferred candidate of non-Asian voters won the election.

ELECTION	Race of candidates	first choice of Indian voters	first choice of EA voters	first choice of non-Asian voters (and winner)
Seat 2, 2014	2 W, 1 Ind	Nadeem (Ind)	Hardy (W)	Kolstad (W)
Seat 5, 2014	2 W, 1 EA	Park (EA)	Park (EA)	Caserta (W)
Seat 3, 2016	2 W	Davis (W)	Davis (W)	Davis (W)
Seat 4, 2016	2 W, 1 Ind, 1 H	Chahal (Ind)	Mahan (W)	Mahan (W)
Seat 6, 2016	2W, 2 Ind, 1 H	Nadeem (Ind)/Watanabe (W)	Watanabe (W)	Watanabe (W)
Seat 7, 2016	1 W, 1 Ind, 1 EA	Rafah (Ind)/O'Neill (W)	Park (EA)/O'Neill (W)	O'Neill (W)

(W = White, Ind = Indian, EA = East Asian, Hisp = Hispanic)

Thus, we have clear evidence of racially polarized voting in three of the six races (shown in **bold**), while only one of the six races (Seat 3, 2016) shows a clearly consistent choice across the three groups. At the same time, there is not a monolithic Asian voting bloc. Indian voters do support Indian candidates whenever possible, but in no case was an Indian candidate the preferred candidate of East Asian voters, even in the absence of East Asian alternatives. In fact, in three of the four elections that had an Indian candidate, East Asian voters supported the Indian candidates at a definitely lower rate than non-Asian voters did, and therefore at a lower rate than White voters in particular. (In the fourth case, the difference is not statistically significant.)

We note here once again that there is a possible confusion to be carefully avoided: the second-most-frequent choice of a subgroup must not be confused with the most common second choice of voters from that subgroup. The question of second choices (discussed in §1.2) is still opaque.

3   Analysis of voting system performance in Santa Clara

3.1   Current System: 1×6, separate seats with plurality vote

Bottom line: Demonstrably blocks Asian voters from electing a candidate of choice.

The preferred candidate of non-Asian voters wins in every case. Asian voters are sometimes observed to have a different candidate of choice, and that person is never elected. This is the case for well-established structural reasons; Asian candidates can't get close to the 50% threshold for election in a city in which they make up a large minority and receive only a modest number of crossover votes.

3.2   Standard Remedy: 6×1, plurality vote

Bottom line: Better than current system, but effects are unclear.

This system—several single-member districts conducting plurality elections—is the most common remedy when local at-large elections are found to violate citizens' voting rights. However, in this case, it is not sure to produce *any* Asian representation and we can be fairly certain that at most one Asian candidate of choice will be elected. The first major contributor to the underperformance of a 6×1 remedy is that the population is too dispersed to make a comfortable Asian majority in any single district. All of North Santa Clara has only 47% AVAP, and that is quite uniform across precincts. A sampling analysis detailed in the Appendix struggled to create one of six districts with 50% AVAP even within North Santa Clara. Since Asian-American share typically drops off at each stage—from share of Census population to CVAP to registered voters to voters—we conclude that it it is likely not possible to create one of six districts with 50%-plus-one Asian voter share.

Clearly, districts might still offer Asians an opportunity to elect a candidate of choice even without a numerical majority. In the two 2014 City Council elections, the preferred candidates of Asian voters were defeated overall; however, in both cases, the preferred candidates of Asian voters won in North Santa Clara. It is straightforward to draw a district completely contained in North Santa Clara where these candidates would have won as well. (North Santa Clara has 20.25% of the City's population and a district would have about 16.7% in this scenario.) At first glance, this provides strong evidence that dividing the City into six single-member districts would indeed be effective. But this does not take into account the second major contributor to the uncertainty of a 6×1 remedy: there is high potential for vote-splitting in the likely case that multiple Asian candidates run in the most heavily Asian district. Since plurality systems shut out communities that split their votes among subgroups, we conclude that this remedy may be ineffective overall.

3.3   City's Proposed Remedy: 2×3, transferable vote

**Bottom line: Better than current system, but effects are unclear.**

This proposal would create two districts, each electing three Councilmembers by transferable vote. A subgroup with a consistent voting preference needs 25% of the vote share to elect a candidate in this situation, and both the City and FairVote agree that 30% is a safer threshold. It will be difficult for either district to reach this threshold. To see why, recall that Asians constitute 31% of the CVAP in Santa Clara. However, we estimate that 6-11% of the Santa Clara's CVAP is Indian and that East Asians account for only 20-25%. This is either below or precariously close to the quota of 25% required to elect, considering the lack of evidence that Indian voters would rank East Asian candidates above White candidates most of the time. This makes it particularly hard to predict what would happen under transferable voting when one subgroup (in this case East Asians) is close to the quota.

Normally, the creation of geographical districts can help minority groups achieve representation by ensuring that one or more districts has a critical mass of minority population. However, the East Asian population is not sufficiently concentrated to easily draw two districts in which one has a substantially higher proportion of East Asians than the City overall. While North Santa Clara does have a more concentrated East Asian population, it has only a fifth of the City population, so it accounts for less than half of a district in this 2×3 scenario. In South Santa Clara, the Asian population is fairly uniformly distributed.

The FairVote report [2], which endorses a 2×3 system, depicts a boundary demarcating what the two districts might be. The Asian CVAP in their two proposed districts is reported to be 28.9% and 32.5%. This means that the East Asian CVAP will be below 30% in both districts, which gives their 2×3 proposal a serious chance of continuing to produce an all-White city council.

6

How to draw two districts

We have used both sampling methods and construction by hand to attempt to devise a different 2-district plan that maximizes the share of East Asians among registered voters, but were unable to get comfortably above 30% without district appearances that would probably be considered unacceptable by most observers, such as the division depicted below.
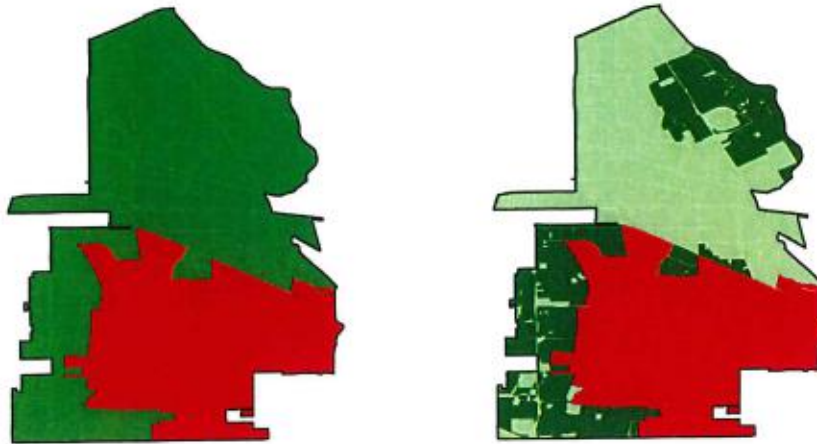
Any two-district plan creating a high API concentration has to take significant advantage of empty space to be plausibly contiguous.

Keeping in mind that populations shift over time, this is certainly a solution that would require delicate line-drawing to maintain any likelihood of securing Asian representation.

3.4 Citywide At-Large: 1×6, transferable vote

Bottom line: At least one candidate of choice for Asians, plus influence opportunities with other candidates.

One viable alternative is a single Citywide election, with all six Councilmembers chosen simultaneously by transferable vote. While this is an at-large system like the Current System, the use of transferable voting rather than plurality makes an enormous difference: by this method, a candidate would need the support of only 1/7 (14.3%) of the voters to be elected. The East Asian CVAP is certainly large enough to elect one candidate and to contribute to the election of a second; thus, as a CVRA remedy for Asian voters, this system should work better than 6×1 plurality (the Standard Remedy).

In addition to avoiding artificial geographical divisions, this method has another very desirable property: because of its low quota (14.3%), not only East Asians but smaller subgroups as well can have a more significant impact on the election. For example, Indian voters can contribute a significant proportion of the votes needed to elect a candidate. Since some Indian candidates (such as Mohammed Nadeem in 2016) are able to draw substantial White support, an Indian candidate would have a much better chance of being elected under this system than under any six-district system. Similarly, Hispanic voters (15% of Santa Clara's CVAP) may well be able to elect a candidate with sufficiently cohesive voting, whereas under the Standard Remedy, they would have no such opportunity.

Note, however, that this system would not allow the City to stagger its elections as it currently does: all six candidates would have to be elected at once. Since Councilmembers can serve two terms this would not necessarily mean a complete turnover of membership every four years. Simultaneous election for all six seats might even have some advantages; for instance, having City Council elections on the same years as presidential elections would increase turnout. But it is a change that the City would certainly need to take into account in deciding which system they prefer.

Another disadvantage is that having to elect six candidates in a single election is slightly more than the recommended three to five candidates for manageable ballots.

3.5 Alternative Districted Scheme: 6 × 1, transferable vote

Bottom line: At least one candidate of choice for Asians, plus influence opportunities with other candidates.

This six-district option improves significantly on the Standard Remedy by controlling for the vote-splitting potential if multiple Asian candidates run in the most heavily Asian of six districts. It retains the geographical awkwardness of all six-district schemes, but it makes Asian representation fairly certain.

3.6 Custom Plans: 1 + 4 + 1 or 5 + 1, transferable vote

Bottom line: At least one candidate of choice for Asians, plus influence opportunities with other candidates.

These systems are designed specifically for Santa Clara, taking into account its unique geography and demography and the preferences of both the Plaintiff and the City.

1 + 4 + 1 plan

Here, one Councilmember is elected by North Santa Clara, four by South Santa Clara, and one at-large Citywide, all by transferable vote. This creates two effective districts: North Santa Clara and South Santa Clara, the natural geographic pieces of the City. Since North Santa Clara currently constitutes almost exactly one-fifth of the City, this accords with the Constitutional principle of One Person, One Vote. (Of course, that could be vulnerable to population shifts over time, but is most likely sound at least until the 2030 Census.)

The advantage of this system is that it combines the properties of the Standard Remedy and the proposed 2 × 3 scheme that are most important to their proponents (the Plaintiff and the City respectively). The Standard Remedy creates a single-member district contained in North Santa Clara in an attempt to provide an opportunity district for Asian voters. This system improves on the Standard Remedy both by making the performance of the North Santa Clara district more certain (via transferable vote) and by not needing to artificially separate a small group of North Santa Clara voters from their community and attach them to a different district in the South. Moreover, this system gives a far better opportunity for Asian voters in South Santa Clara to elect a candidate of their choice. It is unlikely that any single-member district in South Santa Clara will have anything approaching an Asian majority. In contrast, the quota in a 4-member district is only 20%. Since we estimate Asian CVAP in South Santa Clara to be 33%, an Asian candidate would need only a modest number of crossover votes to get elected, even without assuming that East Asian and Indian voters will vote cohesively.

At the same time, this system limits the line-drawing to just the one natural geographical division, which goes a long way towards mitigating the concerns of the Santa Clara Charter Review Committee. Most of the City would elect its Councilmembers by transferable vote, as in the 2 × 3 scheme that the Committee recommended (and with a district size of four, which is also in the recommended range). Just as in the current system, elections could be staggered, with South Santa Clara elections held in one cycle and North Santa Clara plus at-large in the next.

A possible concern about this system is that it would create two kinds of Councilmembers: district-specific and at-large. This arrangement would certainly represent a change, but it would not be unique to Santa Clara. For instance, the City of Oakland currently has a mayor and eight Councilmembers, with seven representing individual districts and one elected at-large. However, we note that this 1 + 4 + 1 system also has the unusual property that residents vote for different numbers of Councilmembers: there would be two Councilmembers elected by North Santa Clara, but five elected by South Santa Clara.

5 + 1 plan

This option is similar but with five districts drawn; one district equals North Santa Clara, while South Santa Clara is divided into four districts, with the last City Councilmember elected at-large. This version will require much less work in public education and confidence-building than the previous custom plan, but sacrifices some of the representational benefits of multi-member balloting.

4 Recommendations

For the reasons detailed above, we find the Current System to be obviously problematic and we find the Standard Remedy and the proposed 2 × 3 Remedy to be inadequate to address any possible CVRA violation.

This leaves four possibilities discussed in this report, ordered here from requiring the least line-drawing to the most.

> A: Citywide at-large transferable (1 × 6)
> B: Custom transferable (1 + 4 + 1)
> C: Custom transferable (5 + 1)
> D: Districted transferable (6 × 1)

Some of their strengths and weaknesses have been discussed above, and can be summarized as follows:

- **Achieves Asian representation:** A, B > C, D

- **Respect for geography:** A,B,C > D

- **Voice for smaller minorities (Indian, Hispanic):** A > B, C; D

- **Maintains staggered elections:** C, D (any), B (4/2), but not A (6 at once)

- **Tractable ballot size:** C, D (choose 1) > B (choose 1 or 4) > A (choose 6)

We note that besides having much improved chances to win a seat outright,[1] both Indian (13%) and Hispanic (19%) residents will have greatly increased opportunities to influence the election in all four of these plans as compared to the current system or the Standard Remedy.

Overall, these systems have various strengths and weaknesses, but we find A, B, and C to be the best options, particularly since achieving Asian representation is a paramount concern and respect for geography is a traditional districting principle. The choice between these should be made on political, legal, and practical, rather than mathematical, grounds.

We therefore endorse either **citywide at-large transferable voting** or a **custom transferable voting plan** as the best remedy for the alleged CVRA violations in Santa Clara City Council elections.

Contributors

Researchers contributing to the material and presentation in this report include Mira Bernstein, Moon Duchin, Tommy Ratliff, and Stephanie Somersille. We thank Assaf Bar-Natan for providing adept GIS support for this study. MGGG accepts responsibility as an organization for the opinions expressed in this report.

References

[1] John M. Carey and Simon Hix, *The Electoral Sweet Spot: Low-Magnitude Proportional Electoral Systems.* American Journal of Political Science, Vol. 55, No. 2, April 2011, 383–397.

[2] FairVote memo: Pablo Hernandez, *Assessment of Santa Clara Modified Multi-Member District Plan*, December 21, 2017.

[3] Jack Vowles, *Comparing District Magnitude Effects under Ordinal and Nominal Ballot Structures in Non-partisan Elections: The 2004 Local Elections in New Zealand.* Representation, Vol. 43, No. 4, 2007, 289–306.

[4] Jacky Zvulun, *The Single Transferable Vote and Voter Turnout in the 2004 Local Elections.* Journal of Political Marketing, Vol 11, No. 3, 2012, 123–142.

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[1]Hispanic residents in particular do have a small enclave in the geographical center of the City and would have a chance at winning a seat outright in a South Santa Clara district under plans C or D. This is comparable to the estimated effects in Plan B, but Plan A does slightly better because of the lower threshold for election.

5 Appendix: Evidence from algorithmic sampling

General case

Below, we created an 18×18 grid and placed 31% green squares to model the situation that a minority population has 31% of the population, which is the situation with Asian CVAP in Santa Clara estimated from the most recent ACS (§1.1). It is quite intuitive that a very **uniform** distribution of green squares, such as you might find in a city with no housing segregation, will make it difficult to create a district with a distinctly higher proportion of greens than the city as a whole. The **clustered** distribution, modeling clear housing segregation, can clearly be partitioned more easily to produce a majority-green district. What is not apparent is whether a **semi-clustered** distribution (which may best model populations without a clear geographical enclave) might behave more like the uniform or more like the clustered treatment.

Uniform   Semi-Clustered   Clustered
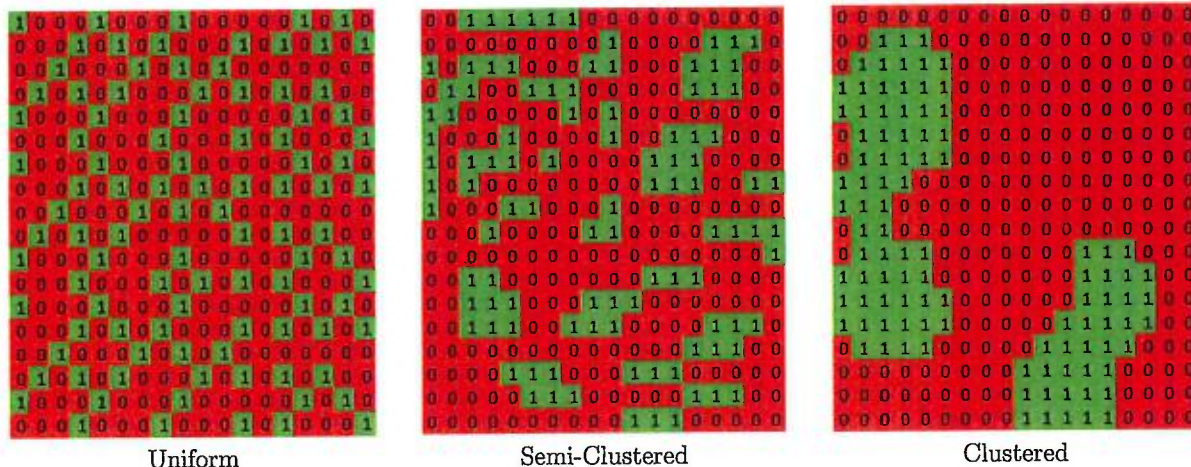
We performed algorithmic searches for districting plans cutting this grid into six contiguous districts (of 54 squares each), and then considered how many majority-green districts each plan would produce. Our algorithm runs for 100,000 steps in less than 20 seconds on a standard laptop and generates approximately 30,000 distinct districting plans. The findings are clear: the semi-clustered setup is not at all different from the uniform setup, and majority-green districts are extremely hard to produce.

To be precise, here are the findings from five separate runs.

Question:	Run	Uniform	Semi-Clustered	Clustered
What proportion of randomly sampled	1	0.7%	0.1%	54.9%
six-district plans provide likely plurality	2	0.3%	0.4%	72.2%
representation for the green minority?	3	0.6%	0.6%	56%
(i.e., some district ≥ 50% green)	4	0.9%	1.2%	61.7%
	5	1.2%	0.3%	43.1%

The runs presented above proceed by starting with an initial plan (or *seed*) and making many small modifications at random. For those five runs, the seed was simple rectangular districts. In order to consider whether the random walk is mixing well in the space of possible plans, one double-check is to confirm that runs from a different seed are producing similar results. To check this, we initialized other runs with a carefully crafted plan that has *two* green districts (each with a comfortable 54% margin in the semi-clustered distribution). In three runs from that seed, the share of sampled plans with *at least one* green district in the semi-clustered distribution is 1.4%, 1.5%, and 0.3%, an essentially identical outcome to the runs from the prior seed.

Conclusion: if you assume (a) polarized voting, and (b) no extremely clustered patterns of housing segregation, then it is difficult for a fully districted plurality voting system to produce stable representation for a minority subgroup. **Transferable voting should therefore be strongly preferred in this situation.**

Geography-specific

A similar analysis is possible taking into account the geography and demographics of any particular jurisdiction by choosing units from which to build plans (say precincts or census blocks) and randomly sampling plans as follows.

Step 0 Begin with a shapefile showing the jurisdiction decomposed into the chosen units.

Step 1 Build a *dual graph* of those units that has one vertex for each unit and has edges when the units are adjacent. (See figures below.) The graph data should include both total Census population and estimated CVAP of the group of interest for every node, so that the sampling can limit population deviation and report the CVAP statistics of the districting plans it creates.

Step 2 Choose a seed: fix an initial districting plan for your graph into the desired number of districts with a tolerable level of population deviation.
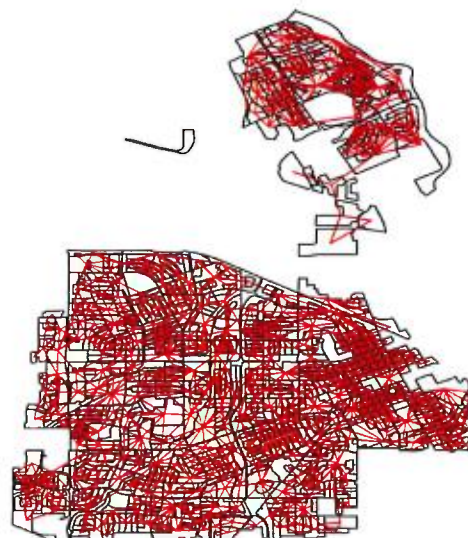
Step 3 Run a random walk that builds an ensemble of plans by considering flipping units from one district into another. Only accept a proposed change if the new plan maintains contiguity and satisfies any other principles you would like to be maintained (e.g., population deviation below a threshold, compactness above a threshold).

Step 4 Report the subgroup CVAP by district in the ensemble of plans produced on each run.

In this way, it is possible to search for districting plans and see how often the subgroup CVAP meets the quota for election under the system being considered.
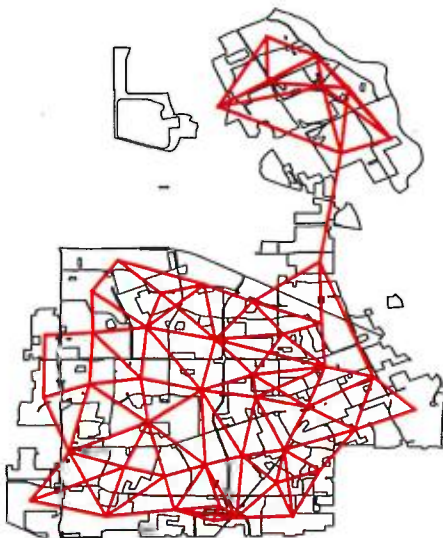
Precinct-level dual graph   Block-level dual graph

The findings of this analysis were that in the 6-district plans in these ensembles, the district with the highest Asian concentration always had 47.7-48.9% AVAP, dropping off very quickly to below 40% in the second most Asian district. This corroborates the finding above that a plan with six single-member districts might fail to elect even a single Asian representative if plurality elections are conducted in each district.

More Accurate CVAP

(Avoiding CVAP Anomalies)

Asian American CVAP
As proposed

Plan	District 1/A	District 2/B	District 3/C	District 4/D	District 5/E	District 6/F	District 7/G
City Draft Plan 1	**51%**	27%	**33%**	31%	27%	13%	
City Draft Plan 3	**51%**	27%	**33%**	31%	14%	25%	
City Measure A Plan	**37%**	**23%**					
Plaintiff Plan 1	**50.5%**	33.5%	**44.9%**	33.7%	27.7%	22.3%	18.7%
Plaintiff Alternative	**49.6%**	33.8%	35.9%	**42.2%**	26.8%	22.3%	18.6%

Asian American CVAP More Accurate

Plan	District 1/A	District 2/B	District 3/C	District 4/D	District 5/E	District 6/F	District 7/G
City Draft Plan 1	**46.13%**	30.37%	**40.92%**	26.82%	28.54%	16.54%	
City Draft Plan 3	**46.13%**	30.37%	**40.92%**	29.13%	26.97%	15.89%	
City Measure A Plan	**38.55%**	**23.13%**					
Plaintiff Plan 1	**49.10%**	32.49%	**43.64%**	33.24%	26.34%	21.57%	15.77%
Plaintiff Alternative	**48.07%**	32.95%	35.01%	**41.27%**	25.61%	21.57%	15.74%

Problems with Gobalet CVAP

- **Calculation of percentages**
- **Allocation of CVAP**
  - **from census block-groups**
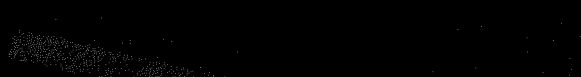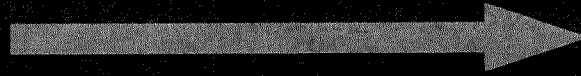 - **to census blocks**

Gobalet CVAP Percentages

| Category	Alloc	Alloc%	Re-Cat	Alloc%
Total	1,000	100%	800	100.0%
NH Asian	300	30%	300	37.5%
NH White	250	25%	250	31.2%
Hispanic	200	20%	200	25.0%
NH Black	50	5%	--	
NH Other	200	20%	50	6.2%

Conservation Principle of Allocating CVAP

Allocating CVAP should neither create nor destroy CVAP

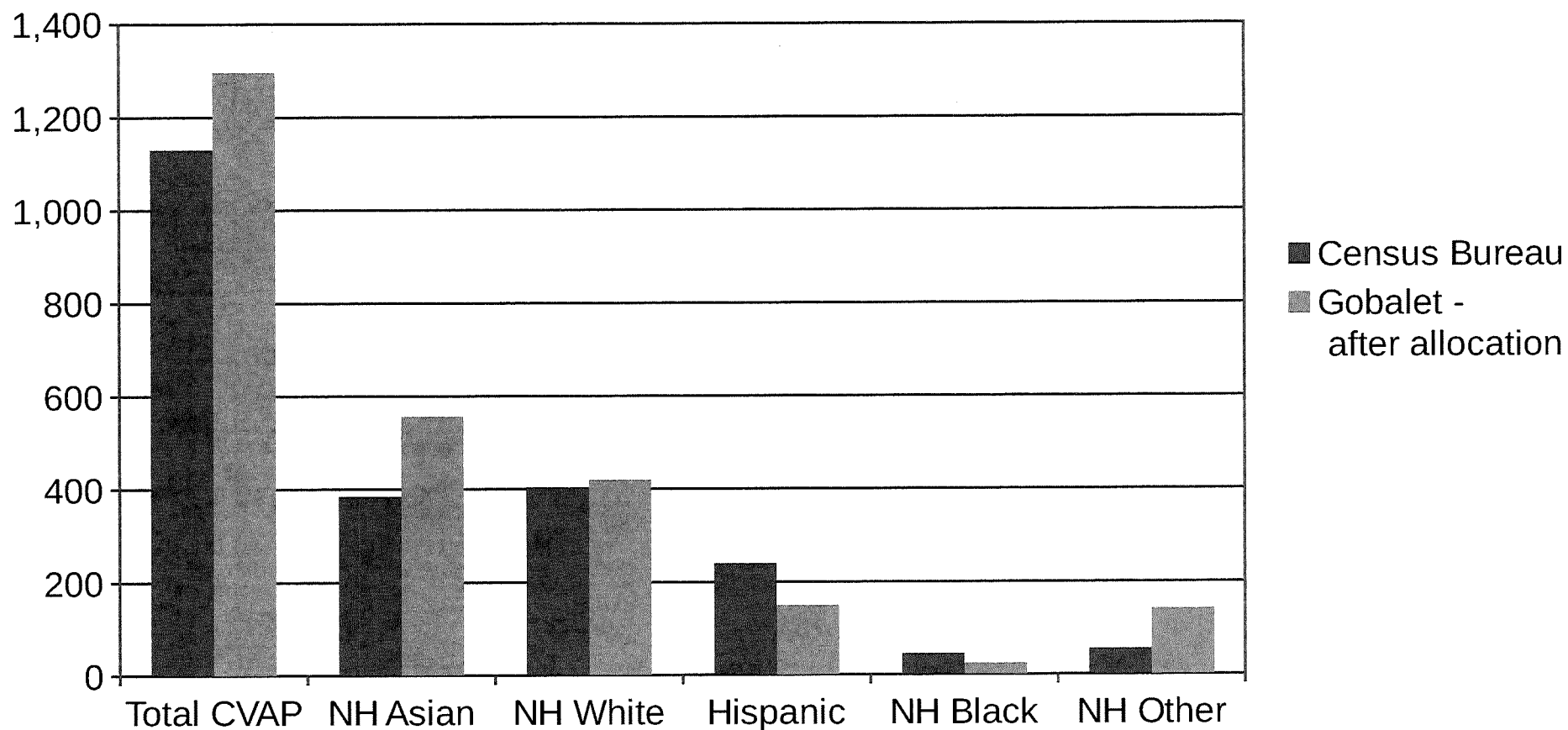You should end up with as much CVAP as you started with.

Allocation Failure to Conserve CVAP Counts
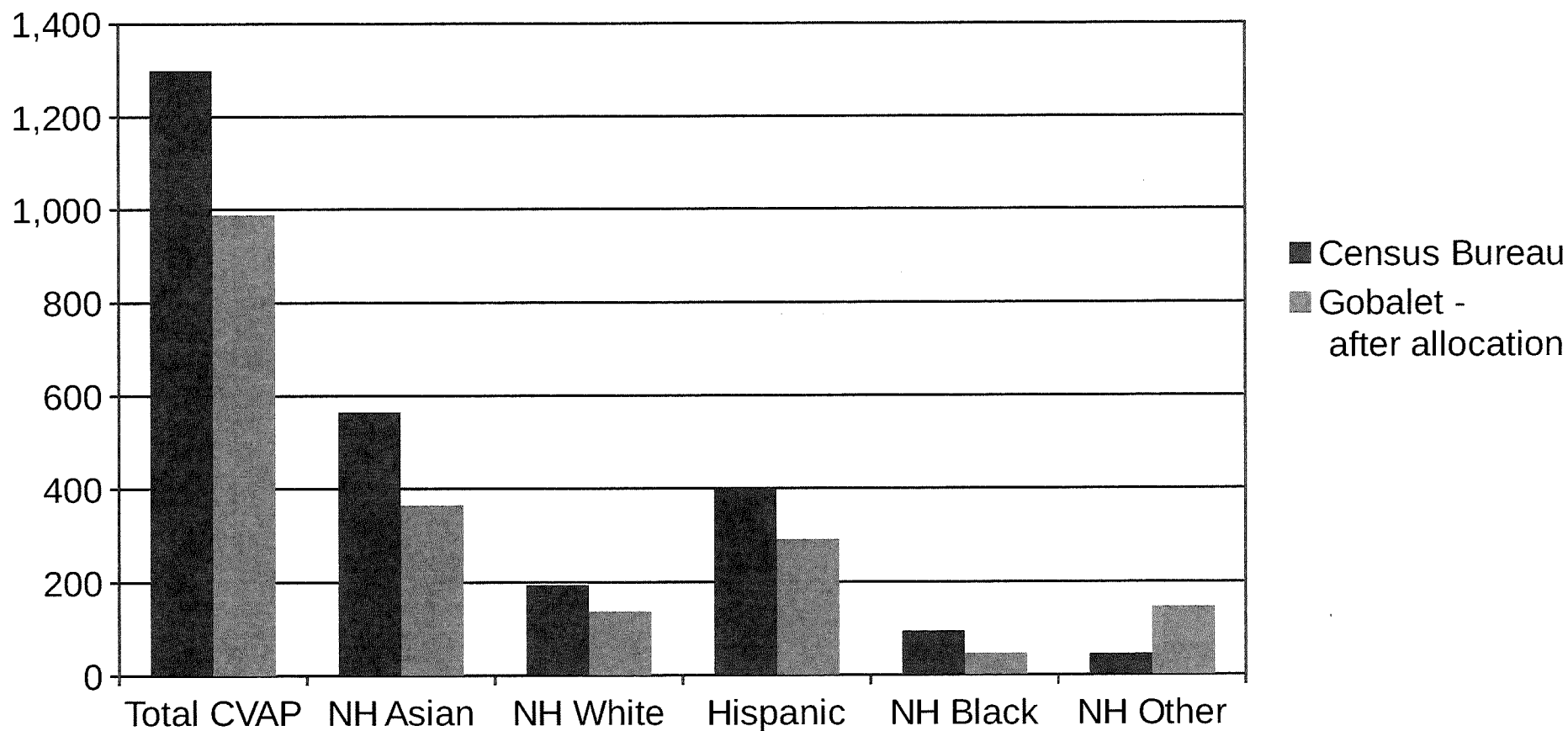
Census Tract 5049.01, Block Group 1
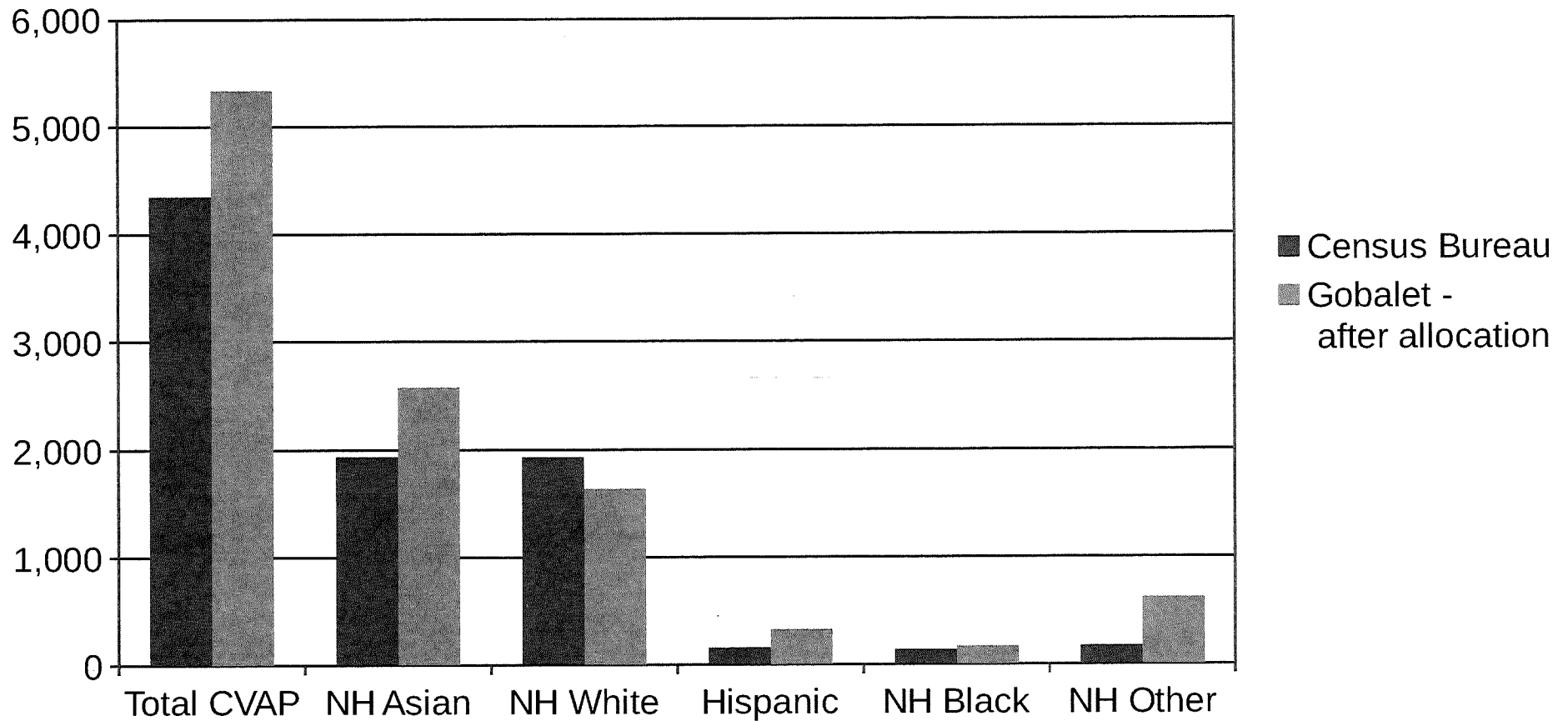
Allocation Failure to Conserve CVAP Counts
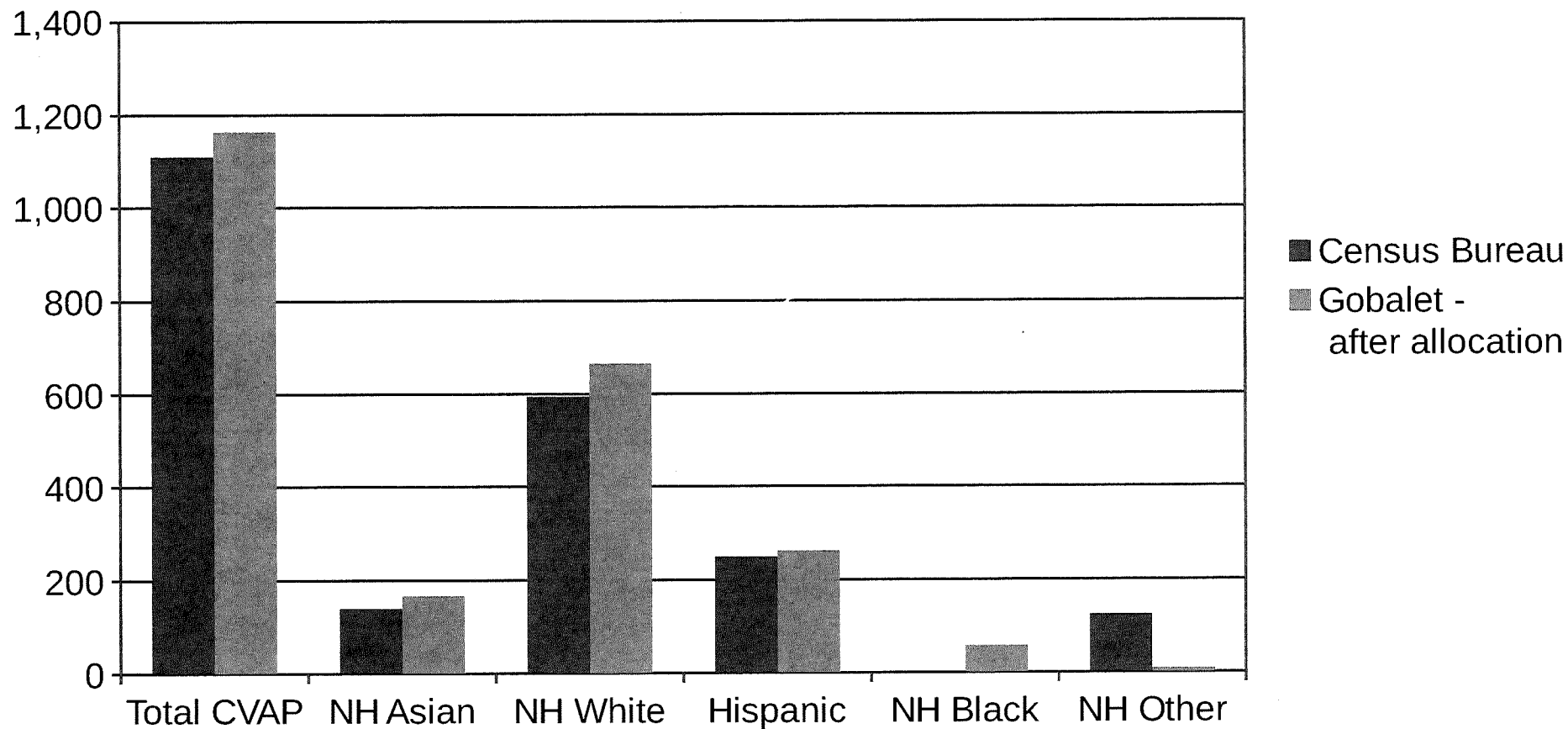
Census Tract 5050.01, Block Group 3

Allocation Failure to Conserve CVAP Counts

Census Tract 5053.03, Block Group 4

Allocation Failure to Conserve CVAP Counts

Census Tract 5057, Block Group 4

Asian American CVAP More Accurate

Plan	District 1/A	District 2/B	District 3/C	District 4/D	District 5/E	District 6/F	District 7/G
City Draft Plan 1	**46.13%**	30.37%	**40.92%**	26.82%	28.54%	16.54%	
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