

Case No.: F048277

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

ENRIQUE SANCHEZ, EMMA PINEDO, and SALVADOR VERA,

Plaintiffs-Appellants,

v.

CITY OF MODESTO, JEAN ZAHR, JIM RIDENOUR, BOB DUNBAR,
JANICE KEATING, GARRAD MARSH, WILL O'BRYANT, DENNY JACKMAN,
and BRAD HAWN,

Defendants-Respondents.

Appeal from the Superior Court of County of Stanislaus
The Honorable Roger M. Beauchesne, Presiding
Superior Court Case No. 347903

**BRIEF OF *AMICI CURIAE* CALIFORNIA COMMON
CAUSE AND FAIRVOTE IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

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Amici Curiae California Common Cause and FairVote respectfully submit this brief in support of the Plaintiffs-Appellants in the above entitled appeal from the Superior Court of Stanislaus County.

I. INTRODUCTION

Although the population of Modesto, California is fully 25.6% Latino there are no Latinos on the Modesto City Council, and only one Latino has ever been elected to the Council in its 94-year history. These facts are strong indicators of minority vote dilution in Modesto. They indicate that the winner-take-all, at-large voting system used in Modesto City Council elections usually enables bloc voting majority voters to prevent an identifiable subgroup of the population (*i.e.*, Latinos) from electing candidates of their choice or influencing the outcome of elections. Such an extended history of electoral futility strongly suggests that Latino voting strength in Modesto has not simply been diminished by winner-take-all, at-large elections. It has been eliminated entirely.

The dilution of their voting strength has serious consequences for minority communities like Modesto's Latinos. When minority voters are unable to elect candidates of their choice, they find themselves unrepresented in government. As a result, government is often unresponsive to minority concerns, which form no meaningful part of the public debate. Without adequate political representation, minority communities must frequently endure inadequate public services (including public schools, street maintenance, and fire and police services), unequal access to public employment opportunities, and government agencies that fail to respond to allegations of racial bias in their operations, among other harms.

The pernicious consequences of minority political isolation (*i.e.*, lack of representation and governmental disregard for minority concerns) exist regardless of whether they can be remedied by a court. Nevertheless, it has been held that, in order to state an actionable claim for vote dilution, a minority group must be able to demonstrate that an available alternative voting system would afford them an opportunity to elect

candidates of their choice or to influence the outcome of elections, which the voting system chosen by the jurisdiction in which they live denies them. Only if such an alternative voting system is available, the cases hold, can the jurisdiction's decision to use a system that dilutes minority voting strength be identified as the cause of the vote dilution, even in jurisdictions affected by racially polarized voting.

Certain minority groups are sufficiently numerous or geographically compact to comprise a majority in a single-member electoral district, even though they cannot elect their preferred candidates in winner-take-all, at-large elections. In vote dilution litigation, these groups prove causation by demonstrating that the jurisdiction could have afforded them the electoral strength that winner-take-all, at-large voting denies them by implementing a single-member-districted election system and drawing one or more majority-minority districts in which they will regularly be able to elect candidates of their choice.

For minority groups that are not sufficiently numerous or geographically compact to comprise a majority in a single-member district, this argument is obviously not available. And yet the effect of winner-take-all, at-large voting systems on their voting strength and their ability to make government respond to their concerns is no less severe, especially in jurisdictions affected by racially polarized voting.

The California Voting Rights Act ("CVRA") recognizes and addresses this potential limitation on the ability of small and dispersed minority groups to obtain meaningful remedies for the dilution of their votes by racially polarized voting in winner-take-all, at-large elections in at least two important ways. *First*, at the liability stage, the CVRA eliminates geographic compactness as an element of a state statutory vote dilution claim. In other words, minority groups can prove vote dilution, if they can demonstrate that another available voting system would afford them the voting strength that they are denied by winner-take-all, at-large voting, even if they are not sufficiently large or geographically compact to comprise a majority in a single-member-district. *Second*, at

the remedy stage, the CVRA requires courts to fashion remedies that are tailored to cure the vote dilution at issue before them. This remedial mandate directs courts, among other things, to remedy dilution of the voting strength of small and dispersed minority groups, once they have proved liability, even where they cannot comprise a majority in a single-member district.

In combination, these provisions of the CVRA empower California courts to employ a series of well-known and widely used remedies for vote dilution that affects small and dispersed minority communities. These remedies include influence districts, in which minority voters can elect their preferred candidates by forming stable electoral coalitions with voters from other groups, and modified at-large voting systems, which enable minority voters to elect their preferred candidates by lowering the “threshold of exclusion,” *i.e.*, the percentage of the vote at which a minority group can elect candidates of their choice on the strength of minority votes alone.

Influence districts and modified at-large voting systems have been implemented in a wide variety of jurisdictions throughout the United States over the past twenty years, and, in some instances, much earlier; and, where they have been implemented, the results have been remarkable. Minority voters with little or no history of electoral success have elected candidates of their choice, often for the first time, to city councils, school boards, and other legislative bodies. Moreover, this minority electoral success has proved durable. Small and dispersed minority groups have regularly elected candidates of their choice under these voting systems for decades. As a result, these long unrepresented minority communities have gained meaningful and lasting representation and their concerns have at last been heard in the halls of government.

California Common Cause and FairVote respectfully submit that the California Voting Rights Act is an important piece of civil rights and good government litigation. By empowering courts to take cognizance of the vote dilution that palpably affects small and dispersed minority communities and to implement proven, effective remedies to cure

such vote dilution, the statute promises to render California's state and local governments more truly representative of all of the people they govern. For all of these reasons, and as discussed more completely below, *amici* urge this Court to reverse the decision of the Superior Court and to uphold this important statute against the instant constitutional challenge.

II. ARGUMENT

A. Winner-Take-All At-Large Voting Systems Cause Vote Dilution In Jurisdictions Affected By Racially Polarized Voting, Even Where Minority Voters Cannot Form A Majority In A Single Member District.

The CVRA was designed to eliminate vote dilution in at-large elections. Cal. Elec. Code § 14027. Under the Act, an at-large election causes vote dilution when it "impairs the ability of the protected class to elect candidates of its choice or its ability to influence the outcome of an election." *Id.* In seeking to remedy vote dilution in California's political processes, the Legislature targeted a serious problem that palpably affects minority populations throughout the State, regardless of whether they are sufficiently numerous or geographically compact to constitute a numerical majority in a single-member electoral district.

1. Vote Dilution Causes Pernicious Harms.

The right of suffrage has long been recognized as a "fundamental matter in [our] free and democratic society," *Reynolds v. Sims* (1964) 377 U.S. 533, 561-62, 84 S. Ct. 1362, 12 L. Ed. 2d 506, "because [it is] preservative of all rights." *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 370; 6 S. Ct. 1064, 30 L. Ed. 220, accord *Burdick v. Takushi* (1992) 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (quoting *Illinois Bd. of Elections v. Socialist Workers Party* (1979) 440 U.S. 173, 184, 59 L. Ed. 2d 230, 99 S. Ct. 983, 59 L. Ed. 2d 230) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'"). Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws

under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders* (1964) 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481. Because it is "the citizen's link to his laws and government," *Evans v. Cornman* (1970) 398 U.S. 419, 421, 90 S. Ct. 1752, 26 L. Ed. 2d 370, "any alleged infringement of the right . . . to vote must be carefully and meticulously scrutinized," *Reynolds*, 377 U.S. at 562. "[T]he right to vote is [just] too precious, too fundamental to be . . . burdened or conditioned." *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 670, 86 S. Ct. 1079, 16 L. Ed. 2d 169; see *Kramer v. Union School District* (1969) 395 U.S. 621, 626, 89 S. Ct. 1886, 23 L. Ed. 2d 583 ("any unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government").

"[O]ne source of [the] fundamental nature [of the right to vote] lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore* (2000) 531 U.S. 98, 104-05, 121 S. Ct. 525, 148 L. Ed. 2d 388. For this reason, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. As the United States Supreme Court recognized over 40 years ago, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. To prevent this harm and to preserve each citizen's "inalienable right to full and effective participation in the political process[,]" *id.* at 563, the Court has repeatedly held that vote dilution is a pernicious harm that should be eradicated. See, e.g., *Johnson v. De Grandy* (1994) 512 U.S. 997, 1007, 114 S. Ct. 2647, 129 L. Ed. 2d 775; *Thornburg v. Gingles* (1986) 478 U.S. 30, 47-48, 106 S. Ct. 2752, 92 L. Ed. 2d 25; *White v. Regester* (1973) 412 U.S. 755, 765, 93 S. Ct. 2332, 37 L. Ed. 2d 314; *Reynolds*, 377 U.S. at 555; cf. *Bush v. Gore* 531 U.S. at 105.

Vote dilution of the type prohibited by the CVRA occurs "when an election

method impairs the political effectiveness of an identifiable subgroup of the electorate." Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 176 (1989). It constitutes a misuse of the majority's electoral power through the adoption of voting systems that minimize or eliminate minority political strength and, ultimately, governmental responsiveness to minority concerns. See *Gingles* 478 U.S. at 87 (O'Connor, J., concurring in the judgment) (vote dilution, "in the legal sense, simply refers to the impermissible discriminatory effect that a . . . [voting system] has when it operates to minimize or cancel out the voting strength of racial groups"). Vote dilution "'allows those elected to ignore [minority] interests without fear of political consequences,' leaving the minority effectively unrepresented." *Id.* at 48 n.14 (plurality opinion) (*quoting Rogers v. Lodge* (1982) 458 U.S. 613, 623, 102 S. Ct. 3272, 73 L. Ed. 2d 1012). Vote dilution thus strikes at the very heart of our representative form of government.

Moreover, vote dilution causes concrete and palpable harms that people whose votes have been diluted actually experience every day. Elected officials may be unresponsive to significant minority concerns and government may fail to provide necessary services for minority communities. Vote dilution "deprive[s] minorities of benefits such as government jobs, adequate services, and responsive officials available to address their complaints." James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of 'Representation'?*, 7 Mich. J. Race & L. 357, 394 n. 204 (2002). The case law is legion with examples of the dark legacy of minority vote dilution.

For example, in *Goosby v. Town Bd. of Town of Hempstead* (2nd Cir. 1999) 180 F.3d 476, 495, the case turned significantly on the Second Circuit's finding that the Town Board had been unresponsive to the particular needs of the Black community whose vote had been diluted by use of an winner-take-all, at-large voting system. Specifically, the

Court cited the following examples of the Town Board's disregard for Black concerns: "the lack of an affirmative action policy; the failure to take action in a case involving racial slurs in the workplace; the failure to respond to a complaint of race discrimination in employment that ultimately resulted in a judgment against the Town; the denial or disregard of funding requests for community centers in the black communities; the lack of training for the Town's Affirmative Action Officer; and the insensitivity of the Town Board to evidence of racism in a village fire department for which the Town provides financial support." *Id.*

Similarly, in *Buchanan v. City of Jackson* (W.D.Tenn. 1988) 683 F.Supp. 1515, 1536, the Court found that the City Commission did not respond to the needs of its Black community, whose votes had been diluted by a winner-take-all, at-large voting system: "It is clear that for approximately fifty years of government under the Jackson City Commission, elected officials were *not* responsive to the needs of the black community. The fact that ninety-one of 103 inadequate streets in 1978 were located in black neighborhoods, the fact that in 1955 and prior thereto the City of Jackson employed no black supervisors, black policemen, or black firemen, and the fact that no black has ever been appointed as head of any department make it painfully obvious that the City Commission has not always been responsive to the needs of black citizens." *Id.*

These are but two examples in the case law of unresponsive governmental bodies elected in jurisdictions using voting systems that diluted the strength of minority votes. Other examples abound. *See, e.g., Jeffers v. Clinton* (E.D.Ark. 1989) 730 F.Supp. 196, 213 ("Houses in black parts of town tend to be run down, streets and gutters are not as well kept, and there are more open ditches. Certainly this condition is due in part to the unresponsiveness of local government over the years, a situation that, however, is now beginning to change with the election of more black City Council members and Justices of the Peace."); *Dillard v. Baldwin County Bd. of Educ.* (M.D. Ala. 1988) 686 F.Supp. 1459, 1467 ("[T]he Baldwin County Board of Education has been particularly

unresponsive to the black citizens' concern about race relations in the county's schools, in particular concerns arising out of school desegregation and the apparent resulting displacement of black administrators."); *Bradford County NAACP v. City of Starke* (M.D.Fla. 1989) 712 F.Supp. 1523, 1538 (noting the city's lack of responsiveness to the needs of black citizens with regard to upper level employment opportunities; indicating "Blacks who are employed by the city are concentrated in lower paying, more menial positions" and that "no black individual has ever served as a department head for any of Starke's numerous departments.").

As these cases demonstrate, whenever a voting system deprives a community of an equal ability to influence the outcome of elections or to elect candidates of its choice, the community's concerns are more likely to be ignored by elected officials who are not answerable to voters in that community in any meaningful way. That is the central harm caused by vote dilution and it is one suffered by Latino voters in Modesto, whose votes have been diluted and whose political concerns have been ignored for years.

2. Winner-Take-All, At-Large Election Systems Cause Vote Dilution In Jurisdictions Affected By Racially Polarized Voting.

The earliest case recognizing the viability of minority vote dilution claims addressed the effect on minority voting strength of the adoption of winner-take-all, at-large voting systems. *See Allen v. State Bd. of Elections* (1969) 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed. 2d. In traditional, winner-take-all, at-large elections, voters from the entire jurisdiction vote to fill all open seats on a jurisdiction-wide legislative body. Each voter may vote for as many candidates as there are open seats, with the top vote-getters winning election to those seats. When the majority group votes as a bloc, it can elect its preferred candidates to every open seat on the legislative body, thereby completely "nullify[ing minority voters'] ability to elect the candidate[s] of their choice just as would prohibiting . . . them from voting." *Id.* at 569. Winner-take-all, at-large voting systems thus facilitate minority vote dilution in communities affected by racial bloc voting in a

manner that courts have long sought to eradicate. *See, e.g., Gingles*, 478 U.S. at 50-51; *White v. Regester*, 412 U.S. at 765-66; *Zimmer v. McKeithen* (5th Cir. 1973) 485 F.2d 1297, 1305, *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall* (1976) 424 U.S. 636, 96 S. Ct. 1083, 47 L. Ed. 2d 296.

The Supreme Court long ago described the unacceptable risks of winner-take-all at-large elections in jurisdictions affected by racially polarized voting :

At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election The minority's voting power in a multimember district is *particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines.*

Rogers v. Lodge, 458 U.S. 613, 616 (1982).

In the ensuing decades, countless courts have invalidated winner-take-all at-large election schemes in jurisdictions where racially polarized voting is prevalent precisely because of this dilutive effect.¹ And perhaps the starkest example arose in California.

¹ *See, e.g., U.S. v. Charleston County* (4th Cir. 2004) 365 F.3d 341; *U.S. v. Blaine County* (9th Cir. 2004) 363 F.3d 897; *Goosby v. Town Bd. of Town of Hempstead* (2nd Cir. 1999) 180 F.3d 476; *Cane v. Worcester County* (4th Cir. 1994) 35 F.3d 921; *Westwego Citizens for Better Government v. City of Westwego* (5th Cir. 1991) 946 F.2d 1109; *Campos v. City of Baytown* (5th Cir. 1988) 840 F.2d 1240; *Citizens for a Better Gretna v. City of Gretna* (5th Cir. 1987) 834 F.2d 496 ; *Cuthair v. Montezuma-Cortez, Colorado School Dist. No. RE-1*, (D.Colo 1998) 7 F.Supp.2d 1152 ; *League of United Latin American Citizens (LULAC) v. North East Independent School Dist.*, (W.D.Tex. 1995) 903 F.Supp. 1071; *Williams v. City of Texarkana*, (W.D.Ark. 1992) 861 F.Supp. 756; *Ward v. Columbus County* (E.D.N.C. 1991) 782 F.Supp. 1097; *Williams v. City of Dallas* (N.D.Tex. 1990) 734 F.Supp. 1317; *Bradford County NAACP v. City of Starke* (M.D.Fla. 1989) 712 F.Supp. 1523; *Brown v. Board of Com'rs of City of Chattanooga* (E.D.Tenn.1989) 722 F.Supp. 380; *Smith v. Clinton* (E.D.Ark. 1988) 687 F.Supp. 1310; *Buchanan v. City of Jackson* (W.D.Tenn. 1988) 683 F.Supp. 1515; *Jackson v. Edgefield County, South Carolina School Dist.* (D.S.C. 1986) 650 F.Supp. 1176; *Windy Boy v. Big Horn County* (D. Mont. 1986) 647 F.Supp. 1002.

See Gomez v. City of Watsonville (9th Cir. 1988) 863 F.2d 1407 (invalidating Watsonville's winner-take-all, at-large method of electing its mayor and city council where, even though 48.9% of the population was Hispanic, no Hispanic candidate had ever been elected). The CVRA's prohibition of winner-take-all, at-large voting systems in communities affected by racially polarized voting is thus an entirely appropriate legislative response to the sad history of minority vote dilution in similar circumstances.

3. Vote Dilution Occurs Regardless Of Whether Minority Groups Are Sufficiently Numerous Or Geographically Compact To Form a Majority in a Single-Member District.

The CVRA also appropriately recognizes that, in the presence of racially polarized voting, minority groups will experience the pernicious harms associated with winner-take-all, at-large elections, regardless of whether they are sufficiently numerous or geographically compact to form a majority in a single-member district. *See, e.g.,* Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743, 746 (1991-1992) ("While somewhat dispersed residentially, minority voters may be cohesive politically, and the votes of a dispersed minority can be diluted just as seriously as are those of a concentrated minority."); Karlan, *Maps and Misreadings*, 24 Harv. C.R.-C.L. L. Rev. at 203 (1989) ("[T]here may be cases in which minority voters, although not a large enough to constitute the majority of a single-member district, may nonetheless have their political strength diluted by the use of at large elections.").

Imagine a jurisdiction, where fully 40% of the population is Latino, yet the population is geographically dispersed such that a majority-minority district cannot be drawn. If white and Latino voters choose different candidates 80% of the time -- strong evidence of racial polarization -- Latinos will not be able to elect their chosen candidates to a governing board elected using a winner-take-all, at-large voting system. In this

example, the Latino-favored candidate will generally lose the election 56% - 44%.² Even if a majority-minority district cannot be drawn in this jurisdiction, that does not change the fact that the choice of a winner-take-all, at-large voting system enables racially polarized voting patterns to cancel out this sizeable minority population's political influence entirely. *See, e.g., Gomez*, 863 F.2d at 1409 (racially polarized voting in winner-take-all, at-large elections resulted in Watsonville's 48.9% Hispanic population never having elected a single mayor or city council member in the city's history).

In enacting the California Voting Rights Act, the Legislature recognized the very real harms that vote dilution inflicts on small and dispersed minority voting groups, and sought to address them by eliminating geographic compactness as an element of a vote dilution claim under the state statute. *See* Cal. Elec. Code § 14028 (c) ("The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section . . ."). The purpose behind the CVRA's elimination of the geographic compactness requirement is, as the Senate Judiciary Committee's analysis noted, to put "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)." Senate Judiciary Committee Analysis of SB 976, June 4, 2002 at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_09511000/sb_976_cfa_20020603

² Assume the City has a population of 100 voters (40 Latino voters and 60 white voters), and that candidate A is the Latino-favored candidate, and candidate B is the white-favored candidate. If 80% of the Latino population votes for candidate A, candidate A will receive 32 of the Latino population's votes (40 Latino voters x 80% = 32 votes). If 20% of the white population votes for candidate A, candidate A will receive only 12 of the white population's votes (60 white voters x 20% = 12 votes). Therefore, candidate A will receive only 44 of the total population's votes, while candidate B, the white-preferred candidate, will receive the remaining 56 votes. Candidate B, the white-preferred candidate, will win the election 56-44.

In other words, the Legislature sought to remove a barrier to the courts' ability to remedy the substantive conditions of minority vote dilution – political isolation of minority voters and governmental indifference to their concerns – which occur when government chooses to implement voting systems that enable bloc voting majorities consistently to deprive minority voters of the ability to elect candidates of their choice or to influence the outcome of elections, regardless of whether minority voters are sufficiently numerous or geographically compact to comprise a majority in a single-member electoral district.

Moreover, vote dilution under the CVRA is no standardless inquiry. To prove actionable vote dilution, minority voters must show that a voting system other than the one chosen by the jurisdiction in which they vote would enable them to elect candidates of their choice or to influence the outcome of elections. Without such a showing, minority voters would not be able to prove that the choice of the challenged voting system caused the dilution of their voting strength. The CVRA does not eliminate this requirement.

On the contrary, the Legislature simply put the focus of vote dilution analysis

³ Although certain interpretations of the Federal Voting Rights Act have left minority voters without a remedy in the face of clear vote dilution solely because they could not constitute a majority in a single-member district, *see, e.g., Valdespino v. Alamo Heights Independent School District* (5th Cir. 1999) 168 F.3d 848, 850-51; *Skorepa v. Chula Vista* (S.D. Cal., 1989) 723 F.Supp. 1384, 1388-90, the United States Supreme Court has recognized repeatedly that a federal vote dilution claim may be viable even where a minority cannot do so. *See, e.g., Voinovich v. Quilter* (1993) 507 U.S. 146, 154, 113 S. Ct. 1149, 122 L. Ed. 2d 500 ("But [black voters] could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters. We have not yet decided whether influence-dilution claims such as appellees' are viable under § 2."); *Johnson v. De Grandy* (1994) 512 U.S. 997, 1009 ("As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases.").

under the state statute on whether the jurisdiction could have chosen an alternative voting system that would enable minority voters to elect their preferred candidates or to influence the outcome of elections, regardless of the size or geographic compactness of the minority group in question. If such an alternative voting system is legally available, a jurisdiction's choice of a winner-take-all, at-large voting system constitutes vote dilution under the CVRA, if it deprives minority voters of the electoral power they would have wielded under the alternative system. This approach to minority vote dilution is both good news and good policy for those who care about preserving the representative nature of California government and for small and dispersed minority communities throughout the State.

Modesto is a perfect example of a jurisdiction where minority voters are not sufficiently numerous and/or geographically compact to constitute a majority in a single member district, but have their votes and their political effectiveness entirely nullified by a winner-take-all, at-large voting system. Despite a Latino population of approximately 25.6%, no Latino occupies a seat on the 7 member City Council, Complaint, ¶ 2, 19, 20, and only one Latino has ever been elected in the 94-year history of the City Council. Complaint, ¶ 2, 20.

The CVRA recognizes the very real harm suffered by Modesto's Latino voters and other minority voters throughout California, who have been denied the opportunity to elect candidates of their choice or to influence the outcome of elections by winner-take-all, at-large voting systems that permit bloc voting majorities to cancel out minority voting strength. There can be no doubt that alternative voting systems of the types discussed below would enable Modesto's Latino voters to elect candidates of their choice, even without constituting a majority in a single-member district. The availability of these alternatives demonstrates that the majority-elected government in Modesto has chosen a voting system that, under the circumstances prevalent in Modesto, denies Latino voters the ability to elect candidates of their choice and to influence the outcome of elections

that they would have under an available alternative system. That is the essence of vote dilution.

The CVRA thus provides Latinos in Modesto and other small and dispersed communities of minority voters with rights and remedies that enable them to eliminate the dilution of their votes and to ensure the representation of their interests in the halls of government, regardless of where they live within a jurisdiction. That result is wholly consistent with both "the core concern in racial vote dilution cases," *i.e.*, "political isolation, rather than geographic isolation" and "the central aim" of such cases, *i.e.*, "inclusion." Karlan, *Maps and Misreadings*, 24 Harv. C.R.-C.L. L. Rev. at 204. It is also true to a fundamental tenet of vote dilution jurisprudence and representative democracy: "Legislators represent people, not trees or acres." *Reynolds*, 377 U.S. at 562.

B. The CVRA Requires Courts To Fashion Effective Remedies To Cure Vote Dilution Affecting Smaller And Dispersed Minority Populations.

The framers of the CVRA understood that a variety of voting systems can enable small and dispersed minority populations to elect their preferred representatives or to influence the outcome of elections. By eliminating the geographic compactness requirement from the liability analysis, the Legislature empowered courts to recognize that a jurisdiction's choice of a winner-take-all, at-large voting system constitutes vote dilution when it deprives minority voters of the electoral power that one of these alternative systems would provided them. The statute also requires courts to fashion remedies that cure the particular conditions of minority vote dilution at issue before them, including by mandating the adoption of voting systems that enable small and dispersed minority populations to elect candidates of their choice or to influence the outcome of elections, if that is what is required to cure the dilution of their votes.

Section 14029 of the CVRA provides simply that "the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." The Governor's signing message underscored this point:

“[u]pon a determination that a violation has occurred, the court shall fashion appropriate remedies, including but not limited to single district elections.” Governor Gray Davis, Signing message regarding Stats. 2002, c. 129 (S.B. 976). Similarly, the Assembly Judiciary Committee's analysis indicates that, “[u]nlike prior legislation regarding at-large methods of election . . . this bill does not mandate that any political subdivision convert at-large districts to single-member districts. Instead, this bill simply prohibits at-large election systems from being used to dilute or abridge the rights of voters in protected classes.” Senate Judiciary Committee Analysis of SB 976, June 4, 2002 at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0951_1000/sb_976_cfa_20020603_131744_asm_comm.html.

These statements make clear that the CVRA provides courts with the flexibility in their choices of remedies for dilution resulting from the use of winner-take-all, at-large elections. The imposition of single-member, majority-minority districts remains an option, where appropriate, but courts can employ other remedies, including influence districts (which enable voters from one minority group to combine forces with voters from other groups to elect candidates of their choice), and modified at-large voting systems (which lower the threshold of exclusion, thereby enabling smaller groups of minority voters to elect candidates of their choice on the strength of minority votes alone). All of these voting systems have been used in a variety of jurisdictions to cure minority vote dilution affecting small and dispersed minority groups. The CVRA thus enables courts in this State to use these tested remedies to cure vote dilution where it surely exists and has remained unremedied for far too long.

1. Minority Influence Districts:

Influence districts, in which minority voters can elect their chosen candidates by forming coalitions with other minority groups or by drawing limited support from white “cross-over votes,” can effectively remedy minority vote dilution where protected groups are insufficiently numerous or geographically compact to form a majority in a single-

member district.⁴

a. Coalition Districts

A coalition district is one in which two separate protected groups can join forces to elect representatives of their choice, even though neither of them could do so on the strength of their own votes alone. Increasingly, urban communities are multiracial and multiethnic, and protected groups often have similar political concerns. This is especially true in California, where no racial or ethnic group constitutes a majority of the population. Coalition districts assure that jointly held minority interests are represented in government by enabling protected groups to combine their votes to achieve greater political effectiveness.

Several courts have recognized coalition districts as an effective remedy for minority vote dilution in multi-ethnic communities. *See Campos v. City of Baytown* (5th Cir. 1988) 840 F.2d 1240 (authorizing a coalition district of Black and Hispanic voters); *Bridgeport Coalition for Fair Representation v. City of Bridgeport* (2d Cir.) 26 F.3d 271 (authorizing a coalition district of Black and Hispanic voters), *vacated and remanded on other grounds*, (1994) 512 U.S. 1283, 115 S. Ct. 35, 129 L. Ed. 2d 931; *League of United Latin American Citizens Council No. 4386 v. Midland Independent School Dist.* 812 F.2d 1494 (5th Cir. 1987) (authorizing a coalition district of Black and Hispanic voters), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987).

For example, in *Campos v. City of Baytown*, Blacks and Hispanics together constituted 25.4% of the city's population, and yet, under a winner-take-all, at-large voting system, no minority candidate, either Black or Hispanic, had ever been elected to the Baytown City Council. *Campos*, 840 F.2d at 1241-42. The court found that the at-

⁴ Of course, any such districting plan will have to comply with the Equal Protection considerations delineated in *Shaw v. Reno*, (1993) 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511, *Miller v. Johnson*, (1995) 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762, and their progeny.

large election of City of Baytown council members constituted a violation of Section Two of the federal Voting Rights Act, because it diluted the votes of a politically cohesive combination of Blacks and Hispanic voters. *Id.* at 1241. In reaching this conclusion, the court relied on statistical evidence showing that, in elections pitting a minority candidate against a white candidate, Blacks and Hispanics usually voted together as a bloc for the minority candidate. *Id.* at 1245-48. The court then approved a Black and Hispanic coalition district to remedy the vote dilution in Baytown.⁵ *Id.* at 1244.

The California Supreme Court has similarly recognized the potential for coalition districts to give minority voters a meaningful chance to elect candidates of their choice. *See Wilson v. Eu* (1992) 1 Cal. 4th 707, 715 (commending California's proposed congressional and state legislative reapportionment plan for "endeavor[ing] to protect the *combined* voting strength of two or minority groups in areas containing substantial numbers of such groups.").

Coalition districts have likewise been used effectively in a number of jurisdictions to give minority concerns a voice in government. For example, the combined support of Black and Latino voters has often been a key factor in the success of Black and Hispanic congressional candidates. Thus, six of eight non-majority Black districts that elected Blacks to Congress in 1986 had substantial Hispanic populations, ranging from 25.1% to 38%. Bernard Grofman & Lisa Handley, *Minority Population and Black and Hispanic Congressional Success in the 1970s and 1980s*, 17 Am. Pol. Q. 436 (1989). Similarly, a U.S. Commission on Civil Rights study of coalition voting patterns in Texas "found that districts in which the Black and the Hispanic populations, when combined, exceed 50%

⁵ Although the court approved of the influence district remedy, it indicated that, because Texas is a "covered jurisdiction," any particular new voting system had to be submitted for preclearance under Section 5 of the Voting Rights Act before it could be implemented. *Campos*, 840 F.2d at 1250.

of the population are characterized by Blacks and Hispanics voting together for minority candidates. Such districts, the study showed, also elect more minority candidates than does a single Black or a single Hispanic district of the same total percentage." *League of United Latin American Citizens (LULAC) v. North East Independent School Dist.* (W.D.Tex. 1995) 903 F.Supp. 1071, 1089. And these minority voting coalitions have proved stable over time. In Bexar County, Blacks and Hispanics formed a political coalition in the 1960s and 1970s, and a coalition district in which neither of them constituted a majority consistently elected Black candidates in city council and state legislative elections for the next three decades. *Id.*

As these examples demonstrate, when two separate minority groups are politically cohesive and live in close proximity, coalition districts can be an effective remedy to cure vote dilution that has habitually prevented either or both of them from electing candidates of their choice.

b. Cross-over Districts:

A cross-over district is one in which minority voters are not a majority of the relevant voting population but can still elect representatives of their choice regularly with limited and reliable cross-over support from white voters. Cross-over districts can effectively remedy vote dilution in jurisdictions where white cross-over voters and minority voters live in the same or neighboring communities. As Justice O'Connor acknowledged in her *Gingles* concurrence:

[I]f a minority group that is not large enough to constitute a voting majority in a single membership district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Gingles, 478 U.S. at 90 n.1.

The United States Solicitor General has likewise recognized the ability of cross-over districts to remedy vote dilution: "Most importantly, even if voting in a particular jurisdiction is generally polarized by race, nonetheless there may be a small amount of consistent crossover voting from the majority (or from a different racial or language minority in the district) that would give the minority voters the potential to elect the representative of choice. "Brief of *Amicus Curiae* United States at 11, *Valdespino v. Alamo Heights Independent School Dist.* (2000) 528 U.S. 1114, 120 S. Ct. 931, 145 L. Ed. 2d 811 (No. 98-1987).

It is important to note, as the Solicitor General suggested, that the possibility of a cross-over district is not antithetical to racially polarized voting. *See id.* at 11 (noting that "a small but consistent amount of cross-over voting does not defeat a finding of racially polarized or bloc voting"). One can easily imagine a jurisdiction where cross-over voting is concentrated in the geographic area surrounding a minority enclave, but the degree of cross-over voting in other neighborhoods is much less. Whites who choose to live in racially integrated neighborhoods are more likely to share certain local concerns with their minority neighbors and may also be more likely than whites who choose to live in all-white areas to support minority candidates and candidates responsive to minority interests. *See* Karlan, *Maps and Misreadings*, 24 Harv. C.R.-C.L. L. Rev. at 203.

Cross-over districts have been used effectively to remedy vote dilution in a number of jurisdictions. For example, in the 1990s in several southern congressional districts, "the cohesive black support offered to black candidates and the consistent white crossover vote of about 33% for these candidates [in the general election] appears to have been sufficient to provide black voters with an opportunity to elect minority candidates to office from districts that were less than majority black." *See* Bernard Groffman, Lisa Handley, and David Lublin, *Drawing Effective Minority Districts: A Conceptual*

Framework and Some Empirical Evidence, 79 N.C. L. Rev. 1383, 1409 (2000-2001).⁶

Cross-over districts have had similar success in California. Cf. J. Morgan Kousser, *Beyond Gingles: Influence Districts And The Pragmatic Tradition In Voting Rights Law*, 27 U.S.F. L. Rev. 551, 566-67 (1991-1992) (noting that, while white crossover voting varies as much in California as the rest of the country, in four congressional races won by Black candidates in 1990, the Black percentage of the population in the districts did not exceed 34%, and in three districts won by Latino incumbents, the Latino percentage of the population did not exceed 41%).

As the commentators have recognized, where a majority-minority district cannot be created "and voting is still substantially polarized, a coalitional district [will] achieve the same aim [*i.e.*, facilitating minority representation], as long as enough white voters are willing to cross over." Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1553 (2002). In such circumstances, a cross-over district is an effective remedy for minority vote dilution.

c. Benefits Of Cross-over And Coalition Districts As Remedies For Vote Dilution

Cross-over and coalition districts are both district-based remedies. Single-member district voting systems have a number of recognized characteristics that may prove particularly helpful in remedying minority vote dilution and minority political isolation in a particular jurisdiction.

First, single-member districts promote effective individual and personal representation, which is "considered by some to be a fundamental principle of American democracy." Henry L. Chambers, *Enclave Districting*, 8 Wm. & Mary Bill Rts. J. 135,

⁶ It should be noted that there was a finding of racially polarized voting in *Gingles*, even with an average cross-over of 1/3 of white voters in a general election.

146 (1999). Because of the relatively small size of single-member districts, representatives may be more accessible to voters than they would be if they were elected at-large by a larger population. *See id.* ("That citizens can identify 'their' congressman, who is ready and willing to hear their entreaties, is meaningful and comforting."); Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 Hous. L. Rev. 1119, 1140 (1998) (discussing the advantages of single-member districts, indicating their relatively "small size allows constituents greater access to the representatives (and vice versa)"). And, because of this accessibility, representatives may also be particularly responsive to their constituents under a district-based system. Chambers, *Enclave Districting*, 8 Wm. & Mary Bill Rts. J. at 147 ("That focused communication allows the representative to advance the interests of her constituency as she deems appropriate, providing the best opportunity for the constituency to receive good representation."). Of course, making government more responsive to minority concerns is the fundamental purpose of vote dilution remedies.

Second, some community interests actually correlate with geography, and implementation of geographically smaller single-member districts may render government more responsive to such local concerns, which is especially important for local and municipal governments. *See* Karlan, *Maps and Misreadings*, 24 Harv. C.R.-C.L. L. Rev. at 181 ("Some of the discrete interests of minority citizens, such as the provision of municipal services at the neighborhood level (e.g., street paving, allocation of programs among neighborhood schools, or police services) will be closely correlated with geography."); McKaskle, *Of Wasted Votes*, 35 Hous. L. Rev. at 1140 (discussing the advantages of single-member districts, indicating their relatively "small size . . . allows for the possibility of greater delineation of geographical interest").

Third, district-based systems provide minority voters the opportunity to hold a single representative accountable for his or her responsiveness to their concerns by re-electing or defeating that representative in the next election. *See* Chambers, *Enclave*

Districting, 8 Wm. & Mary Bill Rts. J. at 147 ("[T]he continuing relationship [fostered by a single member district] allows constituents to hold the representative accountable in future elections for any shortcomings made apparent during a representative's term.").

Finally, cross-over and coalition districts, unlike majority-minority districts, foster political integration in a community, rather than racial division. See Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 Harv. L. Rev. 2208, 2215 (2003).

Coalition and crossover districts thus both remedy vote dilution effectively and foster good and responsive government and political integration. By giving courts the flexibility to employ these remedies where appropriate, the CVRA makes all of these benefits available to all California voters.

2. Modified At-Large Voting

District-based remedies are by no means the only cure for vote dilution affecting small and dispersed minority communities. As voters in an increasing number of jurisdictions can attest, modified at-large voting systems – including (1) limited voting, (2) cumulative voting, and (3) choice voting – also counteract vote dilution by enabling minority voters to elect candidates of their choice on the basis of their own votes alone.

a. Limited Voting

Limited voting is an at-large election system in which voters receive fewer votes than the number of open seats and may cast one of their votes for each candidate they support. The lower the number of votes each voter has to cast, the lower the percentage of votes necessary to win a seat. All candidates run in a single pool for all of the open seats and the top vote getters are elected in order to the number of seats available.

Limited voting counteracts minority vote dilution because it allows relatively small minority groups to elect candidates of their choice on the basis of their own votes alone, and reduces the ability of bloc-voting majorities to submerge the votes of a politically cohesive minority. See Engstrom, *Modified Multi-Seat Election Systems*, 21

Stetson L. Rev. at 758; Karlan, *Maps and Misreadings*, 24 Harv. C.R.-C.L. L. Rev. at 224. To understand how limited voting counteracts vote dilution, one must focus on the “threshold of exclusion,” *i.e.*, the percentage of the electorate that any group must exceed in order to elect at least one candidate of its choice regardless of how the rest of the electorate votes. The threshold of exclusion in limited voting systems is expressed in terms of a percentage of the entire electorate by the following formula:

$$\frac{[(\text{Number of votes each voter can cast}) \times 100]}{[(\text{Number of votes each voter can cast}) + (\text{Number of seats to be filled})]} + 1 \text{ vote}$$

The threshold of exclusion thus depends both on the number of open seats and the number of votes each voter may cast. In percentage terms, if five seats are being filled on a city council, the threshold is just over 16.7% if only a single vote is allowed, 28.6% if two votes are allowed, 37.5% if three votes are allowed, and 44.4% if four votes are allowed. Engstrom, *Modified Multi-Seat Election Systems*, 21 Stetson L. Rev. at 758.

Limited voting has been effectively used to remedy vote dilution in a number of jurisdictions, including localities in Alabama, North Carolina, Georgia, Connecticut, and Pennsylvania. See Edward Still, *Alternatives to Single-Member Districts*, in *Minority Vote Dilution* 249, 253 (Chandler Davidson ed., 1989); Engstrom, *Modified Multi-Seat Election Systems*, 21 Stetson L. Rev. at 758-62. Importantly, “[l]imited vote systems have long been used by local governments (particularly in the Northeast) because they assure minority representation by preventing the majority from shutting out the minority.” Karlan, *Maps and Misreadings*, 24 Harv. C.R.-C.L. L. Rev. at 224.

Thus, in Alabama, twenty-one different municipalities adopted limited voting systems as part of settlement agreements in federal Voting Rights Act litigation. Engstrom, *Modified Multi-Seat Election Systems*, 21 Stetson L. Rev. at 758. Blacks were candidates for election in fourteen of these municipalities in the next elections, but only seven races were contested. In the seven contested elections, Blacks won seats in six out

of seven municipalities. *Id.* In the seventh, the Black-preferred candidate lost by only a single vote to the candidate who won the last seat. *Id.* The use of limited voting gave many of Alabama's Black voters a long awaited first chance to elect local officials of their choice. "The victory by an African American candidate was the first ever in ten of the [] municipalities" that adopted limited voting. *Id.* at 759.

Minority voters in North Carolina also have had considerable success using limited voting systems to elect candidates of their choice. *Id.* at 759. In the first elections held in Bladen County, North Carolina after limited voting rules were adopted, two new Black officials were elected, one to the county commission and another to the school board. *Id.* A similar result was achieved in Sampson County. *Id.* And this pattern of minority electoral success has continued from these early limited voting elections all the way through the most recent elections. *See generally* Shaun Bowler, Todd Donovan & David Brockington, *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections*, Ohio State Univ. Press (2003) (analyzing the success of limited voting in providing fair representation to Latino and Black voting populations).

b. Cumulative Voting

Cumulative voting is an at-large election system in which every voter is given one vote for each seat to be filled and permitted to give more than one of his or her votes to a single candidate. Under this system, a voter in an election for the Modesto city council would be given six votes and allowed to give all six votes to one candidate (a strategy known as "plumping"), or to give one vote to all six candidates or to distribute their six votes in any other way they chose. By "plumping" their votes, members of a cohesive minority group can elect the candidate of their choice and/or influence the outcome of an election by expressing a strong preference for particular candidates.⁷

⁷ In one version of cumulative voting used in many jurisdictions like Amarillo, Texas, voters can allocate their votes in any manner they choose, be it one vote each to
(Footnote Continued)

The threshold of exclusion in a cumulative voting system is calculated using the following formula:

$$\frac{100}{1 + (\text{Number of Seats to be filled})} + 1 \text{ vote}$$

The greater the number of seats at issue, the smaller the threshold of exclusion will be. Thus, if five seats are to be filled, the threshold of exclusion in percentage terms is just over 16.7%, *i.e.*, a group must constitute 16.7% of the electorate in order to elect a candidate of its choice, regardless of how the rest of the electorate votes.

The reduced threshold of exclusion in cumulative voting systems has enabled minority voters to elect their preferred candidates in a number of different jurisdictions. *See* Charles Robinson, *Minority Voting Rights and Judicial Selection Reform in Texas: Why not a Modified At-Large Voting System???*, 3 *Hispanic L.J.* 11 (1997) (noting that approximately three dozen American jurisdictions have adopted cumulative voting as a remedy for minority vote dilution in local municipal and school board elections); Engstrom, *Modified Multi-Seat Election Systems*, 21 *Stetson L. Rev.* at 752 ("Cumulative voting elections have been held, as a consequence of vote dilution litigation, by local governments in Alabama, New Mexico, South Dakota, and Texas. Almost all of these elections have resulted in the election of minority candidates.").

In the *Dillard v. Chilton County Board of Education* litigation, five jurisdictions in Chilton County, Alabama (three municipalities, a county commission, and a county

several candidates or multiple votes to one highly favored candidate. In the equal allocation method used in Peoria, Illinois, a voter's votes are allocated equally among the candidates chosen by that voter. For instance, if a voter has five votes and votes for two candidates, each candidate receives 2.5 votes. This form of cumulative voting has a particularly easy ballot design that looks exactly like a traditional winner-take-all, at-large election for multiple seats.

school board) voluntarily adopted cumulative voting in order to settle a voting rights lawsuit. (M.D. Ala. 1988) 699 F. Supp. 870. In each of the jurisdictions, the Black population was either too small or too geographically dispersed to constitute a majority in a single-member district. *Id.* at 876. In the first election held under cumulative voting, a Black candidate was successful in four of five the jurisdictions. Karlan, *Maps and Misreadings*, 24 Harv. C.R.-C.L. L. Rev. at 234. And that success has continued. On the Chilton County Commission, in particular, Black Commissioner Bobby Agee, elected in the first cumulative voting elections, has been re-elected in every election since the adoption of cumulative voting, most recently in 2004. FairVote – The Center for Voting and Democracy, *Cumulative Elections in Alabama (2004)*, available at <http://www.fairvote.org/?page=516>.

Other examples of the success of cumulative voting abound. *See, e.g.*, Engstrom, *Modified Multi-Seat Election Systems*, 21 Stetson L. Rev. at 754 ("Cumulative voting was likewise a critical factor in the election in 1989 of a member of the Sisseton-Wahpeton Sioux tribe to the board of the Sisseton Independent School District No. 54-5 in northeastern South Dakota."); Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Different Texas Communities*, 78 Soc. Sci. Q. 973, 974 (1997) (noting that cumulative voting has been used at the local level in Texas to successfully combat racially polarized voting against Latino candidates).⁸

A recent, systematic study of cumulative voting and limited voting elections between 1994 and 1997 found that in jurisdictions using one of these voting systems,

⁸ Between 1870 and 1980, the lower house of the Illinois legislature used cumulative voting to give representation to political minorities. *McCoy v. Chicago Heights* (N.D. Ill. 1998) 6 F. Supp. 2d 973, 984-85. Cumulative voting has also frequently been used in corporate board elections to provide a voice to minority views among shareholders. *Id.* at 982.

when a Latino candidate sought office, Latino candidates were elected 65% of the time. Bowler, Donovan & Brockington, *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections*, at 95-96. Black electoral success was even more pronounced. Black candidates were elected in 97% of cumulative voting or limited voting elections in which a Black candidate was running. Importantly, in nearly all of these jurisdictions, a minority candidate had never been elected prior to the adoption of cumulative or limited voting. *Id.* at 96.

This pattern of minority electoral success and the elimination of vote dilution was repeated when cumulative voting was adopted in elections for the Amarillo Independent School District in 1999. Despite sizeable African American and Latino populations, a winner-take-all, at-large system had prevented fair minority representation on the school board. In 2000, cumulative voting was implemented, and in the inaugural election under the new system, a Black candidate was elected to the board for the first time, along with a Latino candidate. FairVote – The Center for Voting and Democracy, *The History of Cumulative Voting in Amarillo*, available at <http://www.fairvote.org/?page=247>.

c. Choice Voting

Choice voting (the modern version of the single transferable vote, or STV) is an at-large election system that allows members of a small or dispersed minority group to elect candidates of their choice and to be influential in elections, even when not electing a candidate of choice. Under choice voting, voters rank the candidates in order of preference (1st choice, 2nd choice, 3rd choice, and so on) and the votes are then tabulated in a series of rounds. Candidates are declared elected when they reach the threshold of election, but do not retain any votes that exceed that threshold. The threshold of election in a choice voting system can be expressed mathematically as:

$$\left[\frac{\text{number of votes cast}}{(\text{number of seats to fill}) + 1} \right] + 1 \text{ vote}$$

In the initial round of tabulation, first choices are counted, and any candidate who reaches the threshold of election is declared elected. In the next round, "surplus votes,"

defined as the number of votes cast for any winning candidate beyond what is needed to reach the threshold of election, are counted for the second choices of voters, as indicated by their ballots. To assure that all voter choices are given equal weight, the second choices on all ballots are counted and the value of all second choices is reduced to reflect the number of surplus votes available (*i.e.*, if 60 of 100 ballots constitute surplus votes after tabulation of the first round, second choices would be counted as 60% of a vote for the candidates not yet elected, with 40% of the ballot value going to election of the first choice candidate). If not all seats are filled at the end of the second round, then the candidate with the fewest votes is eliminated, and ballots cast for that candidate are counted for the candidate listed next on each voter's ballot. In this way, "[b]oth the 'surplus' votes received by a winning candidate and the 'wasted' votes cast in support of a losing (eliminated candidate) are transferred to the next choice indicated on the ballot." Engstrom, *Modified Multi-Seat Election Systems*, 21 Stetson L. Rev. at 762. These rounds of election continue until all seats are filled or the number of remaining candidates equals the number of open seats. See Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333, 342 & nn.42-43 (1998) (providing a complete explanation of choice voting and collecting references on specific counting procedures); Engstrom, *Modified Multi-Seat Election Systems*, 21 Stetson L. Rev. at 766 (providing an illustrative diagram of choice voting). Typically, the majority will elect a majority of the representatives, but the minority will not be excluded. See Still, *Alternatives to Single-Member Districts*, at 258-60.

Choice voting has been recognized as an effective way to counteract vote dilution, especially because it enables smaller, non-geographically compact minority groups to

elect candidates of their choice.⁹ See, e.g., Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867 (1998-1999); Engstrom, *Modified Multi-Seat Election Systems*, 21 Stetson L. Rev. at 762-69. Specifically, choice voting has been "used at some time to elect city councils in approximately two dozen American cities," *id.* at 767, including New York, Cincinnati, and Cambridge, Massachusetts. Mulroy, *Alternative Ways Out*, 77 N.C. L. Rev. at 1878-79 & n.61. Importantly, in all of the jurisdictions where it has been employed, choice voting has succeeded in providing fair representation for minority voters. See *id.* at 1893; Douglas Amy, *Real Choices, New Voices* 137-38 (1993); see also *McSweeney v. City of Cambridge* (Mass. 1996) 665 N.E.2d 11, 15 (choice voting "seeks more accurately...to provide for the representation of minority groups") (internal quotations omitted).

For example, after the first choice voting election for New York City community school boards in 1970, "the percentage of black and Hispanic community school board members dramatically jumped to levels approximating the black and Hispanic percentages of the New York's population." Mulroy, *The Way Out*, 33 Harv. C.R.-C.L. L. Rev. at 350. 28 years later, when New York tried to shift to another voting system for the 1999 elections, in order to allow the elections to take place on the city's lever voting machines, the Department of Justice denied preclearance of the change because the choice voting system was more effective in achieving fair representation for communities of color in the City's covered jurisdictions.

Choice voting is also used at the national level in several countries, including

⁹ The threshold of exclusion for a choice voting election is the same as that for a cumulative voting system. Mulroy, *Alternative Ways Out*, 77 N.C. L. Rev. at 1880. If five seats are to be filled, the value of the threshold is 16.7%, *i.e.*, a group must exceed 16.7% of the vote in order to elect a candidate of its choice, regardless of how the rest of the electorate votes.

Ireland and Australia. Mulroy, *Alternative Ways Out*, 77 N.C. L. Rev. at 1879. Notably, it has been adopted in Northern Ireland for its local and provincial elections to encourage fair representation and coalition-building.

Choice voting has two additional benefits pertinent to California's rapidly changing, racially complex communities. *First*, it increases opportunities for cross-over voting because cross-over voting still can happen under a choice voting system even when a voter supports a candidate of his or her race as a first choice. That voter may choose to rank a candidate preferred by a (different) minority group second choice. This pattern of coalitions across racial lines actually occurred when choice voting was used in five New York City Council elections from 1936 to 1945. Belle Zeller and Hugh A. Bone, *The Repeal of P.R. in New York City- Ten Years in Retrospect*, American Political Science Review at 1127-1148 (December 1948). *Second*, voting removes the disincentive for communities of color to run candidates when they are below the threshold of exclusion, allowing those communities to sponsor candidates who will make minority concerns part of the political debate. After all, even when minority voters fail to elect their first choice candidates, they may nevertheless be able to combine their votes with those of non-minority voters to help elect non-minority candidates who have earned their high rankings by responding to minority concerns. Mulroy, *Alternative Ways Out*, 77 N.C. L. Rev. at 1911-12.

d. Benefits Of Modified At-Large Voting Systems As Remedies For Vote Dilution

The modified at-large voting systems discussed above have a number of unique benefits that may assist in the elimination of vote dilution. Indeed, in some jurisdictions and for some minority populations, modified at-large voting may be the best or only effective remedy for vote dilution resulting from the use of a winner-take-all, at-large voting systems where racially polarized voting is prevalent.

First, and most importantly, modified at-large voting systems provide remedies for

vote dilution that affects small or dispersed minority groups. See Engstrom, *Modified Multi-Seat Election Systems*, 21 Stetson L. Rev. at 746 ("The opportunities to elect candidates of choice within modified multi-seat systems, of course, are not limited by the[] geographical constraints [of single-member districts], and therefore modified systems may provide better remedies, if not the only remedies, when residential dispersion is present."). Where there is geographical dispersion such that even coalition districts or cross-over districts cannot be drawn, modified at-large voting systems can assure that voters in protected classes are not left unrepresented in the halls of government. Modified at-large voting lowers the "threshold of exclusion", *i.e.*, the percentage or proportion of the electorate that any group must exceed in order to elect a candidate of its choice on the basis of its own votes alone, thereby enabling smaller but politically cohesive minority populations to elect their preferred candidates and to assure the representation of their interests, even without any significant support from a bloc voting majority. See Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Vote Dilution in Judicial Elections*, 9 Yale. L. & Pol'y Rev. 354, 358-59 (1991).

Second, because modified at-large voting systems are still at-large systems, mathematical equality in the weight of votes is achieved and the "one person, one vote" requirement of the Equal Protection Clause is always satisfied. See Tucker, *Redefining American Democracy*, 7 Mich. J. Race & L. at 386 ("Alternative voting systems using modified at-large methods of election eliminate difficulties posed by the "one person, one vote" mandate because the entire legislative body is elected from what amounts to a single, multimember district."); Mulroy, *Alternative Ways Out*, 77 N.C. L. Rev. at 1924 ("The ability of voters to cast more than one vote is not a violation of the "one-person, one-vote" constitutional principle because each voter is entitled to the same number of

votes.).¹⁰

By contrast, in district-based systems, governments must redraw districts regularly in order to satisfy the one person, one vote requirement, while also never losing sight of the effect of such redistricting on the voting strength of protected groups. The redistricting process can be politically divisive, very costly, and may leave protected groups in malapportioned districts for years at a time. These problems are particularly acute in states, such as California, with highly mobile, multi-ethnic populations. See Geographical Mobility: 1995-2000, Census 2000 Brief at <http://www.census.gov/prod/2003pubs/c2kbr-28.pdf>. Modified at-large voting systems obviate the need for redistricting and may thus be less divisive, thus more cost-efficient, and better tailored to the needs of a mobile population.

Third, because modified at-large voting systems do not involve the drawing of race-conscious districts, they are facially race neutral and therefore do not implicate equal protection concerns identified in such cases as *Shaw v. Reno*, 509 U.S. 630 (1993) and *Miller v. Johnson*, 515 U.S. 900 (1995).¹¹ See Mulroy, *The Way Out*, 33 Harv. C.R.-C.L. L. Rev. at 350-52 ("Because [modified at-large voting systems] are race neutral, they do not run afoul of the constitutional prohibitions set out in *Shaw*, *Miller*, and their progeny.").

¹⁰ At least one court has recognized the intuitive point that modified at-large voting systems satisfy the one-person, one-vote requirement. See, e.g., *Kaelin v. Warden* (E.D. Penn. 1971) 334 F. Supp. 602, 605 (finding a limited voting system to satisfy one person, one vote because "each elector necessarily has the same relative voting strength since each is permitted to cast two votes and the election is at-large.").

¹¹ The Supreme Court has held that when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the resulting plan would be subject to strict scrutiny, and would be found constitutional only if it is "narrowly tailored to achieve a compelling interest." *Miller*, 515 U.S. at 916, 920.

Fourth, choosing modified at-large systems over districted remedies may also make sense from a good government perspective. "[B]ecause these systems tend to allow less well-known candidates and parties to gain seats and to prevent dominant groups from sweeping elections, electoral contests held under these systems tend to offer voters more choices, and to be more competitive, which in turn leads to higher participation rates." *Id.* at 350-52; see also Mulroy, *Alternative Ways Out*, 77 N.C. L. Rev. at 1894-95 & nn.144-48 (collecting studies that show modified at-large voting systems result in higher voter turnout than districted systems); accord Bowler, Donovan & Brockington, at 77-79, 89-91 (same).

Fifth, modified at-large voting systems may help reduce racial tensions in ways that single-member districts cannot. When jurisdictions draw single-member districts that are controlled by politically cohesive minority groups, legislators may decide that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw*, 509 U.S. at 648. By contrast, modified at-large voting encourages cross-racial coalitions and cooperation. By making all legislators accountable to all constituents, modified at-large voting systems give them incentives to seek political support throughout the jurisdiction and not simply from voters who share their race or live in their often racially-defined neighborhoods. Mulroy, *Alternative Ways Out*, 77 N.C. L. Rev. at 1903-04.

For all of these reasons, modified at-large voting is both an effective remedy for vote dilution affecting small and dispersed minority populations and an important good government reform. By empowering courts to impose modified at-large voting as a remedy where appropriate, the CVRA assures that all of these benefits are available to voters in jurisdictions affected by minority vote dilution.

III. CONCLUSION

By eliminating geographic compactness as an element of a state statutory vote

dilution claim, the CVRA empowers courts to take cognizance of vote dilution that affects small and dispersed minority communities. By requiring courts to implement remedies that are tailored to cure the CVRA violations before them, the statute also both authorizes (and, in some cases, directs) them to use influence districts and modified at-large voting systems to remedy such vote dilution, where they would prove effective. These are important reforms that will, at last, provide members of long disenfranchised communities with a voice in their government and make California's governmental bodies – state and local – more truly representative of all the people they govern. For all of these reasons, California Common Cause and FairVote respectfully submit that the CVRA is an important piece of good government reform that this Court should uphold against the instant constitutional challenge.

DATED: March 1, 2006

Respectfully submitted,

By  _____
KATHAY FENG

Attorney for *Amici Curiae*
California Common Cause and FairVote

CERTIFICATE OF COMPLIANCE

Kathay Feng hereby certifies that the Brief *Amicus Curiae of California Common Cause and FairVote* in Support of Plaintiffs-Appellants is in compliance with the requirements of Rule 14(c)(1) of the Rules of the California Court of Appeals because the brief contains 10,138 words, including footnotes and quotations as calculated by the computer program used to prepare the brief.

DATED: March 1, 2006

Respectfully submitted,

By  _____
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PROOF OF SERVICE

I, Leila A. Fergueson, declare as follows:

I am and was at the time of the service mentioned in this declaration, employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action.

My address is 501 East Foothill Boulevard, Apartment A, Monrovia, California 91016.

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FAIRVOTE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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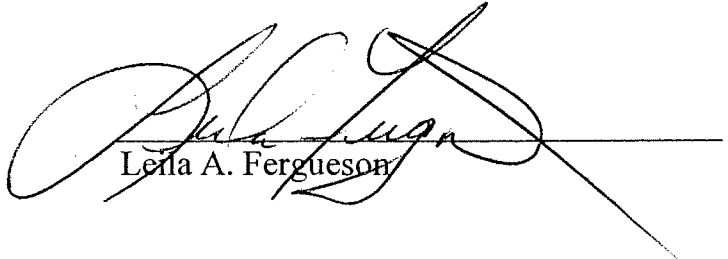
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I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this proof of service was executed on March 1, 2006 at Los Angeles, California.


Lena A. Ferguson