No. 19-1199

IN THE

Supreme Court of the United States

DON HIGGINSON,

Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CURRENT AND FORMER CALIFORNIA LOCAL ELECTED OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the California Voting Rights Act violates the Equal Protection Clause of the Fourteenth Amendment by dispensing with traditional requirements for a "vote dilution" claim under the federal Voting Rights Act in order to impose voting systems designed to achieve proportional representation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are current and former local elected officials from the State of California who have seen firsthand how the California Voting Rights Act has been weaponized against local governments to impose race-based proportional representation.

Amicus Derek Reeve has served on the San Juan Capistrano City Council since 2010, and served as the city's mayor in 2015. Mr. Reeve was a councilmember when the city received a demand letter claiming that its at-large electoral system violated the California Voting Rights Act, and participated in the decision making process that led to the city's transition to district-based elections.

Amicus Cathy Schlicht served on the Mission Viejo City Council from 2008 until 2016, and served as the city's mayor from 2015 to 2016. *Amicus* Gail Reavis served on the Mission Viejo City Council from 2000 to 2008. She twice served one-year terms as mayor of the city. Ms. Schlicht and Ms. Reavis have been actively engaged in Mission Viejo's efforts to change its electoral system after being sued for alleged violations of the California Voting Rights Act. While they do not oppose the principle of a by-district election system, they continue to advocate against Mission Viejo's current plan to replace its at-large electoral system with

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[1] Rule 37 statement: All parties were given timely notice and have consented to the filing of this brief. No party's counsel authored this brief in any part. The Judicial Education Project made a monetary contribution to fund the preparation and submission of this brief. No other person or entity, other than *amici* or their counsel, made a monetary contribution to its preparation or submission.

cumulative voting as a means of resolving the city's California Voting Rights Act claim.

This case concerns *amici* because they oppose having voting systems changed under California Voting Rights Act claims of "vote dilution" in the absence of any evidence that those systems were operated with the effect, much less the purpose, of voting discrimination. Voting systems in both San Juan Capistrano and Mission Viejo have been upended, and the cities have diverted substantial resources to "vote dilution" claims that have no basis as that term has historically been understood.

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Voting Rights Act ("CVRA") prevents California municipalities from maintaining an at-large election system if it "impairs the ability of a protected class" under the Voting Rights Act of 1965, 52 U.SC. § 10301, et seq., "to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters" in that class. Cal. Elec. Code § 14027. Despite purporting to vindicate the same general interests as the federal Voting Rights Act (the "FVRA"), the CVRA's conception of a "vote dilution" claim is a radical departure. The petition demonstrates that this departure causes the CVRA to violate the Equal Protection Clause because it forces California to draw district lines based entirely on race without assuring that any discrimination has actually occurred. *See* Petition at pp. 17–25.

This brief expands on the petition's discussion of the CVRA's history and its practical effect, and further demonstrates how the Act cannot be reconciled with the Equal Protection Clause and this Court's Section 2 jurisprudence.

The CVRA eviscerates this Court's method of analyzing vote-dilution claims by eliminating the need for any critical analysis aimed at determining whether voting discrimination actually occurred. The Act removes both the compactness requirement from *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986), and the FVRA's "totality-of-the-circumstances test," and instead presumes liability based solely on a showing of racially polarized voting. All of this is to guarantee results and require cities to change their electoral

systems however necessary to engineer proportional representation.

This brief tells the story of two cities targeted under the CVRA for proportional representation. San Juan Capistrano capitulated to a CVRA litigation threat and agreed to switch to a district-based electoral system. While a by-district map could have comfortably included a majority-Latino district (which would be expected if the goal were to remediate actual voter discrimination), the final map contains bizarrely shaped, race-based influence districts plainly designed to achieve proportional Latino representation (and thereby avoid an FVRA claim based on how the districts were drawn).

Mission Viejo quickly capitulated to a CVRA claim as well, but it turned out that the city's minority residents were too geographically dispersed to create a majority-Latino district. Instead of celebrating this level of integration as a laudable achievement, the CVRA claimant persisted until Mission Viejo became the first city in California to adopt cumulative voting. Since proportional representation is the ultimate goal, why not force an extreme measure like cumulative voting?

These cities' experiences are hardly isolated. The CVRA's low standard of proof, coupled with mandatory fee-shifting, has led many cities and other political subdivisions across California to switch to new electoral systems based entirely on racial considerations, simply to avoid exposure to a hefty attorney fee award.

The petition should be granted, and this unseemly practice should be stopped.

ARGUMENT

I. The CVRA Clears The Way To Proportional Representation By Eliminating Critical Requirements Imposed By The Federal Voting Rights Act And *Gingles*.

The CVRA was conceived as a way to attack at-large voting systems to promote minority election outcomes without jumping through all the hoops this Court has imposed on plaintiffs seeking race-conscious remedies for vote-dilution claims under the FVRA. By doing so, the CVRA openly confirms it is not really aimed at remedying any discriminatory voting practices. All a plaintiff must show is "racially polarized" voting and it is entitled to force a city or political subdivision to adopt a new voting system based solely on race. Cal. Elec. Code § 14028(a).

The first obstacle the CVRA eradicates is the *Gingles* compactness requirement. "In *Gingles*, the plaintiffs were African-American residents of North Carolina who alleged that multimember districts diluted minority voting strength by submerging black voters into the white majority, denying them an opportunity to elect a candidate of their choice." *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009). *Gingles* only allowed such claims under the FVRA if plaintiffs could first establish three "necessary preconditions," including that the minority group was "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50–51.[2]

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[2] The second and third *Gingles* preconditions are: (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 51.

The California Legislature summed it up this way: "This bill recognizes that geographical concentration is an appropriate question *at the remedy stage*. However, geographical compactness would *not* appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. This bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)." Assem. Comm. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (emphasis added).

The CVRA's view of the compactness "problem" is backwards under the Equal Protection Clause. The Court has explained that geographic compactness is a necessary factor for determining whether there is a "discrimination issue" *at all*, so that the extreme measure of racial remedies does not violate the Equal Protection Clause. "The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17 (emphasis in original). Racial non-compactness is totally inconsistent with the idea that an at-large system has discriminatory effects (much less that it was intended to have them): "If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates. . . . [This standard] thus would only

protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation*." *Ibid.* (citation omitted; emphasis in *Gingles*).

The second "problem" the CVRA expressly eliminates is any inquiry into the "totality of the circumstances" to reveal whether, as required under the FVRA, "the political processes . . . are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b); *see Gingles*, 478 U.S. at 43–47; *Bartlett*, 556 U.S. at 11–12. The *Gingles* factors designed to test for actual discrimination at this stage are merely considered "probative" as to whether "racially polarized voting" has occurred.[3] With this revision, the CVRA openly confirms that its purpose is not to remedy actual burdens placed on minority voting opportunities or combat voting practices that truly impose discriminatory effects (much less intentionally so).

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[3] *Compare* Cal. Elec. Code § 14028(e) (listing "probative, but not necessary factors" in analyzing a CVRA claim), *with Gingles*, 478 U.S. at 44–45 (identifying seven factors to guide Section 2's totality-of-the-circumstances test, including "the history of voting-related discrimination"; the use of "voting practices or procedures" that "enhance the opportunity for discrimination" against the minority group; whether a minority group has been excluded from candidate slating; "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process"; and "whether political campaigns have been characterized by overt or subtle racial appeals").

Instead, the CVRA is focused on guaranteeing results. In short, the Act was designed to do precisely what Section 2 forbids: assuring proportional representation. *See* 52 U.S.C § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."); *see also Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994) ("the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.").

Because the lower courts here refused to conduct strict (or even heightened) scrutiny to this race-obsessed statute, they had "no way of determining [whether the CVRA is] 'benign' or 'remedial' [or whether it is] in fact motivated by . . . simple racial politics." *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993) (citation omitted).

The examples below illustrate how the CVRA is used to engineer proportional representation.

II. San Juan Capistrano: The Drive For Proportional Representation Results In Bizarrely Shaped, Race-Based Districts.

San Juan Capistrano is a small city in Orange County whose population under the 2010 census was 34,593 residents. U.S. Census Bureau, QuickFacts, San Juan Capistrano, https://bit.ly/35qn6XT. San Juan Capistrano's residents are affluent: The Census Bureau reports that 74.9% of the housing units in the city are owner-occupied, and the median value of those homes is $678,000. *Id.* The 2010 Census also revealed that 36.3% of San Juan Capistrano's population was Latino. The City had employed an at-large

system for choosing its city council since incorporating in 1961.

This presented an opportunity for CVRA lawyer Kevin Shenkman. In December 2015, he wrote a letter to the City of San Juan Capistrano demanding that it abandon at-large voting and adopt a by-district system. Dec. 16, 2016 Ltr. from Kevin Shenkman to City of San Juan Capistrano re Violation of California Voting Rights Act ("SJC Demand Letter").[4] The demand cited no evidence to support the claim that the city's system violated the CVRA. SJC Demand Letter, p. 1 (claiming it "appears that voting within San Juan Capistrano is racially polarized, resulting in minority vote dilution" and noting "our belief that San Juan Capistrano's at-large system dilutes the ability of minority residents . . . to elect candidates of their choice"). The letter emphasized that fighting could produce disastrous results: Referring to the City of Palmdale's experience, it noted that "[a]fter spending millions of dollars, a district-based remedy is ultimately being imposed upon the Palmdale city council, with districts that combine all incumbents into one of the four districts." SJC Demand Letter, p. 2.

The SJC Demand letter also asserted that "[o]ur research shows that in at least the last 5 election cycles years [sic], no Latinos have been elected to the San Juan Capistrano City Council – many have run but none have been successful." *Id.* In fact, Latinos had recently enjoyed high-profile electoral success in San Juan Capistrano. Former San Juan Capistrano

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[4] A copy of the SJC Demand Letter is available online at https://www.scribd.com/document/459668411/2015-12-16-San-Juan-Capistrano-Shenkman-Demand-Ltr. The demand letter identified no client on whose behalf it was sent.

mayor Joe Soto served three terms on the council and was mayor from 2003 to 2008. Sean Emery, *San Juan Council elects Soto as Mayor*, Orange Cty. Register (Dec. 5, 2007). Soto was succeeded as the city's mayor by Dr. Lon Uso, who served on the council from 2006 to 2010. Orange Cty. Register, *Lon Uso is new San Juan mayor* (Dec. 2, 2009).

But the city immediately capitulated to the demand because it didn't want to face the risk of owing millions in fees fighting a lawsuit that didn't turn on whether voting discrimination actually existed. Within seven months the city adopted an ordinance to switch to by-district elections. Its ordinance repeatedly cited the financial burden of a CVRA lawsuit as the motivating factor. City of San Juan Capistrano, Ordinance No. 1035 (June 21, 2016) (noting that neither the demand letter "nor the complaint in the civil action contain any evidence of a violation, but the cost of defending against a claim under the California Voting Rights Act is extremely high, even if the City is successful," and, "in order to avoid the litigation costs associated with defending the civil action, the City entered into a Stipulated Judgment pursuant to which it agreed to adopt by-district elections in time for the 2016 City Council elections.").

The city's five-district map is noteworthy here in two important respects. First, the city did not create a majority-Latino district, despite a city-wide Latino population of more than 36%. Instead, it created two "influence" districts in which Latino citizen voting age population (LCVAP) levels were 44.37% (District 1) and 43.71% (District 4). *See* App'x A (Final District

Map Approved on June 6, 2016).[5] It was plainly possible to create a majority-Latino district, as Districts 1 and 4 are contiguous, and the highest LCVAP in the remaining three districts is 9.78%. Were voting in the city actually "racially polarized" as the term is traditionally understood, failing to create a majority-minority district would appear to make little sense. But here the goal was political, not remedial: try to set aside 40% of the seats to match Latinos' 36% share of the population.

Second, in order to pack more Latinos into District 1, the demographic consultant made District 2 non-contiguous – except for a row of 10 houses on the north side of Briarwood Street connecting the two islands otherwise constituting District 2. App'x B. And to be clear, Briarwood is no major thoroughfare; rather it sits quietly in the rear of the Village San Juan subdivision, backing up to the Arroyo Trabuco Golf Club. Old-fashioned notions of district-drawing are cast aside under the CVRA's drive for proportional representation. The district's bizarre shape speaks for itself: it is "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the [city's] dominant and controlling rationale in drawing its district lines." *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

When CVRA claims force cities like San Juan Capistrano to draw districts for the first time, they obviously do so under the threat of a Section 2 lawsuit if the racial interest group that brought the CVRA claim isn't satisfied with the new lines. (The plaintiff in San

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[5] According to the demographer's district-by-district figures set out on the final map, the city-wide LCVAP was roughly 22%.

Juan Capistrano's case, as in many others, *see* Section IV *infra*, was the Southwest Voter Registration Education Project ("SVREP").)

This is a backwards universe: (1) even though a city had never considered race in its at-large voting system, the CVRA forces it to change based not on a finding of discrimination but rather on a claim of "racially polarized" voting; (2) in order to effect the change required under the CVRA, the city has to consider race in drawing lines to avoid the Section 2 litigation thicket; (3) but Section 2 never would have been implicated in the absence of the CVRA claim since there was no finding of discrimination. In short, race pervades claims under the CVRA.

III. Mission Viejo: When Integration Makes Proportional Representation Through Districts Impossible, The CVRA Is Used To Achieve It Through Cumulative Voting.

The city of Mission Viejo rests just to the north of the noncontiguous portion of San Juan Capistrano's District 2. Mission Viejo's 2010 Census population was 93,305 residents. U.S. Census Bureau, QuickFacts, Mission Viejo, https://bit.ly/2VYmUfi. Mission Viejo's residents are also affluent: The city's median income exceeds $114,000 per year. *Id*. The Census Bureau reports that 77% of the housing units in the city are owner-occupied, and the median value of those homes is $668,000. *Id.* Mission Viejo's Latino population is 17.5%. *Id.*

Whereas CVRA's proponents attempt to capitalize on lingering cultural impressions of at-large systems

from the Jim Crow-era South,[6] no such claim to the moral high ground is possible when it comes to Mission Viejo: It didn't become a city until 1988, two years after *Gingles* was decided. *See, e.g.*, Jeffrey A. Perlman & Laura Kurtzman, *A New City Takes Stock: Mission Viejo Mayor Checks Off First-Year Achievements*, L.A. Times (Dec. 13, 1988).

Yet Mr. Shenkman demanded in September 2017 on behalf of SVREP that Mission Viejo adopt a by-district system: "Latinos comprise approximately 17% of the population of Mission Viejo. However, there are currently no Latinos on the City Council, nor have there been *any* in the last nine years. The contrast between the significant Latino proportion of the electorate and the near absence of Latinos to be elected to the City Council is telling." Sept. 26, 2017 Ltr. From Kevin Shenkman to City of Mission Viejo re Violation of California Voting Rights Act.[7]

In fact, Latino candidates had enjoyed recent electoral success in Mission Viejo. *Amicus* Gail Reavis, who served on the City Council from 2000 to 2008, is Cuban. And John Paul Ledesma was elected to the City Council in 1998, served as mayor, and left the council in 2010 after serving the maximum three terms. *See* Erika I. Ritchie, *Unlikely councilman finds niche*, Orange Cty. Register (Aug. 12, 2007) (noting

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[6] *See, e.g.*, Sen. Rules Comm., Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended June 11, 2002, p. 2 ("One of the most frequently cited reasons for changing from at-large to district elections is the need to overcome a history or pattern of racial inequity.").

[7] A copy of the Mission Viejo demand letter is available online at https://www.scribd.com/document/459711247/2017-09-26-Shenkman-Demand-Ltr-Mission-Viejo.

that Ledesma "was the son of a Puerto Rican father who worked hard to master English and a mother of Irish, English and Mexican descent.").

But like nearly every other city to receive a CVRA demand, Mission Viejo immediately tried to resolve the case to avoid huge financial exposure. Mission Viejo Minutes (Oct. 24, 2017), pp. 5–6 (adopting Resolution 17-52 declaring the city's "intent to consider transition from at-large to district-based councilmember elections"); Mission Viejo City Council Resolution 17-52 (Oct. 24, 2017), p. 1 (noting that "although the [demand] letter was not accompanied by any evidence to support the claim of a CVRA violation, the City Council has directed staff to initiate the process to establish by-district elections to avoid costs associated with defending a lawsuit based on the CVRA").

The parties soon discovered, however, that they literally could not draw a district to deliver a "Latino seat": it turned out that Latinos were too geographically dispersed throughout Mission Viejo to create a majority-Latino district. *See Higginson v. Becerra*, S.D. Cal. Case No. 3:17-cv-2032-WQH-JLB, Dkt. 49-2, Decl. of Deborah Diep filed Dec. 14, 2017, ¶¶ 7-9 (detailing dispersion of LCVAP and concluding that, "in both total population and CVAP contexts, . . . the racial and ethnic populations are integrated throughout the City," so "it is not possible to create a single-group minority-majority district in the City at either the block or block group levels while maintaining a similar population count across the district populations").[8]

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[8] This conclusion wasn't reached for lack of trying. The city solicited public feedback through community meetings, which included the opportunity to submit comments and proposed district maps; it also hired a demographer to analyze whether it was

Not long ago, widespread integration of a minority population in an affluent city like Mission Viejo was an achievement to be celebrated. *Cf. Bartlett*, 556 U.S. at 34 ("Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U.S. Constitution.") (quoting Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1547–48 (2002)).

Indeed, *Gingles* adopted the compactness requirement for the very reason that, "[i]f minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates." 478 U.S. at 50 n.17 (quoting Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 55–56 (1982)). As *Gingles* stressed: the compactness standard "would only protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation*." *Ibid*. (emphasis in *Gingles*).

But the CVRA is deployed to assure proportional representation, so Mission Viejo's Latino integration was viewed as a problem that needed a solution. SVREP filed suit soon after the city council rejected the move to districts as fruitless in light of the city's integration. *See* Spencer Custodio, *Mission Viejo City Council Rejects District Elections; Seeks Alternatives*,

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feasible to move to a district-based system. City of Mission Viejo, *Mission Viejo Districting*, https://bit.ly/3bZiMl2 (collecting information on the city's process).

Voice of OC (Feb. 22, 2018) (quoting Mayor Sachs' comment that "[w]e tried to create a majority-minority district and it looked like ink blotch spots").

SVREP did not resolve the case until Mission Viejo agreed to think outside the box and become the first city in California to adopt a *cumulative voting* system. Alicia Robinson, *Mission Viejo Will Go Its Own Way With New "Cumulative Voting" System*, Orange Cty. Register (July 30, 2018) (noting that SVREP "believes cumulative voting will give the city's Latino residents a better chance to elect candidates they feel represent them").

As such, the CVRA machine has accomplished in Mission Viejo the "radical departure[]" that Justice Thomas foresaw in *Holder v. Hall*, 512 U.S. 874, 910 (1994), as the logical endpoint of the drive for proportional representation. *Id.* at 909–10 (Thomas and Scalia, JJ., concurring). Justice Thomas noted longstanding demands by voting rights advocates for "cumulative voting or a system of transferable votes" as alternatives to districts. *Id.* 909–10 & nn. 15–16. Such practices, after all, are "simply more efficient and straightforward mechanisms for achieving . . . roughly proportional allocation of political power according to race." *Id.* at 912. And so it is with the CVRA.

IV. The CVRA's Structure Ensures That Cities Capitulate To Litigation Threats And Adopt A Race-Based Voting System Simply To Save Money.

The CVRA has been a windfall for attorneys who have raced to churn out demand letters targeting nearly every jurisdiction in California that has a non-de-minimis minority population and an at-large

electoral system. The CVRA provides for mandatory recovery of attorney's fees for prevailing plaintiffs. Cal. Elec. Code § 14030.

None of this is by accident. The principal authors of the CVRA collected millions in fees from CVRA suits. A 2009 investigation by the Associated Press concluded that "[e]very lawsuit filed or even threatened under a California law aimed at electing more minorities to local offices—and all of the roughly $4.3 million from settlements so far—can be traced to just two people: a pair of attorneys who worked together writing the statute." Associated Press, *Jackpot: Lawyers earn fees from law they wrote*, L.A. Daily News (Nov. 16, 2009) (explaining that law professor Joaquin Avila and Robert Rubin, who drafted the CVRA, had collected over $4 million in settlements).

Soon, other attorneys got in on the action, most notably Mr. Shenkman, who has filed dozens of lawsuits and settled countless CVRA claims after threatening litigation. In a profile of Mr. Shenkman, the Los Angeles Times highlighted that after the Southern California city of Palmdale paid his firm $4.6 million in fees in a CVRA lawsuit, other cities were quick to capitulate: "[E]ven if other cities didn't see the benefit in switching to district elections for the right reasons, it soon became clear that moving to district elections was a sure way to avoid sky-high legal fees." Robin Abcarian, *California Journal: Meet the Malibu lawyer who is upending California's political system, one town at a time*, L.A. Times (May 14, 2017). That same article quotes the president of SVREP explaining how the Palmdale settlement generated big business for the organization:

> "Palmdale created a new conventional wisdom for cities, which is, 'We are not going to win, so let's work it out,'" Gonzales said. "We just sent another 15 demand letters, so we are up to 25 jurisdictions." [¶] Before the year is out, he said, "We're going to do 100."

Id.

The entire time, the threat of fees has been the cudgel motivating every jurisdiction that receives a CVRA demand. Cities routinely cite the threat of a fee award as their justification for settling. *See, e.g.*, City of Roseville, News, *Roseville moves toward district-based City Council elections* (Aug. 28, 2019) ("The decision to adopt a 'district-based' election format isn't due to a philosophical change by the City Council. Rather it's a strategic, proactive move to potentially save the city millions of dollars in legal fees."); City of San Ramon, *Bay Area Voting Rights Initiative* (May 8, 2019) ("Consideration was given to litigating the issue however, in light of the unlikelihood of prevailing in a lawsuit as experienced by other jurisdictions, and the exposure to substantial legal fees which could range in the millions of dollars, the City Council directed staff to begin the process [of switching to district-based elections].").

The few jurisdictions who have fought back face hefty fee awards. Palmdale is one of multiple jurisdictions on the hook for fee awards or settlements over $1 million. Carolyn Schuk, *Santa Clara Must Pay $3.3 Million In Legal Fees To Plaintiffs In Voting Rights Lawsuit*, Silicon Valley Voice (Jan. 21, 2019); Adam Ashton, *Settlement in Latino voting case will set Modesto back $3 million*, Modesto Bee (June 6, 2008); Sharon McNary, *Anaheim City Council settles nearly 2-*

year-old Voting Rights Act lawsuit; Voters to have final say, S. Cal. Pub. Radio (Jan. 7, 2014) (after settlement, "the case is expected to cost Anaheim about $2 million"); Mike Sprague, *Judge awards nearly $1 million in legal fees to attorneys who sued Whittier over district-based council elections*, Whittier Daily News (Apr. 6, 2015).

In 2017, the Legislature amended the CVRA to include a safe-harbor provision that gives cities 45 days after receiving a demand letter to "voluntarily" move to by-district elections. *See* Cal. Elec. Code § 10010(e). If a city takes prompt action, it caps their attorney-fee liability at $30,000. *Id.*, § 10010(f)(3). As a result, cities have little choice but to scrap their voting system and cut a check. And as shown above, the changes are transparently designed to achieve proportional representation. But even then, the electoral results do not necessarily follow:

> The threat of legal action has forced cities to switch to council districts, but in some cases the move hasn't resulted in more minority representation because the city already is well-integrated and drawing districts where minorities predominate is difficult.
>
> Among the cities that made the switch from "at large" citywide voting are the Central Valley city of Visalia, which moved to district elections last year after Latino residents filed a lawsuit. They noted that only one Latino had ever been elected to the five-member council even though Latinos account for 46% of the population. [¶] Even after the switch, though, not a single Latino was elected to the council

> last November—and none even ran for the two districts that were up for grabs[.]

Phil Willon, *A voting law meant to increase minority representation has generated many more lawsuits than seats for people of color*, L.A. Times (Apr. 9, 2017).

This only further demonstrates that "vote dilution" was not occurring before the change, yet the CVRA uses bald racial stereotyping to force cities to change their election systems. As the Court has explained, "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.' Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" *Miller*, 515 U.S. at 911–12 (citations omitted).

Indeed, the CVRA's true vice, of course, is not its financial cost, but its social cost. Drawing electoral lines on the basis of race is a pernicious enterprise. "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

CONCLUSION

For these reasons, and those stated by the petitioner, the Court should grant the petition.

Respectfully submitted,

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