Exempt from Government Code § 6103

H046105 / H046696

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

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

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

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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

/s/ Steven G. Churchwell

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

II. STATEMENT OF APPEALABILITY

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

III. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Total	34,468	100.00%

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

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

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

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

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

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

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

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

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

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

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

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

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

V. STANDARD OF APPELLATE REVIEW

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

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

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

VI. APPLICABLE LAW

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

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

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

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

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

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

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

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

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

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

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

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

B. Differences Between the CVRA and Federal VRA.

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

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

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

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

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

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

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

VII. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

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

DATED: July 23, 2019

Respectfully submitted,

By /s/ Steven G. Churchwell
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City of Santa Clara

STATEMENT OF COMPLIANCE

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

DATED: July 23, 2019 CHURCHWELL WHITE LLP

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

CERTIFICATE OF SERVICE

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

APPELLANT'S OPENING BRIEF

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

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

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

☐ By Express Mail or another method of overnight delivery to the person/entity at the address set forth below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☒ By electronically transmitting a true copy to the persons/entities via electronic filing submission.

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

/s/ Alicea Norsby
Alicea Norsby