City of Sunnyvale

Agenda Item

18-0776 | **Agenda Date:** 9/5/2018

REPORT TO COUNCIL

SUBJECT
Direction Regarding Public Outreach and Submitting a Charter Amendment to Voters Regarding Changing At-large with Numbered Seats to District-Based Elections

REPORT IN BRIEF
Cities throughout the state have increasingly been facing legal challenges to "at-large" systems of electing city councilmembers. The California Voting Rights Act ("CVRA") was adopted to address vote dilution caused by at-large election systems in the presence of racially polarized voting. Almost all cities challenged under the CVRA have settled claims out of court by voluntarily shifting to district-based elections. In the Bay Area, cities including, among others, Fremont, Menlo Park, and Morgan Hill, have recently switched to district-based elections.

This issue made headlines in our neighboring city of Santa Clara over the last several months. Santa Clara, which has a charter provision with an at-large, numbered-seat system nearly identical to Sunnyvale's system, was sued by the South Asian Law Alliance claiming that the system violated the CVRA by diluting the vote of Asian voters. Santa Clara chose to litigate the issue and the case went to trial in April 2018. The Santa Clara County superior court judge agreed with plaintiffs, holding that Santa Clara's system violated the CVRA. The second phase of the trial to determine remedies was held in July 2018, and the court ordered Santa Clara to shift to district-based elections (six districts and a separately-elected mayor) beginning in November 2018.

Although most cities that have changed their electoral systems have done so under the threat of CVRA litigation, staff is bringing this issue forward and recommending that the Council make the voluntary choice to submit the issue to Sunnyvale voters as a charter amendment to comply with the CVRA's disfavor of at-large electoral systems and eliminate the City's exposure to litigation. The fact that Santa Clara's substantially similar system was recently struck down makes this issue timely for the Council's consideration. As discussed in detail below, Sunnyvale would likely face a high burden if sued, CVRA litigation is tremendously costly, and the outcome of litigation would be highly uncertain. Voluntarily initiating the process to switch to by-district elections will give the Council greater flexibility to determine the process, and the community greater opportunity for input, than the City would have if CVRA litigation is threatened or commenced.

BACKGROUND
1. **The California Voting Rights Act Makes it Easier for Plaintiffs to Prevail in Lawsuits Challenging At-Large Voting Systems**

The CVRA was signed into law in 2002. Broadly, the CVRA prohibits an at-large method of election that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election. The law's intent is to expand protections against vote dilution over those

provided by the Federal Voting Rights Act of 1965 ("FVRA"). The law was also motivated, in part, by the lack of success by plaintiffs in California in lawsuits challenging at-large electoral systems brought under the FVRA. The passage of the CVRA made it much easier for plaintiffs to prevail in lawsuits against public entities that elect members to their governing bodies through "at-large" elections. To establish liability under the CVRA, a plaintiff must prove the existence of "racially polarized voting," which is defined as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and the electoral choices that are preferred by voters in the rest of the electorate." Other factors are also relevant in determining liability. Proof of intent on the part of voters or elected officials to discriminate against a protected class is not required. In addition, plaintiffs are not required to prove that the protected class can form the majority of the eligible voters in a single-member district in order to proceed to trial, a significant change from the proof required under the FVRA.

As a result of the CVRA, public agencies throughout the state have increasingly been facing legal challenges to their "at-large" election systems. Only 28 of California's 482 cities had by-district election systems prior to the passage of the CVRA. Between 2011 and 2016, that number doubled to 56. Today, at least 88 cities have transitioned to by-district elections, with an estimated two dozen or more at various stages of switching or litigating the issue. School districts and counties have also been targets for CVRA litigation, and like cities, have made the switch to district elections as a result of threatened litigation, or to settle litigation. Almost all agencies challenged have settled CVRA claims out of court by essentially agreeing to voluntarily shift to district-based elections. Those that have defended CVRA challenges in the courts have ultimately either voluntarily adopted, or have been forced to adopt, district-based elections.

Sunnyvale is subject to the CVRA because it has an electoral system that provides for at-large elections. Sunnyvale's system includes an additional feature, candidates run for specific seats but on a citywide basis. *See* Charter Section 601. This type of system is commonly referred to as a "numbered post" or "numbered-seat" system. Although uncommon at the local level in California, a few cities historically used this type of system. Our research indicates that all except Sunnyvale have switched to district elections, either through settlement of litigation or by court order.

2. <u>**Litigation Outcome under the CVRA is Highly Uncertain**</u>

The CVRA is largely untested in the California Courts of Appeal, with only three precedential rulings. Significantly, the California Court of Appeal for the Fifth District upheld the CVRA against a facial constitutional challenge in *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006). Both the California and United States Supreme Courts denied review, and Modesto ultimately settled the litigation.

Litigation has also been filed against several cities and jurisdictions, but nearly all have settled at various stages of the litigation. Only three CVRA cases have gone to trial. In the first, *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781 (2014), the City lost in the trial court and was forced into district-based elections formulated by the plaintiffs. An interlocutory appeal in the case determined that the CVRA applies to charter cities. The appeal on the merits settled before a final determination on appeal. The second, *Kaku v. City of Santa Clara*, resulted in a trial court decision discussed in more detail below, holding that Santa Clara's at-large electoral system with numbered-seats violates the

CVRA. Further, at the remedies phase, the court ordered immediate district-based elections. The third, *Pico Neighborhood Association v. City of Santa Monica*, is in the middle of trial as of the writing of this report, with the city arguing, among other defenses, that it's at-large system does not violate the CVRA because districts will not meaningfully enhance minority representation.

Another case, *Higginson v. City of Poway*, was brought by the former mayor of that City after it switched to district-based elections in response to a threat of litigation. Former Mayor Higginson, as plaintiff, is arguing that the decision to switch to district-based elections violated his constitutional rights as a racial gerrymander that directly affected him by reducing the number of candidates for which he can vote. The case is now pending in federal district court in Southern California after the Ninth Circuit Court of Appeals reversed an earlier dismissal.

Decisions are not expected on the merits of either the Santa Monica or Higginson cases for some time, and it appears likely that both will be appealed once trial court decisions are issued.

   a. *Kaku v. City of Santa Clara*

The Santa Clara case is important for Sunnyvale to consider because of the similarities between the demographics and the electoral systems in both cities, as well as their geographic proximity. Plaintiff in this case alleged that Santa Clara's at-large, numbered-seat system for electing city council members impaired the ability of Asians to elect preferred candidates.

CVRA trials are held in two phases. First, liability, determining whether a City's electoral process violates the CVRA. Second, if a CVRA violation is found, a remedies phase to determine how the violation should be corrected.

A primary factor in determining liability in a CVRA case is statistical analysis of voting patterns over time and election results for minority candidates who are preferred by minority voters. The plaintiffs' expert in *Santa Clara* presented analysis showing that five of ten city council elections, as well as six of nine county and school board elections, exhibited racially polarized voting. The City argued, among other arguments, that the usual statistical methods to analyze racially polarized voting could not produce reliable results because there is not a high enough concentration of Asians in any precinct, and that, even if statistical methods did have some probative value, they did not show racially polarized voting. The court not only rejected all of Santa Clara's arguments on these points, but also accepted a lower standard of reliability for the statistical analysis in order to establish racially polarized voting in some elections: 80% rather than the typical 95% standard for such statistical analysis.

In addition to statistical analysis on whether voting is racially polarized, other factors, such as the extent to which minority representatives have been elected, a history of discrimination, or voting practices that enhance the potential for discrimination, may also be considered in determining liability. The court was convinced that many of these other factors also weighed in favor of finding a CVRA violation in Santa Clara. For example, the court noted that "at-large voting systems are disfavored under both federal and California voting rights laws because it is well-understood that such election systems can dilute the votes of racial minority groups." (Citing *Thornburg v. Gingles* (1986) 478 U.S. 30, 47). Although nearly 40% of Santa Clara residents and 30% of eligible voters are Asian, voters had never elected an Asian to the City Council, and the City had considered but failed to address the

issue on several occasions even though plaintiff had put Santa Clara on notice of the alleged violation as early as 2011. The court also noted that the "numbered-seat" system of at-large elections has been held in numerous cases to disadvantage minority voters, in part by preventing them from concentrating their votes behind a single minority-preferred candidate and withholding votes from less preferred candidates. (Citing, *e.g., City of Rome v. United States* (1980) 446 U.S.156). Thus, the court concluded that both the statistical evidence and other evidence demonstrated that Santa Clara's system violated the CVRA.

In the remedies phase, the court enjoined further at-large elections, ordered the City to conduct a highly expedited process to develop proposed electoral districts, and then ordered future City Council elections to be conducted by-district elections. Following a ten-hour trial, the court selected a six-district map with a separately elected mayor proposed by the City, and directed the City and the Registrar of Voters to implement district elections beginning with the November 2018 election.

There are three important takeaways from this case for the Sunnyvale City Council to consider. First, the court, the same court in which a case against the City of Sunnyvale would likely be tried, was willing to accept statistical evidence that did not meet usual standards of reliability. Second, the court could find that other factors-particularly the at-large, numbered-seat system that is nearly identical to the system at issue in *Santa Clara*- weigh in favor of finding a CVRA violation. Finally, the outcome if Sunnyvale was sued could be a court-ordered switch to by-district elections, eliminating the opportunity for the City to determine the process for community input, discussion, and education on an issue that arguably goes to the core of city governance, and truncating the community's ability to participate meaningfully.

1. The Potential Costs of CVRA Litigation are Extremely High

The CVRA has a mandatory provision that awards reasonable attorney fees and costs, including expert fees, to the prevailing plaintiff. This requirement applies even if the case settles and districts are instituted after the lawsuit is filed. Fees and expenses in a voting rights lawsuit, which requires generally two or more experts, can be quite high. Cities that attempted to defend their "at-large" systems of city council elections in court have incurred significant legal costs for defense, and paid huge amounts in plaintiffs' attorney fees. Attorneys' fee awards in cases that have gone to trial have reportedly reached $3,500,000 and beyond. Even cases that settle typically have included paying substantial amounts (six-figures or more) in plaintiff's attorneys' fees. To date, staff is unaware of any city that has prevailed in defending its "at large" system of election under a claim filed by any individual or group under the CVRA.

Moreover, even if a city prevailed, it would be responsible for its own defense costs because the CVRA does not allow fee or cost recovery for prevailing defendants. Defense costs for a complete trial under the CVRA are likely to exceed $1 million. Also, without changing its electoral system, the City would continue to remain vulnerable to subsequent litigation brought under the CVRA by different plaintiffs.

DISCUSSION

1. Sunnyvale Elections, Census Data, and Election History

As noted above, Sunnyvale has an electoral system specified in its charter that provides for at-large elections, with candidates running for specific seats on a citywide basis. This system is subject to challenge under the CVRA.

Under the most recent estimates (2012-2016) available from the United States Census Bureau's American Community Survey, approximately 52 percent of Sunnyvale's eligible voters, (i.e., Citizens of Voting Age, or "CVAP") are members of a minority group:

City of Sunnyvale - Summary Demographics	Count	Percent
Total Population (2010 Census)	140,081	
Ideal District Size	20,012	
Voting Age Population (2010 Census)	108,646	
Citizen Voting Age Population (2012-2016 Special Tabulation)	77,125	
Hispanic/Latino CVAP (2012-2016 Special Tabulation)	10,687	13.86
Non-Hispanic White CVAP (2012-2016 Special Tabulation)	37,035	48.02
Non-Hispanic Black CVAP (2012-2016 Special Tabulation)	2,560	3.32
Non-Hispanic Asian CVAP (2012-2016 Special Tabulation)	25,679	33.30
Non-Hispanic Pacific Islander CVAP (2012-2016 Special Tabulation)	338	0.44
Non-Hispanic Indian CVAP (2012-2016 Special Tabulation)	457	0.59
Non-Hispanic "Other" & Multi-racial CVAP (2012-2016 Special Tabulation)	370	0.48
Total Registered Voters (2016 General Election)	60,926	
Spanish-Surnamed Registered Voters (2016 General Election)	7,352	12.07
Asian-Surnamed Registered Voters (2016 General Election)	13,226	21.71
Total Actual Voters (2016 General Election)	50,586	
Spanish-Surnamed Actual Voters (2016 General Election)	5,757	11.38
Asian-Surnamed Actual Voters (2016 General Election)	10,756	21.26

With regard to Asian and Latino eligible voters, Sunnyvale's demographics are similar to the City of Santa Clara's.

Over the years, Sunnyvale has had City Council candidates and Councilmembers that identify as a minority race or ethnicity.
- In 2013, Magana ran for City Council and lost to Hendricks.
- In 2011, Chang lost to Meyering; and Pan lost to Milius.
- In 2009 and 2003, Flores lost to Moylan and Swegles, respectively.
- In 2003, Chu won but was not reelected in 2007, when he lost to Whittum.
- Lee won in 2003 and served a term as mayor. Lee was not challenged in 2007 and served another term.

While Asian candidates have had success running for election to the Sunnyvale City Council, plaintiffs could argue that more recent losses (Magana, Chang, Pan, Flores, and Chu) are more probative of the current ability of minority candidates to get elected, if there is racially polarized voting. Potential plaintiffs would also introduce evidence of the electoral success of minority candidates for other jurisdictions. For example, Flores ran for election to the Sunnyvale School District Board of Trustees in 2005, and was not elected. On the other hand, Trustee Mah has represented Sunnyvale School District on the Board of Education for three terms.

As noted above, proof of intent to discriminate against a protected class is not required. Moreover, the CVRA does not require, at the liability stage, that plaintiffs demonstrate the possibility of creating a district that is majority-minority in terms of the Citizens of Voting Age Population.

2. Types of Voting Systems

There are five major types of voting systems in use throughout California, discussed below. As a charter city, Sunnyvale has the flexibility to choose any of these methods, or a different method. However, as a practical matter, it is constrained because (a) if a court concludes that the City is in violation of the CVRA, by-district elections is the only remedy to date imposed by a court under the CVRA, and (b) even if it was clear that some of the other methods, discussed below, met CVRA requirements, the Santa Clara County registrar of voters, which administers Sunnyvale elections, does not currently have the ability to implement the last two methods (i.e., cumulative voting and ranked choice voting). Consequently, Staff is recommending that Council focus narrowly on the question of switching to by-district elections at this time in order to address the immediate issues related to CVRA compliance. Other methods or related considerations could be evaluated separately as future study issues.

a. At Large: In at-large elections, voters of the entire city elect all members of a city council every two years. Depending on the number of open positions on a city council, the top three or four vote-getters (e.g., in a city with seven council members) win a seat on the City Council. At-large elections can also have the added feature of numbered-seats, in which candidates must run for specific seats on the City Council, and only the top vote-getter for each seat is elected. Advocates of at-large elections argue that governance is improved when elected officials answer to the entire community and not the interests of their district alone, and contend that officials elected by-districts tend to have too much influence over decisions affecting their district or make decisions to benefit their individual districts, rather than the community as a whole. Also, in at-large elections, all voters vote for city council candidates every two years; in by-district elections, voters vote only every four years. *The plain language of the CVRA explicitly targets elimination of at large elections.*

b. From-District: Another version of an at-large elections system is a "from-district" elections system where each council member is elected by voters from the entire city, but the city is divided into districts and each council member must reside within a particular district. This hybrid system provides some assurance of geographical representation for all parts of the City, while also promoting citywide decision making. *However, this system is not immune from a CVRA challenge.*

c. By-District: In a by-district election system, a city is divided into equipopulous districts and one council member is elected by only the registered voters in that particular district. Advocates of by-district-based elections argue that officials elected by-districts are more responsive to the constituents in the district and all areas of the City are represented. Also, as all CVRA lawsuits assert,

by-district voting allegedly makes it easier for members of protected classes to elect candidates of their choice because theoretically, minority voters would be concentrated in a particular number of districts increasing their voting strength. Additionally, some argue that non-incumbents fare better in by-district elections because a by-district system likely makes running for election more accessible in terms of campaign time and costs since citywide campaigning is not required, and voter choices are simplified with fewer candidates to learn about. Cities around the state are now moving to by-district elections regardless of size, although historically by-district elections were commonly utilized primarily in large cities with distinct neighborhoods. Sunnyvale has experienced significant growth over the last several decades and now has a population size that historically would have made by-district elections a stronger consideration, independent of the CVRA. *By-district elections are the only form of election that is immunized from a CVRA challenge.*

d. Cumulative Voting: Cumulative voting allows a voter to cast more than one vote per candidate. For example, if there are three Council seats up for election, a voter can cast all three votes for one candidate, or two votes for one candidate and one for a second candidate, or one vote each for three candidates. Mission Viejo recently settled a CVRA lawsuit by agreeing to implement cumulative voting beginning in 2020, and is believed to be the first municipal entity in the state to use this method. Also, in the CVRA lawsuit against the City of Santa Clarita, the parties proposed a settlement by implementing cumulative voting, but the California Secretary of State filed a letter with the Court noting there was no authority for cumulative voting in cities in California. *There is no definitive authority that cumulative voting remedies a CVRA violation, the Santa Clara County Registrar of Voters cannot currently implement this system and staff is unaware of any time table for the Registrar of Voters to implement this system.*

e. Ranked Choice Voting
Ranked-choice voting ("RCV"), sometimes called instant-runoff voting, gives voters the option of choosing multiple candidates in order of preference. After the ballots are first counted, if no candidate receives a majority of the votes, the candidate with the fewest top-rank votes is eliminated and the next choices of that candidate's supporters are apportioned among the remaining candidates. The process continues until one candidate gets a majority. Section A(5) of Council Policy 7.0 (Long-term Advocacy Positions - Planning and Management) supports "Instant Runoff Voting if/when it is determined to be economically and technologically feasible for the county." RCV can be combined with by-district elections, which is currently done in San Francisco, Oakland, Berkley and San Leandro. *Like cumulative voting, no authority approves RCV alone (i.e., without underlying districts) as remedy to CVRA violations, and the Santa Clara County Registrar of Voters is not currently able to implement this method.*

3. **Voluntarily Switching to District Elections Will Requires a Charter Amendment and Subsequent Actions to Establish the Process for Drawing District Boundaries**

Sunnyvale's process for electing council members is established in Article VI of the City Charter. Thus, absent a judicial finding that the City is in violation of the CVRA, voter approval is required to amend the Charter to change its electoral system. If the City Council chooses to voluntarily submit to the voters the question of changing to district-based elections, and voters approved that change, the City could follow the phased approach to implementing district-based elections that most communities have taken.

In drawing district boundaries, many factors may be considered, including topography, geography, cohesiveness, contiguity, integrity, and compactness of territory, and community of interests of the districts, among others. (*See* Government Code section 34884; Elections Code section 21601.) Federal law states that districts cannot be drawn with race as a predominate consideration. (See, e.g., *Miller v. Johnson* (1995) 515 US. 900, 917-19.) Because these factors involve inherently local considerations and knowledge, it is important for the City Council and community to have the opportunity for robust discussion and for the community to provide substantive input to the City Council on this issue.

4. <u>**Recommended Strategy for Addressing CVRA Exposure**</u>

As discussed in section 2 above, by-district elections are currently the only method that insulates an agency from CVRA litigation. While staff acknowledges that there are a number of other election systems that may have desirable components, and that related governance issues might arise in discussion about election methods, we recommend a phased approach that first addresses the narrow issue of district-based elections in order to mitigate the immediate challenge presented by the CVRA and to provide meaningful public participation in that discussion, which could be curtailed if the City is sued or even threatened with litigation, as discussed in section 5 below. Layering issues onto the immediate CVRA concern risks complicating and prolonging the process, which the court viewed with disfavor in the Santa Clara case.

Therefore, staff recommends a phased approach as follows:

Phase 1- Public Outreach and Education on District Elections.
- Timeline**:** Winter- Spring 2019.
- Scope: Public engagement and education regarding the issue of changing to district-based elections. Details of outreach plan to be determined/approved by City Council in Fall 2018.

Phase 2: Decision on 2020 Ballot Measure for District Elections.
- Timeline: Summer 2019
- Scope: (a) Council consideration of public outreach and decision on whether to submit question of changing to district-based elections to voters in 2020.

Phase 3: Election regarding Charter Change to District Elections.
- Timeline: November 2020 general election
- Scope: Voter consideration of proposed change to City Charter to eliminate city council at-large, numbered-seat elections, and implement district-based elections.

Phase 4: District Implementation (assuming voter approval of charter amendment)
- Timeline: Public process establishing districts in Winter- Summer 2021 based on 2020 Census results, with first district elections beginning 2022 when existing seats 1-3 would be up for election; remaining district seats to be filled in 2024 when existing seats 4-7 would be up for election.
- Scope: Generally, when implementing district-based elections, the terms of sitting Councilmembers are not to be cut short, so cities that make the change to

district-based elections generally implement them as terms of existing incumbents end. Thus, council seats based on districts would not be fully implemented until the 2024 elections. Additionally, the City Council would be required to update district boundaries based on 2020 census data.

Subsequent/Standalone Phases: Consideration of Other Voting Methods and Related Issues
- Timeline: As approved by the City Council study issue process.
- Scope: Other issues that might arise in discussions about the electoral process include, but may not be limited to, alternate forms of voting, a directly elected mayor, and City Council size. These matters can be treated as standalone issues as they do not have the same immediacy as the CVRA/district election issue. The City Council could consider any of these issues through the standard study issue process. For example, the City could study alternate forms of voting if/when the Santa Clara County Registrar of Voters becomes able to implement new or different voting methods such as RCV, and/or as new decisions in CVRA cases clarify the availability of new methods as acceptable remedies.

5. <u>**Options if the City Does Not Take Voluntary Action**</u>

Based on the statewide trends in CVRA litigation and the structure of Sunnyvale's current electoral system, the City could be named as defendant in a CVRA lawsuit; particularly if City Council decides not to voluntarily initiate action to address CVRA exposure. Prior to initiating litigation, a potential plaintiff is required by law to notify the City of her/his belief that the City is in violation of the CVRA. In that event, the City would have the option of litigating or using Elections Code section 10010, which provides a type of limited "safe harbor" from CVRA litigation for cities that choose to voluntarily transition to a district-based election system. Elections Code section 10010 applies to charter cities.

The process under Elections Code section 10010 would be as follows:
a. If the City receives a demand letter from a potential plaintiff, it will have 45 days to assess its situation before a lawsuit can be filed.
b. If, within that 45 days, the City adopts a resolution declaring the City Council's intent to transition from at large to district-based elections, outlining specific steps to be undertaken to facilitate the transition, and estimating a time frame for action, then the potential plaintiff is prohibited from filing a CVRA lawsuit for an additional 90-day period.
c. Within that period, the City would then follow the steps set forth in Elections Code section 10010 to complete the transition to a district based election system, including a minimum of five (5) public hearings and adoption of an ordinance establishing districts and district-based elections.

If the City receives a CVRA demand letter and chose this process, its liability for plaintiff's attorney fees would be capped at $30,000. The benefits of this approach are that it provides certainty and limits costs for cities (from the city perspective), and encourages cities to make the switch more quickly than they otherwise might (from a plaintiff perspective). The obvious drawback is that the statute provides an extremely short period to complete the process, and that the accelerated public hearing schedule may not provide full opportunity for a robust community discussion of such an important local governance issue.

EXISTING POLICY
Sunnyvale City Charter section 601 currently provides for at-large elections with seven numbered City Council seats.

ENVIRONMENTAL REVIEW
The action being considered does not constitute a "project" with the meaning of the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines sections 15320,15378 and 15061 (b)(3) as it is an organizational structure change and does not have the potential to result in either a direct or reasonable foreseeable indirect physical change in the environment.

FISCAL IMPACT
The cost to voluntarily implement changes will likely depend on the scope of public outreach the City Council desires. In other cities, demographics consultants hired to assist with public meetings and district boundaries have been in the range of $50,000-$75,000, but may be more depending on the extent of public outreach the City Council chooses to direct. Should council direct staff to return on this issue, the report back will include a detailed discussion of staff and other consultant resources needed or recommended and estimated costs.

As noted above, if the City Council chooses not to voluntarily initiate a change and receives a CVRA letter, it could choose to implement the "safe harbor" process to switch to district-based elections. Consultant and related costs would run in the range mentioned above, and City would also be responsible for attorney fees up to $30,000. If the City Council choose to maintain at-large elections and defend a potential lawsuit, the defense costs and attorneys' fees would likely exceed $1 million, with additional exposure exceeding $1 million for plaintiff attorneys' fees should the City not prevail. This would result in a significant and unexpected impact to the General Fund.

PUBLIC CONTACT
Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's website.

ALTERNATIVES

1. Direct staff to scope a public outreach and education plan for receiving public input on whether the Council should place a measure on the November 2020 ballot for voters to decide whether to amend the City Charter to change from at-large, numbered seat elections to district-based elections, and return to Council by November 2018 for approval of the outreach plan and resources necessary to implement that plan.
2. Take no action at this time related to potential changes to the City's election system.
3. Alternate direction determined by Council.

RECOMMENDATION
Alternative 1: Direct staff to scope a public outreach and education plan for receiving public input on whether the Council should place a measure on the November 2020 ballot for voters to decide whether to amend the City Charter to change from at-large with numbered seats to district-based

elections, and return to Council by November 2018 for approval of the outreach plan and resources necessary to implement that plan.

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Reviewed by: Teri Silva, Assistant City Manager
Approved by: Kent Steffens, City Manager

ATTACHMENTS
1. California Elections Code Sections 14025 - 14032 (California Voting Rights Act)
2. *Kaku v. City of Santa Clara,* Statement of Decision, June 6, 2018
3. *Kaku v. City of Santa Clara,* Amended Statement of Decision re Remedies Phase of Trial, July 24, 2018

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ELECTIONS CODE - ELEC
   DIVISION 14. ELECTION DAY PROCEDURES [14000 - 14443] *(Division 14 enacted by Stats. 1994, Ch. 920, Sec. 2.)*

CHAPTER 1.5. Rights of Voters [14025 - 14032] *(Chapter 1.5 added by Stats. 2002, Ch. 129, Sec. 1.)*

14025. This act shall be known and may be cited as the California Voting Rights Act of 2001.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14026. As used in this chapter:

(a) "At-large method of election" means any of the following methods of electing members to the governing body of a political subdivision:

(1) One in which the voters of the entire jurisdiction elect the members to the governing body.

(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.

(3) One that combines at-large elections with district-based elections.

(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.

(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a general law city, general law county, charter city, charter county, charter city and county, school district, community college district, or other district organized pursuant to state law.

(d) "Protected class" means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.).

(e) "Racially polarized voting" means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.
(Amended by Stats. 2016, Ch. 86, Sec. 121. (SB 1171) Effective January 1, 2017.)

14027. An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14028. (a) A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

(b) The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

(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, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14029. Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14030. In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in Serrano v. Priest (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14031. This chapter is enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14032. Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

LADONNA YUMORI KAKU, et al.,	Case No. 17CV319862
Plaintiffs,	**STATEMENT OF DECISION**
vs.	
CITY OF SANTA CLARA, and DOES 1 to 50,	
Defendants.	

Plaintiffs Ladonna Yumori Kaku, Wesley Kazuo Mukoyama, Umar Kamal, Michael Kaku, and Herminio Hernando (collectively, "Plaintiffs") allege that the at-large elections for City Council seats for the City of Santa Clara ("City") violate the California Voting Rights Act ("CVRA"). The City denies any violation. The liability phase of trial commenced on April 23, 2018 in Department 5, the Honorable Thomas E. Kuhnle presiding. At the conclusion of trial the parties agreed the Court could issue a Proposed Statement of Decision ("PSOD") without first announcing a tentative decision. The Court issued its PSOD on May 15, 2018. The parties subsequently submitted written objections. Having received and considered the parties' objections, the Court now issues its final Statement of Decision.

I.   INTRODUCTION

Members of Santa Clara's City Council are elected at-large for numbered seats and serve staggered four-year terms. The CVRA provides that "[a]n at-large method of election may not

1 be imposed or applied in a manner that impairs the ability of a protected class to elect

2 candidates. . . ." (Elec. Code § 14028, subd. (a).)[1] Asian Americans ("Asians") are a protected

3 class. Voters in Santa Clara have never elected an Asian to the City Council. Plaintiffs argue

4 that while Asian voters have overwhelmingly supported Asian candidates in local elections, the

5 will of these voters has been impaired by a voting majority comprising non-Hispanic white and

6 black voters.[2] The liability phase of trial determines if the City's at-large, numbered seat method

7 of selecting City Council members violates the CVRA.[3] If liability is found, a trial to determine

8 an appropriate remedy will follow.

9 **II.   BACKGROUND**

10   **A.   Demographics**

11   The 2010 U.S. Census reported the City had approximately 115,000 residents. At present

12 approximately 125,000 people reside there. As described in more detail below, the expert

13 witnesses relied on surnames as a proxy for race/ethnicity classifications. This enabled them to

14 separate the City's population into three groups: non-Hispanic whites and blacks ("NHWBs"),

15 Latinos, and Asians. The table below displays the percentage of City residents, eligible voters

16 and actual voters who fall into each group in the 2012-2016 time period.

17

	NHWB	Asian	Latino
Residents	46.3%	39.5%	16.9%
Eligible Voters	51.0%	30.5%	15.0%
Actual Voters	64.1%	21.2%	14.7%

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23 [1] All references herein are to the Elections Code unless otherwise noted.

24 [2] The United States Census officially recognizes six racial categories: White American, Black or African American, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander. It also classifies Americans as "Hispanic or Latino" and "Not Hispanic or Latino," which identifies Hispanic and Latino Americans

25 as an ethnicity (not a race) distinct from others. The Federal Voting Rights Act has adopted these classifications and consequently they are referenced herein.

26 [3] In its Objections to the Proposed Statement of Decision the City argues Plaintiffs have not provided notice required

27 under section 10010(e). The Court recalls this issue was discussed and resolved earlier. It was not raised at trial. The Joint Case Management Conference Statement filed on January 19, 2018 states: "Defendant plans to file a

28 responsive pleading on January 26, 2018 . . . If the operative complaint affirms compliance with AB 350's 45-day notice provision by each plaintiff, Defendant will not file a demurrer, but will instead answer." The City filed its answer on January 26, 2018.

1 (Kousser Direct at 27.) The percentage of City *residents* who are NHWB and Asian are not all

2 that different – 46.3 percent versus 39.5 percent. The percentage of *actual voters* is quite

3 different – 64.1 percent versus 21.2 percent. This raises the possibility that NHWB bloc voting

4 could impair the ability of Asians to elect preferred candidates.

5   **B.**   **City Council Elections**

6   The City is a municipal corporation established under Article XI, Section 5, of the

7 California Constitution. It operates as a council-manager form of government under the laws of

8 the State of California and its City Charter. (Charter of the City of Santa Clara (the "Charter"),

9 §§ 400 and 500.) The City adopted its Charter in 1951. Its Charter, and not California state

10 statutes, governs the City's "municipal affairs" through approval of ordinances and resolutions.

11 Because it governs an issue of statewide concern, however, the CVRA supersedes the City's

12 Charter. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 802.)

13   The Charter provides for a seven-member City Council, including a separately elected

14 Mayor. (Charter § 600.) Council members, including the Mayor, are elected from the entire

15 City to four-year terms. (*Id.*) Each City Council office is designated by a seat number (e.g.,

16 Council Member Seat No. 1). (Charter § 700.01.) Any change to the City's election system

17 requires the City Charter to be amended, which can only occur by a vote of the majority of City

18 voters. (Gov. Code, § 34458.)

19   **C.**   **The City's Consideration of Changes to its Election System**

20   Plaintiffs' attorney sent a letter to the City dated June 2, 2011. (EX. 7.) Among other

21 things, it stated: "[T]he city's at-large election system for its City Council appears to violate the

22 California Voting Rights Act." (*Id.*) After receiving the letter, the City Council formed a

23 Charter Review Committee to consider changes to its electoral system. (EX. 9 at

24 YUMORI_00636-37.) As part of that effort, Lapkoff & Gobalet Demographic Research, Inc.

25 ("L&G") provided several reports to the City titled "Report on Demographic Characteristics and

26 Voting Patterns of Residents of the City of Santa Clara." (EXS. 22, 23.) On November 17,

27 2011, by an 11-4 vote, the Charter Review Committee recommended the City abandon its

28

1 numbered posts system and move to a pure at-large system. (EX. 10 at YUMORI_00713-16.)

2 The City Council did not adopt that recommendation.

3   On October 27, 2015, the City Council again authorized a Charter Review Committee to

4 consider changes to the procedures for electing members to the City Council. (EX. 11 at

5 YUMORI_00731-32.) Once again L&G provided information to a Charter Review Committee,

6 including a presentation dated May 5, 2016. (EX 26.) While the Charter Review Committee

7 recommended changes to council member compensation, term limits, procedures for calling

8 special meetings of the City Council, and other issues, it did not suggest any changes to the way

9 City Council members are elected. (EX. 12.)

10   On February 21, 2017, the City Council convened a new Charter Review Committee.

11 (Amended Joint Trial Stipulation for Liability Phase of Trial ("Trial Stipulation") at ¶ 20.) On

12 July 18, 2017, the City Council adopted the recommendations of the Charter Review Committee.

13 (*Id.* at ¶ 22.) The proposed changes would split the City into two voting districts with three City

14 Council seats in each. (EXS. 16, 19) The changes would also allow voters to rank their

15 preferences. (*Id.*) On December 5, 2017, the City Council approved proposed amendments to

16 the City's Charter. (Trial Stipulation at ¶ 23.) On January 30, 2018, and again on March 6,

17 2018, the City Council agreed to submit the proposed changes to the electorate on June 5, 2018.

18 (*Id.* at ¶¶ 23-24.)

19   **D.**   **No Asian Has Ever Won a City Council Election**

20   It is undisputed that no Asian candidate has ever been elected to the City Council.

21 From 2002 to 2016 Asians ran in ten elections. The Asian candidate lost each time.

22   **E.**   **Asian Political and Civic Participation**

23   Plaintiffs called Dr. S. Karthick Ramakrishnan as a witness. He is an expert on

24 immigrant political and civic participation. Dr. Ramakrishnan's testimony focused on three

25 areas: (1) historical patterns of discrimination and political exclusion of Asians in California that

26 inform present-day disparities in political outreach and participation; (2) the extent to which

27 Asians of different national origins hold similar policy and political preferences; and (3) the

28 barriers Asians face with respect to local political participation, including language barriers and a

1 | lack of outreach by political campaigns. As discussed below, his testimony is relevant to a

2 | number of issues the CVRA instructs the Court to consider.

3 | **III.   EXPERT OPINIONS OF STATISTICAL EXPERTS**

4 | Two prominent statistics experts testified at trial. Dr. Morgan Kousser testified for

5 | Plaintiffs and Dr. Jeffrey B. Lewis testified for the City. Both analyzed election results.

6 | **A.   Overview of Inference Methods**

7 | Precinct-level voting results are a matter of public record. The State of California

8 | collects the names of voters in each precinct. To determine the ethnicity of voters in a particular

9 | precinct, the State of California has a database of surnames that are likely to correspond to a

10 | particular ethnicity. This allows experts to calculate for each precinct: (1) the number of votes

11 | cast for each candidate, and (2) the percentage of voters who fall into a particular ethnicity.

12 | What the experts do not have, however, is actual, precinct-wide data showing the percentage of

13 | voters within each ethnic group who voted for a particular candidate. This is where the

14 | complicated statistical analyses come in.

15 | Many earlier voting rights cases relied on a statistical method called "ecological

16 | regression" ("ER") which correlates precinct-level election results with the racial or ethnic

17 | composition of the broader electorate. Later, a related, more sophisticated "weighted ecological

18 | regression" ("WER") model was developed. More recently, an improved version of ER called

19 | "ecological inference" ("EI") was developed. EI is viewed as the most reliable of the three

20 | methods, and is used regularly by experts, including Drs. Kousser and Lewis. (TR1 76:8-12,

21 | 134:15-22;[4] Lewis Direct at 31.)

22 | Output from the EI models used by Drs. Kousser and Lewis include the most likely

23 | "point estimate" along with a "standard error" associated with the point estimate. The standard

24 | error is a measure of the accuracy of the point estimate. Standard errors, in turn, can be

25 | converted into "confidence intervals" that represent a range within which there is a certain

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[4] "TR1" refers to the trial transcript from April 23, 2018, i.e., the first day of trial. Transcripts from subsequent days of trial follow the same form.

1 degree of confidence. For example, a model might generate a point estimate of 34 percent along

2 with a confidence interval from 27 to 41 percent.

3 **B. Dr. Kousser's Direct Testimony**

4 Dr. Kousser examined the results of ten City Council elections from 2002 to 2016 in

5 which an Asian candidate appeared on the ballot. Dr. Kousser also examined voting by City

6 residents in nine County School Board and SCUSD elections from 2000 to 2016 in which an

7 Asian appeared on the ballot. His methodology grouped the population into NHWBs, Latinos

8 and Asians. Dr. Kousser focused on the voting patterns of NHWBs and Asians. Dr. Kousser

9 then analyzed all nineteen elections using the three standard statistical models.

10 Dr. Kousser's EI analysis shows that in five of the ten City Council elections voting was

11 polarized and the Asian candidates lost. He also shows that in elections where voting was not

12 polarized, the Asian candidates also lost. Dr. Kousser's EI analysis shows that in six of the nine

13 County School Board and SCUSD elections voting was polarized and the Asian candidates lost.

14 In the three elections where voting was not polarized, the Asian candidate won. Dr. Kousser also

15 provides qualitative information about each of the nineteen elections.

16 **C. Dr. Lewis's Direct Testimony**

17 Dr. Lewis's direct testimony focuses on the methodological shortcomings of using EI to

18 analyze City Council elections. He raises four key issues.

19 First, Dr. Lewis testified that the reliability of EI depends on the degree of racial and/or

20 ethnic homogeneity of precincts. Jurisdictions analyzed in most other FVRA and CVRA actions

21 include at least some precincts with a high degree of racial and/or ethnic homogeneity. In the

22 City, however, Asians at most constitute 42 percent of a precinct's population. Dr. Lewis

23 concludes that the low level of homogeneity in the City "precludes reliable inferences about the

24 support for various candidates for City Council among Asian voters." (Lewis Direct at 5.)

25 Second, Dr. Lewis tested the EI results by calculating Democratic Party registration

26 among Asians and non-Asians in the City. Dr. Lewis found that the predictions using EI were

27 substantially different than the actual registration data, thus casting doubt on whether EI could

28 provide any useful output.

1   Third, Dr. Lewis testified that the problems inherent in applying EI where there is a low

2   degree of homogeneity make it difficult to establish there is "cohesion in voting across the

3   diverse national-origin communities that exist within the City of Santa Clara's broader Asian

4   community." (Lewis Direct at 5.)

5   Fourth, while Dr. Lewis applied EI to the 2016 City Council elections only as a "proof of

6   concept," he testified that evidence of polarized voting was weak.

7   **IV.   LEGAL FRAMEWORK**

8   **A.   At-Large Elections and Polarized Voting**

9   The trial considered the City's at-large method for electing City Council members.

10   At-large voting systems are disfavored under both federal and California voting rights laws

11   because it is well-understood that such election systems can dilute the votes of racial minority

12   groups. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 47 ("*Gingles*"); *Sanchez v. City of Modesto*

13   (2006) 145 Cal.App.4th 660, 667-68) ("*Sanchez*"); § 14028, subd. (e) [stating as a probative

14   factor "practices or procedures that may enhance the dilutive effects of at-large elections...."].)

15   To protect against voter dilution, the CVRA provides:

16   An at-large method of election may not be imposed or applied in a manner that
         impairs the ability of a protected class to elect candidates of its choice or its
17   ability to influence the outcome of an election, as a result of the dilution or the
         abridgment of the rights of voters who are members of a protected class, as
18   defined pursuant to Section 14026.

19

20   (§ 14027.) The term "protected class" means "a class of voters who are members of a race,

21   color, or language minority group, as this class is referenced and defined in the federal Voting

22   Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.)." (§ 14026, subd. (d).) Asians are a protected

23   class.[5]

24

25   _____

26   [5] Federal courts follow United States Census definitions of race. (See, e.g., *Georgia v. Ashcroft* (2003) 539 U.S.
     461,473 n.1, superseded by statute on other grounds.) The Asian racial category is set out in guidance from the
27   Office of Management & Budget and comprises those persons "having origins in any of the original peoples of the
     Far East, Southeast Asian, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan,
28   Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam." (Office of Management & Budget,
     Revisions to the Standards for the Classification of Federal Data on Race & Ethnicity, 62 Fed. Reg. 58782, 58789
     (Oct. 30, 1997).)

1   The CVRA is violated if there is racially polarized voting. (§ 14028, subd. (a).) The

2   phrase "racially polarized voting" means:

3   [V]oting in which there is a difference, as defined in case law regarding
         enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et

4   seq.), in the choice of candidates or other electoral choices that are preferred by
         voters in a protected class, and in the choice of candidates and electoral choices

5   that are preferred by voters in the rest of the electorate.

6

7   (*Id.* § 14026, subd. (e).)

8   **B.   The *Gingles* Preconditions**

9   The reference to "case law regarding enforcement of the federal Voting Rights Act of

10   1965" (the "FVRA") in the definition of "racially polarized voting" implicates the U.S. Supreme

11   Court opinion cited above – *Gingles*. To determine if the FVRA is violated, *Gingles* instructs

12   courts to first determine if three "preconditions" are met. If that showing is made, *Gingles*

13   requires courts to consider the "totality of the circumstances" in determining if the challenged

14   electoral process impermissibly impairs the minority group's ability to elect representatives of its

15   choice. (*Gingles, supra,* 478 U.S. at 44-45.)

16   The CVRA is patterned after the FVRA and incorporates federal case law interpreting

17   provisions in the FVRA. The statutes, however, differ in at least four respects. First, under the

18   CVRA the first *Gingles* precondition – if there is a compact majority-minority district – is not

19   considered until the remedy phase. (§ 14028, subd. (e).) Second, *Gingles's* "totality of the

20   circumstances" analysis is augmented with express circumstances and factors spelled out in the

21   CVRA. (§§ 14028, subds. (b), (e).) Third, the CVRA does not consider "proof of an intent on

22   the part of the voters or elected officials to discriminate against a protected class. . . ." (§ 14028,

23   subd. (d).) Fourth, the CVRA protects minority voting rights not only to elect minority-preferred

24   representatives but also to "influence the outcome of an election." (§ 14027.) These differences

25   are consistent with the legislative intent for the CVRA to "provide a broader cause of action for

26   vote dilution than was provided for by federal law." (*Sanchez, supra,* 145 Cal.App.4th at 669.)

27   The liability phase of trial considers the second and third *Gingles* preconditions, which

28   are: "the minority group must be able to show it is politically cohesive" and "the minority must

be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – to defeat the minority's preferred candidate." (*Gingles, supra,* 478 U.S. at 51.) In other words, *Gingles* states that racially polarized voting is shown where "there is a consistent relationship between the race of the voter and the way in which the voter votes, or to put it differently, where [minority] voters and [nonminority] voters vote differently." (*Id.* at 53, n.21 [internal citation and editing omitted].) This "consistent relationship" between race and voting may be established by evidence of statistically significant differences between the voting patterns of a minority and nonminority group. (*Id.* at 53.)

Under the FVRA courts are required to conduct "a searching practical evaluation of the past and present reality" to determine whether minority groups can participate equally in the political process and elect candidates of their choice. (*Gingles, supra,* 478 U.S. at 79-80 [internal quotations omitted].) Individual elections can be given more or less weight depending on the circumstances, including "the absence of an opponent, incumbency, or the utilization of bullet voting." (*Id.* at 51.)

C.   Evidence of Impaired Voting Rights

The CVRA states, "The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting." (§ 14026, subd. (e).) Federal courts have approved complicated statistical methods to prove FVRA violations, including EI.

In addition to statistical methods, the CVRA instructs courts to consider other evidence:

> One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action. . . .

(§ 14028, subd. (b).) The CVRA also declares as probative of a violation:

9
STATEMENT OF DECISION

[T]he history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns. . . .

(§ 14028, subd. (e).)

The CVRA was enacted with California's racial/ethnic diversity in mind and the fact that California has multiple minority groups. (*Sanchez, supra,* 145 Cal.App.4th at 669.) In particular, the author of the bill stated:

In California we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction. . . .

(*Id.* at 669 [citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2001 Reg. Sess.) as amended Apr. 9, 2002, at 2].) Consequently, the lens through which voting patterns are evaluated under the CVRA is wider than what is used to evaluate voting patterns under the FVRA.

D.   Burden of Proof

Cases interpreting the FVRA hold that plaintiffs must prove all three *Gingles* preconditions by a preponderance of the evidence. (*League of United Latin Am. Citizens v. Perry* (2006) 548 U.S. 399, 425-26.) 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 minority support plus white crossover votes. However, *Gingles* recognizes that "the degree of racial bloc voting that is cognizable as an element of a [] vote dilution claim will vary according to a variety of factual circumstances." (*Gingles, supra,* 478 U.S. at 57-58.) In part because a variety of factual circumstance must be considered, the FVRA does not require mathematical certainty. Indeed, "[A]n approach might yield an inexact result for purposes of a

1   hypothetical mathematical challenge, but could still be correlative, probative, and sufficiently

2   accurate to bear on the ultimate issue of racially bloc voting." (*Luna, supra,* 291 F.Supp.3d at

3   1125, citing *United States v. City of Euclid* (2008) 580 F.Supp.2d 584, 602.) Furthermore, as

4   noted above, the CVRA states that many other factors may be probative of a violation, and thus

5   they too can be considered in determining whether a plaintiff has met his or her burden.

6   **E.   Lack of Precedent**

7   The CRVA was enacted in 2002. It has been amended several times since then. But

8   while more than fifteen years has passed, there are only three published cases interpreting its

9   provisions: *Sanchez, supra,* 145 Cal.App.4th 660, *Rey v. Madera Unified School Dist.* (2012)

10   203 Cal.App.4th 1223, and *Jauregui v. City of Palmdale, supra,* 226 Cal.App.4th 781. None of

11   these cases addressed issues in dispute here.

12   **V.   ANALYSIS**

13   Plaintiffs argue that at-large elections for City Council seats violate the CVRA. Plaintiffs

14   argue Dr. Kousser applied standard statistical methods to relevant election results, and those

15   results show racially-polarized voting. Plaintiffs add that the CVRA allows consideration of

16   other factors, including historic discrimination against Asians and the City's recalcitrance in

17   addressing the dilutive effects of at-large voting. Plaintiffs argue that evidence of racially-

18   polarized voting includes the fact that no Asian has ever been elected to a City Council seat.

19   The City responds by arguing that Plaintiffs have failed, by a wide margin, to carry their

20   burden of proving any CVRA violation. The City starts by explaining that the usual statistical

21   methods used in these types of cases cannot produce reliable results here because there is not a

22   high enough concentration of Asians in any precinct. Even if statistical methods have some

23   probative value, the City argues they show an absence of racially polarized voting. The City

24   further argues that other factors on which Plaintiffs rely have little probative value.

25   **A.   Bivariate v. Trivariate Analysis**

26   A threshold issue is the meaning of the phrase "voters in the rest of the electorate" as it is

27   used in the definition of "racially polarized voting." This issue arises because Dr. Kousser

28   divided the electorate into three groups: NHWBs, Latinos and Asians. He then compared the

1 | voting patterns of Asians to the voting patterns of NHWBs. The City argues that since

2 | Dr. Kousser did not compare Asian voting with all "voters in the rest of the electorate" (e.g.,

3 | NHWBs *and* Latinos), his analysis cannot support a CVRA violation. The City notes that the

4 | California Legislature recognized that California "face[s] a unique situation where we are all

5 | minorities." (*Sanchez, supra,* 145 Cal.App.4th at 669.) Consequently, "[the] CVRA is race

6 | neutral. It does not favor any race over others or allocate burdens or benefits to any groups on

7 | the basis of race." (*Id.* at 666.)

8 | In response, Plaintiffs argue that the plain language in section 14026, subdivision (e),

9 | does not require a comparison of candidates preferred by Asians versus candidates preferred by

10 | *all* other voters. Plaintiffs state that the CVRA requires only a comparison of the voting patterns

11 | of Asians versus "voters in the rest of the electorate." Plaintiffs emphasize that the CVRA does

12 | not say "all of the voters" or "the rest of the electorate." Instead, it says "voters in the rest of the

13 | electorate." Plaintiffs also argue that methodologies approved in FVRA case law, which is

14 | referenced in the definition of "racially polarized voting," include "trivariate" analyses like the

15 | ones performed by Dr. Kousser. (See *Rodriguez v. Harris County* (2013), 964 F.Supp.2d 686,

16 | 768; *Aldasoro v. Kennington* (1995) 922 F.Supp. 339, 375.) Plaintiffs further argue that because

17 | Latinos vote more often for Asian-preferred candidates than do white voters, combining Latinos

18 | and other voters into a single "non-Asian" group would mask differences in voting patterns.

19 | (TR1 98:18-102:1; TR3 156:2-11.) Dr. Kousser states that his trivariate analysis is consistent

20 | with professional practices and that it produces more accurate results. (TR1 99:132-24; TR3

21 | 142:11-16, 154:26-28.)

22 | The Court finds that the language in section 14026, subdivision (e), permits the use of

23 | trivariate analysis in assessing whether there is racially polarized voting. The plain language –

24 | "voters in the rest of the electorate" – includes all or part of the group of other voters, including

25 | NHWBs either alone or combined with Latinos. The plain language does not require a

26 | comparison to "all" voters in the rest of the electorate, just "voters in the rest of the electorate."

27 | The phrase "rest of the electorate" does not stand alone, as the City has suggested several times.

28 |

While the Court does not believe the language is ambiguous, if it were, there would be at least two reasons why it would embrace trivariate analyses. First, the CVRA seeks to overcome bloc voting. To fulfill the purposes of the CVRA, Plaintiffs should be able to compare voting differences between Asians and an NHWB bloc because that difference is what is allegedly causing dilution. The Court agrees that requiring a comparison of Asians on the one hand, and NHWB and Latinos on the other hand, could hide the very thing the CVRA seeks to expose. Second, section 14026, subdivision (e), expressly references the FVRA, and cases under that law have endorsed trivariate analyses. For example, in *Aldasoro*:

> Plaintiffs' experts then developed a multivariate analysis that divided the electorate into three groups: (1) Hispanics, (2) Blacks and (3) Anglos and all others (Asians, Native Americans – everyone not Hispanic or Black). Plaintiffs' experts regarded multivariate analysis as more accurate than bivariate analysis for El Centro elections. Defense expert Dr. Klein also agreed that, if one relies on ecological regression, multivariate is better than bivariate.

(*Aldasoro v. Kennington, supra,* 922 F.Supp. at 345.) Moreover, unless the City shows that NHWBs and Latinos together voted cohesively, it would be improper under the FVRA to include them together in the majority bloc. (*Id.* at 375 ["Numerous cases have refused to combine groups that were shown not to be politically cohesive."].)

For all of these reasons, the Court finds Dr. Kousser's trivariate analysis may be considered in assessing whether the CVRA was violated.

B.   Methodological Disputes in Measuring Political Cohesion

Gingles requires a minority group be politically cohesive. Political cohesion may be established by "showing that a significant number of minority group members usually vote for the same candidates. . . ." (*Gingles, supra,* 478 U.S. at 56.) "Statistical proof of political cohesion is likely to be the most persuasive form of evidence, although other evidence may also establish this phenomenon." (*Monroe v. City of Woodville* (1989) 881 F.2d 1327, 1331.)

The parties agree that EI is considered the best practice for modeling candidate support among voters of a racial group. (Lewis Direct at 31; TR1 134:15-22.) But while EI may be the best method for analyzing election results, the parties sharply disagree on whether it is useful for assessing political cohesion under the circumstances presented in this case. Issues the parties

1   debated at trial include: surname error, effects of homogeneity, aggregation bias, and confidence

2   intervals.[6] These issues are discussed below.

3   **1.   Surname Error**

4   EI relies on a correlation of surnames with ethnicity. Both sides agree there are instances

5   where there may be a mismatch. The current Vice Mayor of Santa Clara is Kathy Watanabe.

6   The parties agree, however, she is not Asian because they agree no Asian has been elected to

7   City Council. The City argues that surname errors undermine the reliability of Dr. Kousser's

8   EI analysis.

9   **2.   Effects of Homogeneity**

10   The City argues that an even more serious problem in applying EI is that no City precinct

11 has a population of Asians greater than 42 percent. Dr. Lewis notes that the level of support for

12 a particular candidate within homogeneous precincts can provide tight, informative bounds.

13 (TR3 18:14-27.) The interplay of homogeneous precincts and level of candidate support works

14 as a sliding scale – the higher the support the more accurate estimate of voting patterns. (TR3

15 18:7-27.) However, if there is both a lack of homogeneous precincts and low levels of candidate

16 support, Dr. Lewis states the statistical models will lack tight, informative bounds and produce

17 unreliable estimates. (TR3 17:7-10.) Indeed, he testified that the lack of a relatively

18 homogeneous Asian precinct in Santa Clara *precludes* an analysis with informative bounds to

19 estimate the level of support for particular candidates among Asian voters. (Lewis Direct at 5.)

20   Dr. Kousser, on the other hand, testified that using EI in the absence of racially

21 homogenous precincts is consistent with academic standards and professional practice. (Kousser

22 Direct at 19-20; TR1 108:21-23.) Dr. Kousser testified that the use of EI to assess the City's

23 election results is in line with cases involving other jurisdictions with comparable levels of

24 homogeneity, including Palmdale and Kern County. (TR1 112:7-13, 129:10-15, 215:24-216:3.)

25 Dr. Kousser concluded that the City's precincts were "sufficiently homogeneous for Asians to

26 permit reliable analysis using ecological inference techniques." (TR1 106:23-107:4)

27 _____

28 [6] The Court does not address every methodological issue discussed at trial. For example, the City argued that removing the abstention choice could generate inaccurate results. Plaintiffs disagreed. When this issue came up at trial, the discussion did not seem to warrant further analysis. (TR3 74:25-76:25.)

1   There is some common ground. Both experts acknowledged there is no fixed standard or

2   "bright line" to apply in determining what level of homogeneity is sufficient to permit reliable

3   analysis. (TR1 107:4-11; TR3 102:4-17.) Dr. Kousser acknowledged that the relatively

4   homogeneous precincts in the City creates greater uncertainty, which is reflected in the larger

5   confidence intervals for his estimates of Asian voting. (TR1 106:5-22.) Dr. Lewis agreed,

6   though his testimony was stronger – he said that EI will produce results with low levels of

7   reliability, greater uncertainty, and the possibility for significant bias. (TR3 56:1-6, 103:19-21.)

8   **3.   Aggregation Bias**

9   The experts discussed "aggregation bias." Dr. Lewis notes that EI models combine

10   aggregate level data, and apply assumptions about how the support for candidates among

11   members of each ethnic group will vary across precincts at the individual level. (Lewis Direct at

12   17.) Dr. Lewis states that this process creates the long-known problem of EI models:

13   "aggregation bias." This problem is created where the relationship observed at the aggregate,

14   group-wide level is not representative of the individual level, e.g., there may be deviations from

15   the aggregate mean at the individual level. (TR3 13:5-10; Lewis Direct at 22.)

16   To illustrate how aggregation bias may warp the results of an EI model, Dr. Lewis

17   estimated Democratic registration among Asians and non-Asians in the City. His EI model

18   estimated those percentages to be 15 and 59 percent, respectively. The actual numbers are

19   44 and 51 percent, respectively. (Lewis Direct at 32.) Dr. Lewis testified, however, that this

20   discrepancy doesn't necessarily mean that same thing would be true in the context of City

21   Council elections or other elections that one might look at. (3TR 39:14-16.) And on cross-

22   examination Dr. Lewis stated he was unaware of how voting behavior in the City's non-partisan

23   elections would be affected by the political party registration of Asians or any other race or

24   ethnicity. (3TR 112:11-16.) He also stated he did not run the EI model to determine registration

25   figures for any group of Republicans. (*Id.* 113:23-27.) It appeared those estimates would have

26   been more accurate than the estimates for Asians who are registered Democrats. (*Id.* 122:5-10.)

27   Dr. Kousser testified that Dr. Lewis's analysis of the Democratic registration of Asians in

28   the City was flawed for a number of reasons. (See TR3 137:12-140:25.) One point he made was

1   that a significant number of Asians express no party preference. Dr. Kousser stated that any

2   party-affiliation analysis is fraught with error when the group of interest often has no party

3   preference, and the elections analyzed are non-partisan. (*Id.* 140:2-19).

4   **4.**   **Confidence Intervals**

5   During the cross-examination of Dr. Kousser, the City confronted him with tables from

6   his own report that show the support Asian voters gave to various candidates. Below the tables

7   the City inserted graphs which illustrated the confidence intervals in Dr. Kousser's voting

8   results. (See EXS. 527-41.) While the point estimates indicated discrete levels of support by

9   Asians for a given candidate, in some instances the confidence intervals did not. The City

10   argued that because in some instances the confidence intervals overlapped, Dr. Kousser's own

11   data show the Asian-preferred candidate could not be determined. Without an Asian-preferred

12   candidate, the City argued, Plaintiffs could not show minority voter cohesion.

13   The point made by the City was explored many other times. Both sides educated the

14   Court about confidence intervals. The Court learned, for example, that a 95 percent confidence

15   level technically "means that if the null hypothesis is that there is no difference between one

16   point estimate and the other point estimate, that five times out of 100 we would say that there

17   was a difference at some level." (TR1 130:10-14.) There was even a discussion about statistical

18   theory and the differing views of traditionalists and Bayesians.

19   In its post-trial brief, Plaintiffs cite numerous cases that address the use of point estimates

20   and confidence intervals. Plaintiffs point out that courts deciding FVRA cases regularly exercise

21   some flexibility in reviewing statistical evidence. (See, e.g., *Fabela v. City of Farmers Branch,*

22   2012 WL 3135545 at *11 & n.33 [relying on point estimates to find cohesion because the broad

23   confidence intervals were the unavoidable results of the absence of highly concentrated Hispanic

24   precincts and it was "undisputed that a point estimate is the 'best estimate' for the data"];

25   *Benavidez v. City of Irving* (2009) 638 F.Supp.2d 709, 724-25 [finding cohesion notwithstanding

26   large confidence intervals because "the figures produced by an accurate calculation of ER and EI

27   both suggest Hispanic political cohesion"].)

28

1   Plaintiffs also cite cases addressing the meaning of "preponderance of the evidence" in

2   the context of statistical analyses. Plaintiffs argue that statistical significance should not be

3   conflated with Plaintiffs' burden to show cohesive voting. Courts and commentators have

4   highlighted this error and warned against the dangers of this conflation. (See, e.g., *Turpin v.*

5   *Merrell Dow Pharms., Inc.* (1992) 959 F.2d 1349, 1357 n. 2 ["While scientists' use of

6   confidence intervals is as a common-sense device to give professional weight to their results,

7   such confidence intervals are not the same as the preponderance of the evidence standard of

8   proof. This requires proving one's case by the greater weight of the evidence."].)

9   Further arguing this issue, Plaintiffs cite the Federal Judicial Center's *Reference Manual*

10 *on Scientific Evidence* (3d ed. 2011) ("*Reference Manual*"), which cautions against equating

11 levels of statistical significance, measured by "p-values" of 0.05, 0.10 and the like, and

12 plaintiffs' burden of proof. (See *Reference Manual* at 271 n.138 ["In some cases, the p-value has

13 been interpreted as the probability that defendants are innocent of discrimination. However, as

14 noted earlier, such an interpretation is wrong."].) Plaintiffs note the *Reference Manual* describes

15 this as a "common error made by lawyers, judges, and academics" and explains why a p-value is

16 an inappropriate stand-in for the burden of proof.

17   **5.   Usefulness of Dr. Kousser's EI Results**

18   The Court offers the following assessments with respect to Dr. Kousser's EI results.

19   First, the problem of using surnames as proxies for ethnicity is easily understood. In

20 most instances the correlation between name and ethnicity will likely be correct. The City did

21 not offer any study or analysis that has measured the level of error or suggested that surname

22 error could disqualify the use of EI. The Court concludes it should be mindful of this source of

23 potential unreliability, but that it is not a basis for rejecting Dr. Kousser's EI results.

24   Second, the Court understands the City's point that the relative homogeneity of Asians in

25 City precincts makes the EI results less reliable. Indeed, Plaintiffs concede this point, and

26 explain it is the reason the confidence intervals are often quite large. Dr. Lewis opined that the

27 lack of reliability "precludes" their use in this case, yet he also agreed: (1) there is no bright line

28 at which EI results must be ignored (TR3 102:4-17); (2) there are no better statistical methods for

determining the voting behavior of different racial groups within Santa Clara (TR3 54:27-56:23.); and (3) some information is better than none. (TR3 59:13-22.) The Court concludes that the EI results presented by Dr. Kousser are less reliable than those generated in more segregated communities, but his EI results are nonetheless probative. (See *Luna v. County of Kern* (2018) 291 F.Supp.3d 1088, 1124-25 ["The court need not insist on mathematical exactitude in assessing racial polarization."] (*"Luna"*); *Rodriguez v. Harris County, supra,* 964 F.Supp.2d at 768 ["The Court finds the ecological inference data imprecise. . . but the data is nevertheless probative on the question of racial bloc voting]; *Fabela v. City of Farmers Branch, supra,* 2012 WL 3135545 at *10-11 & nn. 25, 33; *Perez v. Pasadena Indep. Sch. Dist.* (1997) 958 F.Supp. 1196, 1220-22, aff'd 165 F.3d 368; *Benavidez v. City of Irving, supra,* 638 F.Supp.2d at 724-25; *Aldasoro v. Kennington, supra,* 922 F.Supp. at 347.)[7]

Third, like the methodological difficulties posed by homogeneity, the Court understands the City's concerns that aggregation bias may compromise the EI results. Dr. Lewis's analysis of party registration to illustrate this point, however, is fraught with uncertainties and inconsistencies. The Court reaches the same conclusion as another court to which this argument was presented:

> The court acknowledges the disparity between the estimates produced by ER and EI in Dr. Katz's analysis of Latino Democratic registration compared to the known values, but is not persuaded as to the implications that defendants would have the court draw therefrom. Notably, Dr. Katz was unable to explain the relationship between registration and voting – only to say that they are "related" – while also acknowledging that they are different and may have different geographical distributions. The court has no reason to believe that the cause of the inflated estimates of Latino Democratic registration is due to insufficient homogeneous precincts as suggested by Dr. Katz, rather than to accept Dr. Kousser's rational explanation – that in heavily Latino precincts, non-Latinos tend to register as Democrats at a higher rate than non-Latinos in other precincts.

Luna, supra, 291 F.Supp.3d at 1125 [internal citations omitted].)

Fourth, the Court agrees with two related points made by Plaintiffs regarding confidence intervals: that they are not equivalent to the preponderance of the evidence standard, and

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[7] An interesting wrinkle is that under the CVRA the lack of geographic concentration (i.e., homogeneity) "may not preclude a finding of racially polarized voting. . . ." (§ 14028, subd. (c).)

1 confidence intervals less than 95 percent may be sufficient. As noted below, the Court is

2 comfortable applying 80 percent confidence intervals in assessing whether or not a candidate is

3 preferred by Asians. Given surname error and the other sources of potential unreliability

4 identified by the City, however, the Court does not believe it would be appropriate to use a lower

5 confidence interval.

6 In sum, the City raised many arguments suggesting that Dr. Kousser's EI results are

7 defective. The Court agrees there is some uncertainty. Nonetheless, the Court finds that

8 Dr. Kousser's EI results are probative, and along with the other probative factors set forth in the

9 CVRA, the Court will consider them. (See, e.g., *United States v. Euclid, supra,* 580 F.Supp.2d at

10 602 ["[T]he Court is to employ statistical analysis in aid of its own fact-finding, not to adhere

11 slavishly to it."].)

12 **C. Plaintiffs' Evidence of Asian Cohesion and Majority Block Voting**

13 Dr. Kousser examined City Council elections from 2002 to 2016 in which there was an

14 Asian candidate. This is consistent with CVRA requirements: in single seat elections, "[T]he

15 occurrence of racially polarized voting shall be determined from examining results of elections

16 in which at least one candidate is a member of a protected class." (§ 14028, subd. (b).) The fact

17 that Dr. Kousser analyzed elections over a fourteen year period is also important because "a

18 pattern of racial bloc voting that extends over a period of time is more probative of a claim that a

19 district experiences legally significant polarization than are the results of a single election."

20 (*Gingles, supra,* 478 U.S. at 57.)

21 In addition to the City Council elections, Dr. Kousser examined Santa Clara County

22 School Board of Education ("County School Board") and Santa Clara Unified School District

23 ("SCUSD") Board elections. So-called "exogenous" elections may be considered in assessing

24 racial polarization, though they are not nearly as probative as endogenous elections as to whether

25 the minority group is politically cohesive. (*Luna, supra,* 291 F.Supp.3d at 1120.) The two

26 candidates who receive the most votes in SCUSD elections win. The CVRA provides that in

27 multiseat elections "the relative groupwide support received by candidates from members of a

28 protected class shall be the basis for the racial polarization analysis." (§ 14028, subd. (b).)

1. City Council Elections

Dr. Kousser analyzed ten City Council elections between 2002 and 2016.[8] The parties agree there was RPV in three of those elections: Seat 2 in 2002; Seat 3 in 2004; and Seat 5 in 2014. (EXS. 527, 528, 531.) The parties also agree there was no RPV in five of those elections: Seat 4 in 2004; Seat 2 in 2010; Seat 3 in 2012; Seat 2 in 2014; and Seat 6 in 2016. (EXS. 528, 529, 530, 531, 532.)

The parties dispute whether there was RPV in two elections: Seat 4 in 2016 and Seat 7 in 2016. (EX. 532.) The primary argument made by the City is that the 95 percent confidence intervals overlap among Asian-supported candidates, and therefore Plaintiffs cannot show there was any candidate who was preferred by Asian voters. (§ 14026, subd. (e).) As noted above, other courts have used point estimates, which would dispense with the City's argument. (*Fabela v. City of Farmers Branch*, 2012 WL 3135545 at *11 & n.33.) Moreover, at the 80 percent confidence interval urged by Plaintiffs in their post-trial brief, there is an Asian preferred candidate in both contests, and for the reasons noted above, the Court believes an 80 percent confidence interval provides sufficiently reliable results.[9] Because there was an Asian preferred candidate, because NHWBs voted differently than Asians, and because the NHWB candidate won, the Court finds there was RPV in these two elections.

The Court therefore finds, based on Dr. Kousser's analysis of the City Council elections, that in five elections there was RVP, and in five elections there was no RPV. In all five elections in which there was RPV, there was also voting cohesion among Asian voters. This is also true in a sixth election: the 2016 election for seat 6 in which Kathy Watanabe won.

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[8] Dr. Kousser used three models to generate his results: ER, WER and EI. Because both Dr. Kousser and Dr. Lewis agree EI is the superior method, the Court has considered only the EI results.

[9] To calculate the 80 percent confidence interval, the Court started with the point estimate and the standard error. It then multiplied the standard error by 1.28. That product was then added to, and subtracted from, the point estimate. For example, if the point estimate is 45 percent and the standard error is 5.6, the 80 percent confidence interval would be from 37.8 percent to 52.2 percent. In its Objections to the Proposed Statement of Decision, the City argued the Court "created its own tables" and the Court assumed it was "acceptable" for it "to create its own evidence." The Court disagrees. The Court merely performed mathematical calculations that were based entirely on evidence admitted at trial. (TR1 231:23-232:3.)

2. School Elections

Dr. Kousser analyzed nine County School Board and SCUSD (together, "School") elections between 2000 and 2016. He considered only the votes cast by City residents. The parties agree there was RPV in two elections: 2004 (SCUSD) and 2016 (County School Board). (EXS. 536, 541.) The parties agree there was no RPV in three elections: 2000 (County School Board), 2008 (County School Board), and 2012 (County School Board). (EXS. 533-535.)

The parties dispute whether there was RPV in four SCUSD elections: 2008, 2010, 2012 and 2014. Once again the City notes that the 95 percent confidence intervals overlap among Asian-supported candidates, and therefore Plaintiffs cannot show there were any candidates who were preferred by Asian voters. (§ 14026, subd. (e).) There was, however, an Asian preferred candidate in the 2008 and 2012 elections at the 80 percent confidence level. NHWBs voted differently than Asians, and because the NHWB candidate won, the Court finds that there was RPV in those two elections (2008 and 2012 SCUSD). There was not, however, an Asian-preferred candidate in the two other elections (2010 and 2014 SCUSD), and thus RPV was not shown.

Overall, the Court finds there was RPV in four School elections and no RPV in five School elections. In each of the four School elections in which there was RPV, there was also voting cohesion among Asian voters.

3. Special Circumstances and Weighting of Elections

Gingles states there can be "special circumstances" that affect the weight given to any particular election result. (478 U.S. at 51.) *Gingles* gives as an example of a special circumstance a minority candidate running unopposed. (*Id.*) *Gingles* also counsels that individual elections can be given more or less weight depending on the circumstances, including "the absence of an opponent, incumbency, or the utilization of bullet voting." (*Id.* at 57.) In short, *Gingles* teaches that a Court can consider whether a particular election result was representative because "there is no simple doctrinal test for the existence of legally significant racial bloc voting." (*Id.* at 58; see also *Ruiz v. City of Santa Maria* (1998) 160 F.3d 543, 557

1   [stating that "unusual circumstances must demonstrate that the election was not representative of

2   the typical way in which the electoral process functions."].)

3   Dr. Kousser suggests that the four City Council elections in which Dr. Mohammed

4   Nadeem, an Asian, ran and lost might be considered "special circumstances" such that the Court

5   might disregard, or give less weight to, the results of those elections. Dr. Nadeem lost elections

6   in 2010, 2012, 2014 and 2016. The parties agree RPV was not present in those elections.

7   Dr. Kousser notes that in 2011 Dr. Nadeem served on the Charter Review Committee and

8   rejected proposals to modify election rules after the City received a letter stating there was RPV.

9   Dr. Kousser notes further that Dr. Nadeem flip-flopped on various issues concerning the San

10 Francisco 49ers football team.

11   The Court does not believe Dr. Kousser's speculation about Dr. Nadeem's voting record

12 rises to the level of "special circumstances" that warrant disregarding Dr. Nadeem's election

13 losses. However, the Court does believe that the election results in 2012, 2014 and 2016 should

14 be given less weight. The voting results show that Dr. Nadeem's attractiveness as a candidate

15 dimmed in those years among Asians and all other voters. In 2010 he received 46 percent of the

16 votes. In the elections that followed he received 38 percent, then 29 percent, and finally 20

17 percent of the vote. Dr. Nadeem's poor track record as a candidate is a reasonable explanation

18 for the lack of Asian support.

19   **D.   Statutory Factors**

20   The CVRA specifically calls out factors that go beyond statistical analyses that the Court

21 may consider. This should not be surprising since the CVRA was enacted "to provide a broader

22 cause of action for vote dilution than was provided for by federal law." (*Sanchez, supra,* 145

23 Cal.App.4th at 669.) Relevant factors set forth in the CVRA are discussed below.

24   **1.   City Election Outcomes**

25   The CVRA states that "[o]ne circumstance that may be considered in determining a

26 violation of Section 14027 is the extent to which candidates who are members of a protected

27 class and who are preferred by voters of the protected class . . . have been elected to the

28 governing body of a political subdivision that is the subject of an action. . . ." (§ 14028, subd.

1 (b).) It is undisputed that no Asian candidate has ever won a City Council election. In the City

2 Council elections from 2002 and 2016 Asian candidates ran ten times. The Asian candidate lost

3 each time.

2. Practices that Enhance Vote Dilution

5 The Court may consider the City's use of "electoral devices or other voting practices or

6 procedures that may enhance the dilutive effects of at-large elections." The City uses a

7 "numbered posts" form of at-large elections, in which candidates run for designated seats and

8 voters from the entire city participate in the election for each seat. (Kousser Direct at 25-26.)

9 Numbered posts disadvantage minority voters by preventing them from concentrating their votes

10 behind a single minority-preferred candidate and withholding votes from less preferred

11 candidates, a so-called "single-shot" strategy. (*Id.*) Numerous cases have recognized this

12 potential for discriminatory impact. (See, e.g., *City of Rome v. United States* (1980) 446 U.S.

13 156, 185, 187 & n. 21; *League of United Latin Am. Citizens, Council No. 4434 v. Clements*

14 (1993) 986 F.2d 728, 749-50 (en banc).)

15 The failure to address the source of voting dilution, such as numbered posts, is a factor

16 that should be considered. (*Gingles, supra,* 478 U.S. at 37.) The City was put on notice in 2011

17 that its at-large, numbered posts were diluting Asian voting rights. Instead of candidly

18 addressing the issue, the City's interim general counsel asked that a demographer's report be

19 "stripped" of "the information about the council election history and the charts . . . showing

20 racial polarization" before it was distributed to members of the City Council and the Charter

21 Review Committee. (EX. 43 at CITY000138.) The City did not make any changes to its

22 "electoral devices or other voting practices or procedures" despite having two Charter Review

23 Committees examine the issue, first in 2011 and then in 2015. (EX. 12 at YUMORI_00743.) It

24 was not until 2017 that it again appointed a Charter Review Committee to examine its voting

25 procedures. This new effort started after the City received newly-drafted demand letters from

26 Plaintiffs alleging CVRA violations. (EX. 10 at YUMORI_00706-07; EX. 14 at

27 YUMORI_00785.) In response, the Charter Review Committee concluded that the City's voting

28 procedures should be changed.

3. Past Discrimination

The CVRA provides a long, non-exclusive list of other factors that are probative "to establish a violation of Section 14027. . . ." (§ 14028, subd. (e).) They include "the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health which hinder their ability to participate effectively in the political process." (*Id.*) Dr. Ramakrishnan testified that Asians endured continuous, overt and painful discrimination from federal and state laws from the 1850s until at least 1965. (Ramakrishnan Direct at 2.) This past discrimination included curtailment of basic rights, nationality-based immigration quotas, internment of citizens of Japanese descent during World War II, and limitations on renting housing and owning land. Dr. Ramakrishnan also reviewed documents related to the failed attempt in 2007 to name a business district in Santa Clara "Korea Town" during which inflammatory and demeaning nationality-based public comments were submitted to the City.

The Court agrees that the dark chapters of our country's history, and overt public comments exhibiting great prejudice, hinder the ability of many Asians to participate effectively in the political process. Measuring the extent to which past discrimination affects voting in the City, however, is difficult. Dr. Ramakrishnan testified that between two-thirds and three-quarters of the Asian residents in the City are first generation immigrants. Consequently, most Asian residents were not *directly* affected by the discriminatory laws and policies that were in place before 1965. Indeed, Dr. Ramakrishnan testified that "in the last 20 years . . . California is very welcoming and integrating towards its immigrant populations." (TR2 14:1-7.) The City presented evidence showing that Asians have higher levels of education and higher job earnings. (EX. 505 at 45, 77, 85.) This weakens the argument that "discrimination in areas such as education, employment, and health" hinder the ability of some Asians to participate effectively in the political process. (§ 14028, subd. (e).) And other than his summary of the Korea Town events, which occurred more than a decade ago, Dr. Ramakrishnan did not focus on any unique circumstances that explain Asian voting patterns in City elections. (TR2 46:27-47:10.)

E.   **Evaluating the Evidence**

In aligning the facts presented at trial with the requirements of the CVRA, the Court places the evidence admitted at trial into four categories: (1) statistical analyses of election results; (2) City election outcomes; (3) practices that enhance vote dilution; and (4) past discrimination.

First, the Court finds that Dr. Kousser's analysis of election results support a finding that racially polarized voting occurred in City Council elections from 2002 to 2016. He examined ten elections "in which at least one candidate is a member of a protected class." (§ 14028, subd. (b).) The Court finds that the results of five of the ten City Council elections he analyzed show racially polarized voting and six show cohesive Asian voting. Dr. Nadeem ran in four elections in which there was not racially-polarized voting, and for the reasons set forth above, the Court finds that less weight should be given to those elections. The Court finds there was racially polarized voting in four of the nine School elections that Dr. Kousser analyzed. However, these exogenous elections are not as probative as City Council elections.

Second, it is undisputed that no Asians have been elected to the City Council. The CVRA requires the Court to consider the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action. (§ 14028, subd. (b).) Here, the answer is none.

Third, the Court finds the use of numbered seats in City Council elections are "electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections." (§ 14028, subd. (e).) It is widely recognized that numbered posts or seats increase the difficulty that minority groups face in winning at-large elections by preventing them from concentrating their votes. (*Gingles,* 478 U.S. at 36-39 & nn. 5, 6.) In 2011 an overwhelming majority of the City Charter Committee voted in favor of abandoning numbered seats. The City Council has never adopted that recommendation.

Fourth, the Court has considered other factors the CVRA considers probative including the history of discrimination and the extent to which members of a protected class bear the

effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. While the extent to which historical discrimination affected City elections is hard to measure, the Court concludes it supports finding a CVRA violation.

* * * * * *

Based on the evidence presented at trial, the Court finds that Plaintiffs have proven by a preponderance of the evidence that the at-large method of election used by the City impairs the ability of Asians to elect candidates as a result of the dilution and abridgment of their rights as voters. Having found the City liable for violating the CVRA, this action will now proceed to the remedies phase. To plan for this next phase of trial, the Court has scheduled a case management conference at 1:30 p.m. on Thursday, June 7th.

Dated: June 6, 2018

Thomas E. Kuhnle
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA

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COUNTY OF SANTA CLARA

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LADONNA YUMORI KAKU et al.,

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                                Plaintiffs,

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    vs.

15
CITY OF SANTA CLARA, and DOES 1 to 50,

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                                Defendants.

17

Case No. 17CV319862	
AMENDED STATEMENT OF DECISION RE: REMEDIES PHASE OF TRIAL; JUDGMENT	

18   Plaintiffs allege the at-large method of election used by defendant City of Santa Clara

19 ("City") violates the California Voting Rights Act ("CVRA"). In the liability phase of trial the

20 Court found that Plaintiffs proved by a preponderance of the evidence that the at-large method of

21 election used by the City impairs the ability of Asians to elect candidates as a result of the

22 dilution and abridgment of their rights as voters. Having found the City liable under the CVRA,

23 "the court shall implement appropriate remedies, including the imposition of district-based

24 elections that are tailored to remedy the violation." (Elec. Code § 14029.) On July 18-20, 2018,

25 the remedies phase was tried before the Honorable Thomas E. Kuhnle without a jury.

26 **I.   PROCEDURAL ISSUES**

27   As directed by the CVRA, this action was tried in two phases – liability and remedies. In

28 their pretrial submissions, both sides stated that additional proceedings may be necessary to

1   address implementation issues. Consequently, both sides stipulated that the Court would have

2   continuing jurisdiction in case later disputes arise.[1] In addition, for the remedies phase both

3   sides stipulated that the reference to "eight hours" in Rule 3.1590(n) of the California Rules of

4   Court would be changed to "twelve hours"; that a request for a statement of decision would be

5   deemed made; and that the statement of decision could be issued in writing immediately

6   following the completion of trial. Total trial time turned out to be about ten hours.

7   Plaintiffs filed a motion seeking that the Santa Clara County Registrar of Voters be joined

8   as a necessary party pursuant to Code of Civil Procedure section 389(a)(1). That statute provides

9   that "[a] person who is subject to service of process and whose joinder will not deprive the court

10 of jurisdiction over the subject matter of the action shall be joined as a party in the action if in his

11 absence complete relief cannot be accorded among those already parties." The Registrar of

12 Voters, Shannon Bushey, was present in the courtroom and was represented by counsel. Counsel

13 agreed on behalf of her client that the Registrar of Voters could be joined as a necessary party,

14 subject to certain conditions. A stipulation and order joining the Registrar of Voters as a

15 necessary party was signed by the Court on July 20, 2018.

16 **II.   EVIDENCE PRESENTED AT TRIAL**

17   Plaintiffs presented four witnesses: Wesley Kazuo Mukoyama, Dr. Jose Moreno,

18 Shannon Bushey, and David Ely. Defendants presented one witness: Dr. Jeanne Gobalet.

19 Mr. Ely and Dr. Gobalet were tendered as experts without objection. While the Court's analysis

20 of the controverted issues is based on all of the evidence presented at trial, key evidence is

21 highlighted below.

22   **A.   Fact Witness Testimony**

23   **1.   Wesley Kazuo Mukoyama**

24   Mr. Mukoyama is one of the plaintiffs in this action. He has lived in the City for more

25 than four decades. He is Asian. Mr. Mukoyama testified that at no time while he has resided in

26 the City has an Asian be elected or appointed to the City Council. In addition, he testified that

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[1] Initially the parties agreed to trifurcate the proceedings. Later in trial the agreement was modified to allow for continuing jurisdiction.

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candidates for City Council rarely, if ever, knock on his door or call him or otherwise seek his input on matters concerning the City. Mr. Mukoyama is in favor of Plaintiffs' proposal to adopt seven districts within which City Council members would be elected.

2. Dr. Jose Moreno

Dr. Moreno, a Latino, is currently serving on the Anaheim City Council, where he is the mayor pro tem. Dr. Moreno participated in a lawsuit, which was filed in 2012, that alleged Anaheim's at-large election system violated the CVRA. He ran for an at-large seat on the City Council in 2014 and lost. Anaheim settled the CVRA lawsuit and adopted a system with an at-large mayor and individual council member districts. Dr. Moreno was elected to represent District 3 in central-north Anaheim in 2016.

Dr. Moreno testified about the benefits of district-based elections. He testified that prior to 2016 many city council members lived in the Anaheim hills, while few lived in the western parts of Anaheim. He testified that only three Latino candidates had ever been elected to the Anaheim city council. He also testified that at-large campaigns were costly, and that most candidates had to focus on "high propensity" voters – voters who are most likely to turn out on election day – and pay much less attention to other voters. In his district campaign in 2016 Dr. Moreno testified that he knocked on the doors of nearly all district residents; that he was able engage all voters and not just high-propensity voters; that voters in his district appeared to be more energized; and that he believed that district-based elections will allow council members to address the needs of all residents.

3. Shannon Bushey

Ms. Bushey is the Santa Clara County Registrar of Voters. She testified in great detail about the steps the Registrar of Voters must take to provide timely and accurate voting materials to the cities it serves. Based on her long-time employment in the Registrar of Voters's office, including serving as the Registrar of Voters since 2013, she discussed an almost day-to-day timetable for the tasks that lead up to the November 2018 election. Ms. Bushey testified that her office could provide timely and accurate election materials to voters in the City – even with newly formed districts – as long as district-based information was provided by July 23, 2018. In

1 particular, she testified that she needed district-specific geographic information system ("GIS")

2 data, accessor parcel numbers and addresses.

3 Ms. Bushey also testified that ranked-choice-voting that has been previously proposed by

4 the City cannot be implemented without the Secretary of State approving the voting technology,

5 which may take six to eighteen months.[2]

6 Ms. Bushey discussed the importance, in all elections, of cooperation between the City

7 and the Registrar of Voters. In this regard she described a significant number of tasks on which

8 the City and the Registrar of Voters must work together.

9 During the City's cross-examination, Ms. Bushey testified that sometimes mistakes

10 happen. She was asked questions about events related to recent elections, including materials

11 printed by a vendor that omitted portions of a candidate statement. Ms. Bushey was asked if

12 district-based elections are more complicated, and thus might lead to more errors. She agreed

13 that district-based elections are more complicated and require more work, but in her experience

14 they do not necessarily lead to more errors.

15 **B.   Expert Testimony**

16   **1.   David Ely**

17 Mr. Ely testified for the Plaintiffs. He is an expert demographer with decades of

18 experience working for cities and various districts, and attorneys in litigation, to draw district

19 boundaries. He is familiar with the requirements of the CVRA and the federal Voting Rights Act

20 ("FVRA").

21 In preparing his proposed district maps for the City, Mr. Ely testified that he began by

22 collecting, organizing and reviewing data from the 2010 census. He also reviewed data

23 generated through the Census Bureau's American Community Survey ("ACS"), State of

24 California ethnicity reports, voter turnout reports, actual voting data, Google maps, Google

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28 [2] The Court permitted FairVote to file a pretrial *amicus* brief on the disputed issues. FairVote argued that the Court should adopt multi-member districts and order a single non-transferable voting process be used. Neither party advocated in favor of a map with multi-member districts. Exhibit 68, which showed prior voting patterns in one election, also suggested a north/south division of the City for multi-member districts could be divisive.

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1   Earth, and detailed City maps. In addition, Mr. Ely drove around the City and met with

2   residents.

3   Mr. Ely testified that in drawing the districts he sought to bring together residents with

4   similar community interests. He examined major thoroughfares to determine if they divide or

5   pull together local residents; he examined housing stock to assess socio-economic conditions; he

6   identified City infrastructure such as parks, libraries and schools; and he reviewed materials

7   prepared by the City's expert, Dr. Gobalet, and compilations of City resident comments about

8   voting methods and processes, including their views on at-large voting and district voting.

9   To address the remedial requirements of the CVRA and the FVRA, Mr. Ely took into

10   account the distribution and concentrations of Asian, Latino, black and white residents.[3] These

11   data includes the percent of citizens who can vote, which is referred to as the Citizen Voting Age

12   Population ("CVAP").

13   Based on all of this information, Mr. Ely presented four maps – two showing seven

14   districts (Exhibits 54 & 55), and two showing six districts (Exhibits 69 & 70). For each map

15   Mr. Ely calculated numerous statistics, including CVAP percentages, by district, for each Census

16   classification.

17   Mr. Ely assured the Court he could provide GIS data, assessor parcel numbers, and

18   addresses for each district by the July 23, 2018 deadline prescribed by Ms. Bushey.

19   **2.   Jeanne Gobalet, Ph.D.**

20   Dr. Gobalet testified for the City. She is an expert demographer with decades of

21   experience. She has worked as a consultant for the City since 2011.

22   The focus of Dr. Gobalet's testimony was on the City's "Draft Plan 3" which was shown

23   on page 6 of Exhibit 60. This map reflected Dr. Gobalet's knowledge of, and experience in, the

24   City. Her high-level approach was create districts that reflected City neighborhoods and other

25   communities with common interests. Like Mr. Ely, she started by identifying obvious dividing

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28   [3] The CVRA and FVRA rely on United States Census data. Those data recognizes six racial categories: White
American, Black or African American, American Indian and Alaska Native, Asian, Native Hawaiian and Other
Pacific Islander. It also classifies Americans as "Hispanic or Latino" and "Not Hispanic or Latino," which identifies
Hispanic and Latino Americans as an ethnicity (not a race) distinct from others.

1　lines such as thoroughfares, railroad tracks, and creeks. She then identified neighborhoods in

2　numerous ways, including taking into account information from "Nextdoor" – a social network

3　for neighborhood communities. Dr. Gobalet also took into account information from community

4　members who have spoken at public meetings that she has attended for many years.

5　　　　Dr. Gobalet testified that Draft Plan 3 was presented at recent public meetings that were

6　held in conformity with the requirements of Elections Code section 10010. Consistent with the

7　purpose of that statute, Draft Plan 3 was slightly modified as a result of public comments.

8　Dr. Gobalet testified that the City's Ad-Hoc Districting Advisory Committee, which has a

9　mandate of determining which voting maps to recommend to the City Council, concluded that

10　Draft Plan 3 was the best alternative. Dr. Gobalet calculated numerous statistics for Draft Plan 3,

11　including CVAP percentages.

12　**III.　DISCUSSION**

13　　　　**A.　Legal Requirements for Selecting a Remedy**

14　　　　CVRA remedies must address the dilution and abridgment of voting rights. It directs

15　courts "to implement appropriate remedies, including the imposition of district-based elections,

16　that are tailored to remedy the violation." (Elec. Code § 14029.) "District-based elections," in

17　turn, "mean a method of electing members to the governing body of a political subdivision in

18　which the candidate must reside within an election district that is a divisible part of the political

19　subdivision and is elected only by voters residing within that election district." (*Id.* § 14026(b).)

20　　　　Remedies must address election practices that impair the ability of members of a

21　protected class to elect candidates of their choice and their ability to influence the outcome of an

22　election. (Elec. Code § 14027.) Remedies may take into account "that members of a protected

23　class are not geographically compact or concentrated." (*Id.* § 14028(c).) Lines drawn to form

24　voting districts may also take into account "(a) topography, (b) geography, (c) cohesiveness,

25　contiguity, integrity, and compactness of territory, and (d) community of interests of the council

26　districts." (Gov't Code § 34884; Elec. Code § 21601.) Federal law states that districts cannot be

27　drawn with race as a predominate factor. (See, e.g., *Miller v. Johnson* (U.S. Supreme Ct. 1995)

28　515 U.S. 900, 917-19.)

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B.   The District Lines Shown in Draft Plan 3 Properly Remedy the CVRA Violations

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3   Based on the evidence presented at trial, the Court finds the adoption of district-based

4   elections based on the district lines shown in Draft Plan 3 will adequately remediate the City's

5   violations of the CVRA and best serve its residents. This conclusion is based on numerous

6   considerations, though four stand out.

7   First, the districts drawn in Draft Plan 3 reflect communities of interest, topography,

8   geography and integrity. Dr. Gobalet described at trial her process of identifying neighborhoods,

9   and then drawing district lines around them using significant geographic features.

10   Second, the statistics generated for Draft Plan 3 indicate it will remedy the dilution and

11   abridgment of voting rights of Asians who reside in the City. The Asian CVAP percentage for

12   District One is 51%. This is a proper remedy under both the CVRA and the FVRA. The lines

13   drawn for District Two also enhance the voting power of Latino voters. The Latino CVAP

14   percentage in that district is 27%, which allows for greater voting influence, including the

15   possibility of forming voting coalitions to elect preferred candidates.[4]

16   Third, the City is a charter city that currently elects an at-large mayor. Draft Plan 3

17   results in having six district-based elections for city council members, plus an at-large election

18   for the mayor who has now, and will continue to have, the same powers as city council

19   members.[5] The Court was initially concerned that having an at-large mayor would not provide

20   remediation to the extent required under the CVRA, which can trump charter city rights.

21   (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 802.) But the Court is also sensitive

22   to the rights of people in California to form charter cities, and the greater degree of autonomy

23   charter cities provide. At trial, counsel for the City made an important point. He acknowledged

24   the Court's view that eliminating the at-large mayor would provide additional CVRA

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26   [4] It should be noted that after the 2020 federal census the City will need to consider modifications to the district boundaries. (Elec. Code § 21601.)

27   [5] At present the mayor has several non-substantive powers that are different than City Council members. Section 704 of the City Charter provides that "[t]he Mayor shall be the presiding officer. The Mayor shall have a voice and

28   vote in all its proceedings. He/she shall be the official head of the City for all ceremonial purposes." Section 704.3 sets forth other powers of the mayor, such as presiding over the council meetings and making "recommendations to the City Council on matters of policy and programs."

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1 remediation. But he noted that Draft Plan 3 provides sufficient remediation to comply with law

2 even with a mayor elected by the entire City electorate. That fact, combined with the comments

3 made at public meetings that expressed a preference for an at-large mayor, caused the Court to

4 conclude that all City voters should continue to elect the City's mayor.

5 Fourth, the Court recognizes the risk of implementing a new voting method relatively

6 close to the November 2018 elections. Throughout this case the Court has carefully balanced the

7 need to address the dilution and abridgement of voting rights on the one hand, and the need to

8 ensure the election process is not compromised. Both sides have worked diligently to resolve the

9 contested issues, including working with the Registrar of Voters to ensure a remedy can be

10 timely implemented. At the remedies trial three promises were made. The Registrar of Voters

11 said the election will run smoothly as long as the GIS, assessor parcel number, and address

12 information is provided by July 23, 2018. Both sides said their teams could provide the data for

13 their maps by that deadline. And the City promised to cooperate with the Registrar of Voters to

14 make sure all subsequent voting deadlines are met. Based on those promises, the Court has

15 every reason to believe this decision can be successfully implemented for the November 2018

16 elections.

17 It should be noted that the Court has considered Elections Code section 12262, which

18 states that precinct boundaries cannot be changed less than 125 days before an election.[6] The

19 Court believes Draft Plan 3 does not violate that statute. But even if it did, in balancing the

20 hardships the Court would find the actions necessary to remedy the CVRA violations are so

21 fundamental that a procedural statute should not stand in the way of implementing Draft Plan 3.

22 In part this is because if an appropriate remedy is not implemented for the November 2018

23 elections, those elections would be jeopardized. (*Jauregui v. City of Palmdale* (2014) 226

24 Cal.App.4th 781, 791 [the certification of city council election results was enjoined based on

25 CVRA violations].)

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28 [6] The Article that includes Election Code sections 12260-62 is titled "Precinct Boundary Changes." Section 12262 uses the undefined phrase "jurisdictional boundaries." The Court finds that the phrase "jurisdictional boundaries" refers to precinct boundary changes as indicated in the title of the Article within which section 12262 appears.

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IV. THE REMEDIES PHASE DISPOSITION

Having concluded the remedies phase of trial, the Court ORDERS the City to adopt district-based elections based on the lines shown on Draft Plan 3 (Ex. 60 at page 6) that was submitted by the City. Further, the Court ORDERS the Registrar of Voters to immediately begin implementing district-based elections for the November 2018 election. The Court further ORDERS that elections be held for each district in the sequence shown below:

District Number	Election Month and Year
District One	November 2020
District Two	November 2018
District Three	November 2018
District Four	November 2020
District Five	November 2020
District Six	November 2020
Mayor	November 2018

Consistent with this requirement, the City and the Registrar of Voters are enjoined from holding at-large elections for any City Council members, other than the position of Mayor.

The Court does not intend to abrogate City Charter provisions except the reference to "at large" in Section 600 as it applies to City Council members (excluding the mayor) and the first sentence of Section 700.1, which is titled "Designation of Seats." The Court does not believe other City Charter provisions are affected by the Court's ruling, including provisions governing term length, term limits, compensation, vacancies, and the powers and duties of the mayor. Further, the Court does not intend to change other election procedures for this year, including the last day of the nominations period, which is set on August 10, 2018.

V. JUDGMENT

This action was tried in two phases. At the liability phase, Plaintiffs proved Defendant the City of Santa Clara ("City") violated the California Voting Rights Act by showing by a preponderance of the evidence that the at-large method of election used by the City impaired the ability of Asians to elect candidates as a result of the dilution and abridgment of their rights as voters. At the conclusion of the remedies phase, the Court ordered that six City Council members be elected in district-based elections, and the City mayor be elected in an at-large

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election. The Court's findings and conclusions were set forth in two Statements of Decision.

Based on the outcome of the two-phase trial:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment shall be entered for Plaintiffs Ladonna Yumori Kaku, Wesley Kazuo Mukoyama, Umar Kamal, Michael Kaku, and Herminio Hernando and against Defendant the City of Santa Clara in accordance with the Statements of Decision issued after the liability and remedies phases of trial. Plaintiffs shall be entitled to recover attorneys' fees and costs as permitted under law. FURTHER, pursuant to the parties' agreement, the Court shall retain jurisdiction over the parties and this action pursuant to California Code of Civil Procedure section 664.6.

Dated: July 24, 2018

Thomas E. Kuhnle
Judge of the Superior Court

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