No. 19-1199

In The Supreme Court of the United States

DON HIGGINSON,

Petitioner,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of California; City of Poway,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CITIES OF MISSION VIEJO, OROVILLE, SOLANA BEACH, SOUTH PASADENA, AND BARSTOW, AND THE TOWN OF YUCCA VALLEY, CALIFORNIA, IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Petitioner Higginson documents that "nearly 200 political subdivisions have changed to by-district elections as a result of the [California Voting Rights Act, "CVRA"]. . . ." Pet. at 21.[2] That includes *amici* cities.

The **City of Mission Viejo** is a city in Orange County, incorporated under the general laws of California. Under the 2010 Census, its population is 93,317, with about 17 percent identified as Hispanic or Latino of any race. The Latino citizen voting-aged population ("CVAP") was estimated to be only about 11 percent under the 2005-2009 American Community Survey ("ACS"), and is relatively evenly dispersed. It is not *remotely* possible to create a Latino-majority CVAP district in the City, which uses an at-large, plurality-win method of electing its five-member City Council. A Latino ran unsuccessfully for City Council 20 years ago, in 2000 and again in 2002, but persons of Hispanic origin had been elected to the Council before and since. Nevertheless, in 2017, the City received a certified demand letter from an attorney representing the Southwest Voter Registration Education Project

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[1] Pursuant to Rule 37.2(a), *amici* affirm that notice was provided to counsel for all parties of the intent of *amici* to file this brief at least 10 days before the deadline, and all parties provided written consent to its filing. Pursuant to Rule 37.4, this brief is submitted on behalf of cities by their authorized law officers.

[2] Those data have been updated: ~400 political subdivisions, including 126 cities, have changed their electoral system compelled by the racial distinctions drawn by the CVRA. *See* National Demographics Corp., "Updated Counts of CVRA-Compelled Changes," *online at* https://bit.ly/2J2gaGc (last visited May 1, 2020).

("SVREP"), a Texas corporation, but which has taken up the cause of the CVRA.[3] The letter asserted that the City's at-large electoral system was characterized by "racially polarized voting," defined in the CVRA as a "difference . . . 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," Cal. Elec. Code § 14026(e), and, as a result, the City's at-large electoral system violates the CVRA. The letter noted that, by enacting the CVRA, the Legislature sought to override "what it considered 'restrictive interpretations given to the federal [Voting Rights Act].'" The letter warned that "[t]he California Legislature dispensed with the requirement in [*Thornburg v.*] *Gingles*[, 478 U.S. 30 (1986) ("*Gingles*")] that a minority group demonstrate that it is sufficiently large and geographically compact to constitute a 'majority-minority district'. . . . Rather, the CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA. . . ." The letter threatened a lawsuit against the City if it did not "voluntarily" adopt districts.[4] Since the CVRA does not mandate

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[3] *See* SVREP, "California Voting Rights Act Organizing Project," *online at* https://svrep.org/cvra-2018.php (last visited May 1, 2020).

[4] Such a letter is a prerequisite to filing suit under the CVRA. Cal. Elec. Code § 10010(e)(1)&(2). If the jurisdiction "voluntarily" complies, the attorney sending the letter is entitled to collect the cost of generating the letter from the jurisdiction, up to $30,000. Claims rarely come in under $30,000.

single-member districts, and districts could not possibly remedy the alleged voting rights violation, the City declined to implement them. SVREP sued the City. The lawsuit was settled and a stipulated judgment entered allowing the City to seek implementation of cumulative voting or, if that was not done, single-member districts. The City sought to avoid a "sham" remedy, which was the effect of districting, as minority voters would obtain no benefit thereby.

The **City of Solana Beach** is a general law city in San Diego County. Under the 2010 Census, the City's total population is 12,866, of whom about 16 percent are Latino. Latinos were estimated to be only about 8 percent of CVAP under the 2012-2016 ACS estimates. It is impossible to create a Latino-majority CVAP district. The City uses an at-large, plurality-win method of electing its five-member City Council. For several election cycles, Latinas have been elected and re-elected to the Council, and in the 2018 elections, using the at-large system, a third Latina was elected. Nevertheless, in 2018, the City received a certified letter from the same attorney who sued Mission Viejo, again representing the SVREP. The letter asserted that the City's at-large system is characterized by "racially polarized voting" and thus violated the CVRA. The letter touted the California Legislature's intent to undo the jurisprudence under the federal Voting Rights Act, noting the elimination of the requirement that a minority group demonstrate it is sufficiently large and geographically compact to constitute a majority in a single-member district as a prerequisite to

maintaining an action for vote dilution, or any need to demonstrate indicia of discrimination under the totality of the circumstances. The letter threatened a lawsuit against the City if it did not "voluntarily" abandon at-large elections. Of course, the tiny City could not bear such litigation expense and the concomitant risk of attorney fee-shifting if it lost, so the City begrudgingly passed an ordinance adopting a single-member district system for four of its council members, and a directly-elected mayor. Starting in 2020, Solana Beach voters will be able to vote for only one council member and the mayor, whereas before they could vote for the entire Council. The City's ordinance, however, has a sunset provision that is triggered if the CVRA is held to be unconstitutional. Shortly after passage of the ordinance, the City received a bill from SVREP's attorney for $30,000.

The **City of Oroville** is a general law city in rural Butte County, north of Sacramento. Under the 2010 Census, the City's population is 15,546, with about 12.5 percent Latino. The Latino CVAP was estimated to be only about 11.5 percent under the 2013-2017 ACS. It is impossible to create a Latino-majority CVAP district in this tiny City, which uses an at-large, plurality-win method of electing six council members. (The mayor is separately elected.) This City also has a small African-American population, about 4.8 percent, and Asian-American population, about 10.5 percent. An African-American woman currently sits on the Council, elected in 2016. Previously, an Asian-American was elected in 2008 and re-elected in 2012, but did not run again

thereafter. A Latino ran for Council in 2018 in a first-time candidacy, and was defeated. In November 2019, the City received a certified letter from the same attorney who threatened Mission Viejo and Solana Beach, again representing SVREP. The letter was essentially identical in its assertions of a violation of the CVRA as those sent to the other *amici*. The letter threatened a lawsuit against the City if it did not "voluntarily" abandon at-large elections. The City really had no choice, given its very limited resources. It is in the process of splitting its tiny population into six single-member districts while maintaining a directly-elected mayor.

The **Town of Yucca Valley** is a general law city in the high desert in San Bernardino County, east of Los Angeles. Under the 2010 Census, the Town's population is approximately 20,700, with about 18 percent Latino. The Latino CVAP was estimated to be only about 15 percent under the 2011-2015 ACS estimates. It is impossible to create a Latino-majority CVAP district in the Town, which used to employ at-large elections for its five-member Council. Since 2000, only one Latino candidate has ever run for the Council. That was in 2002, and that candidate lost. In 2017, the Town received a certified letter from the same attorney who threatened Mission Viejo, Solana Beach, and Oroville, again representing SVREP. The letter was essentially identical in its assertions of liability under the CVRA as that sent to the other *amici*. Threatened with suit if it did not "voluntarily" abandon at-large voting, the Town determined not to expend limited resources on litigation, and reluctantly passed an ordinance providing

for single-member districts for its five Council members. The Town's ordinance also has a sunset provision that is triggered if the CVRA is held unconstitutional. Shortly after passing the ordinance, the Town received a bill from SVREP's attorney for $30,000. Starting in 2018, Town voters voted in the new districts for only one council member, whereas before voters could vote for all positions on the Council. No Latino candidate ran for election; the two incumbents who did run were re-elected.

The **City of South Pasadena**, in Los Angeles County, is ethnically diverse. Under the 2010 Census, it had a total population of 25,619, of which non-Hispanic Whites constituted about 44 percent, Asian-Americans about 33 percent, and Latinos about 18 percent. Latinos were estimated to form about 20 percent of the City's CVAP (2011-2015 ACS), and are so dispersed throughout the community that they cannot form a majority in a single-member district. The City Council has always been elected at-large. Since 2003, Latinos have won three of four times they appeared on the ballot. In 2017, the Council was composed of residents from a diverse range of racial and ethnic backgrounds including Asian, Latino, Armenian, Italian, and Caucasian. Nevertheless, in 2017 the City received a letter from the same attorney mentioned above, representing SVREP and claiming the City's "at-large system dilutes the ability of Latinos (a 'protected class')—to elect candidates of their choice or otherwise influence the outcome of South Pasadena's council elections" because of racially-polarized voting. The letter

noted, "[T]he CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA. . . ." The letter demanded the City change its at-large electoral system, or face suit. Many facts cited in the letter are incorrect, but given the crippling expense of CVRA litigation and a plaintiff's low evidentiary burden to demonstrate only a correlation between race and electoral choices, the City saw no alternative but to abandon its at-large electoral system. Latino voters thus lost the right to vote for two or three candidates every two years, yet they do not constitute a sufficiently large voting bloc in any district to elect even one chosen candidate every four years (assuming racially-polarized voting, the legal predicate for CVRA liability, exists in South Pasadena).

The **City of Barstow** is a general law city in the Mojave Desert in San Bernardino County. Under the 2010 Census, the City's population is 22,936. Non-Latino Whites constitute only about 26.6 percent of the population. Latinos are 44.9 percent of the population, and African-Americans are approximately 18 percent. Latinos make up about 37 percent of the CVAP. Given the relatively even dispersion of the racial/ethnic groups throughout all neighborhoods in the City, it is impossible to create a district with majority Latino CVAP. Historically, the City employed an at-large method of electing Council members, and numerous Latinos, African-American, and Asian-American candidates have been elected. Over the past 10 years, there has been continuous representation on every

Council of two or three Latino Council members (including a directly elected Latino mayor from 2008-2012), and an African American Council member. Despite the Council's racial diversity, and because of the rash of CVRA demand letters plaguing California cities and the CVRA's elimination of the *Gingles* elements for proving vote dilution, the City began investigating the advisability of abandoning its at-large voting system in the summer of 2017. Then, on September 25, 2017, it received a demand letter from the same attorney who sent nearly identical letters to the other *amici* herein, again representing SVREP. The letter baldly asserted the City's at-large electoral system violated the CVRA because of the presence of racially-polarized voting. The letter demanded that Barstow "voluntarily" change its at-large system or face litigation. Rather than endure the tremendous expense of litigation under the CVRA, the City instituted a single-member electoral system. The City then resisted SVREP's demands for attorneys' fees on the basis that it lacked standing, was not properly qualified to do business in California, and failed to comply with California's government claims statutes. SVREP sued the City for attorneys' fees. The City eventually prevailed, and SVREP has appealed the judgment in the City's favor.

SUMMARY OF ARGUMENT

The Ninth Circuit, in its four-page, unpublished decision, acknowledged that "a finding of racially polarized voting triggers the application of the [California

Voting Rights Act (Cal. Elec. Code §§ 14025-14032)]. . . ." Pet. App. A at 4a. "[T]he legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates." *Gingles*, 478 U.S. at 62. Thus, the CVRA forces a local jurisdiction to choose a new voting system based solely on racial considerations. Under this Court's case law, such race-based decisionmaking must survive strict scrutiny; the CVRA cannot.

The only interest this Court has ever held to justify predominantly race-based decisions regarding the structure of a jurisdiction's electoral system is "eradicating the effects of past racial discrimination," *Shaw v. Reno*, 509 U.S. 630, 656 (1993), meaning unconstitutional (*i.e.*, intentional) discrimination. The Court has also assumed that complying with Section 2 of the federal Voting Rights Act ("FVRA"), 52 U.S.C. § 10301, is a compelling state interest, because while the FVRA disclaims the need to prove discriminatory purpose, it is nevertheless tailored to the eradication of intentionally discriminatory electoral practices. Race-based determinations are at the core of both laws, but the entire purpose of the CVRA is to undo the narrowly-tailored design of Section 2.

Section 2, as amended in 1982, enables minority voters to challenge at-large voting systems, without the need to prove actual discriminatory intent. For that challenge to prevail, however, the plaintiff must

demonstrate the at-large system has a "discriminatory effect" on minority voters, considering the totality of the circumstances. *Gingles*, 478 U.S. at 43-45. A Section 2 plaintiff must make a showing of racially-polarized voting, but that showing merely starts the analysis. It is necessary but not sufficient, and this Court has held that racially-polarized voting is not synonymous with racial discrimination in voting. In *Gingles* and subsequent cases, this Court has developed detailed standards for distinguishing between at-large systems that are actually discriminatory and those that result in mere losses at the polls.

The CVRA was enacted by the California Legislature for the very purpose of evading those standards. In particular, it abolishes the first *Gingles* precondition—that plaintiffs be able to show a majority-minority district is possible—and it relieves plaintiffs of the obligation to show that, considering the totality of the circumstances, the system is discriminatory once a mathematical correlation between race and voting is shown. In so doing, it "untailors" the law from the compelling purpose of addressing actual discrimination, turning it into a mechanical application of racial thresholds.

The CVRA thus fails strict scrutiny. The Ninth Circuit concluded that rational basis, rather than strict scrutiny, was applicable, but its analysis was flawed. This fundamental mistake of federal law conflicts with the decisions of this Court and merits review. S. Ct. R. 10(c). The Ninth Circuit mistakenly focused on the downstream implementation of Poway's decision to move to abandon at-large voting—the

drawing of the district lines themselves—instead of the threshold, exclusively race-based criterion determining whether at-large voting is permissible in the first instance.

The CVRA has forced an involuntary restructuring of local government in California through the unconstitutional application of a racial criterion, and other states—such as Washington—have begun to adopt similar state voting rights acts of their own, modeled on California's. *See* Rev. Code Wash. §§ 29A.92.005-29A.92.900 (Washington Voting Rights Act); Wash. ACLU, "Voting Rights FAQ," *online at* https://www.aclu-wa.org/pages/voting-rights-faq (last visited May 2, 2020) ("The WVRA is modeled on [the CVRA]").

ARGUMENT

I. The CVRA Intentionally Abolishes the Very Aspects of Section 2 Jurisprudence That Are Designed to Ensure It Is A Remedy for Discrimination in Voting, Rather Than a Salve for Mere Political Defeats.

The CVRA takes Section 2 of the FVRA as its starting point, then makes a number of alterations to Section 2's core standards for identifying discriminatory voting practices. *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 667-68 (2006). While Section 2, like the CVRA, disclaims a need for proof of discriminatory intent, Section 2 still requires proof of discriminatory *effects*. Over the past four decades, this Court has developed standards designed to enable courts to

distinguish racially discriminatory effects in voting from mere political defeat at the polls. The CVRA was enacted expressly to abolish those distinctions as a matter of state law.

The standards for challenging at-large voting under the FVRA are well-established under *Gingles*. At-large voting "is not *per se* violative of minority voters' rights," 478 U.S. at 48, and minority plaintiffs must first make three threshold showings that: (1) the minority group is sufficiently large and geographically compact to form a majority of eligible voters in a single-member district, (2) the group is politically cohesive, and (3) there is sufficient white bloc-voting to usually prevent minority voters from electing their preferred candidates. *Id*. at 50-51. These factors establish that the minority group has the ability to elect, and is not just losing elections because they are insufficiently numerous, or insufficiently cohesive, to effectively exercise the franchise. Failure to meet any of the *Gingles* "preconditions" is fatal under Section 2. The first "precondition" cannot be met in any *amicus* city herein.

Then, if all three preconditions are proven, courts must consider whether, under the "totality of circumstances," at-large voting functions in a discriminatory manner to dilute the rights of minority voters. In the "totality" analysis, courts consider the so-called "Senate Factors," which are indicative of the "discriminatory effect" of the at-large electoral system. *Id*. at 35-36.

The CVRA departs from this paradigm in at least two constitutionally untenable ways.

First, it explicitly abolishes the first *Gingles* precondition—the requirement that minority plaintiffs demonstrate it is possible to draw a reasonably-compact majority-minority voting district. Cal. Elec. Code § 14028(c); *Sanchez*, 145 Cal. App. 4th at 669. In so doing, it authorizes the type of "influence claims" that this Court rejected under Section 2 in *Bartlett v. Strickland*, 556 U.S. 1 (2009).

Second, the CVRA dispenses with the requirement to prove discriminatory effects under the "totality of the circumstances," declaring the Senate Factors are "not necessary factors to establish a violation of" the CVRA. Cal. Elec. Code § 14028(e).

Consequently, a violation of the CVRA can be established solely by demonstrating a statistical disparity in the electoral choices of various racial groups. Cal. Elec. Code § 14028(a) ("A violation of [the CVRA] 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."). This runs counter to federal case law, which holds that "racially-polarized voting" is <u>not</u> synonymous with "discrimination" or "vote dilution."[5] Despite

[5] *See Johnson v. DeGrandy*, 512 U.S. 997, 1008 and 1011-12 (1994) (holding that a district court's finding of vote dilution was error, despite the fact that the presence of racially-polarized voting was undisputed in that case); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir. 1992) (same, cited with approval in *Johnson*, 512 U.S. at 1012 n.10); *Jones v. Lubbock*, 727 F.2d 364, 385 n.17 (5th Cir. 1984) ("Polarized voting is not itself unconstitutional, and does not *ipso facto* render the electoral

its inflammatory name, "racially-polarized voting" is nothing more than a mathematical correlation estimating that different racial or ethnic groups may support particular candidates at different rates. In itself, there is nothing nefarious about it. Similar distinctions can be shown with respect to virtually any demographic characteristic—witness the well-known "gender gap" in which women are more likely to favor Democratic candidates than men are. Proof of racially-polarized voting can be evidence that discriminatory effects *may* be present, but that is just the beginning of the analysis under Section 2; under the CVRA, it is the end.

A. By Eliminating the First *Gingles* Precondition, and Expressly Authorizing Constitutionally Questionable "Influence" Claims, the CVRA Creates Liability Where Electoral Losses Are Not a Discriminatory Effect of the Voting System.

In *Bartlett v. Strickland*, this Court held "a party asserting § 2 liability must show . . . that the minority population in the potential election district is greater than 50 percent." 556 U.S. at 19-20. Otherwise, the first *Gingles* precondition is not met, *i.e.*, a demonstration that the minority voters have the ability to elect in a

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framework in which it occurs unconstitutional." (citing *United Jewish Organizations v. Carey*, 430 U.S. 144, 165-67 & n.24 (1977))); *Earl Old Person v. Brown*, 312 F.3d 1036, 1049-50 (9th Cir. 2002) (affirming district court's finding of no vote dilution, despite "the presence of racially polarized elections").

different electoral system. The CVRA, however, was adopted for the explicit purpose of sidestepping this *Gingles* precondition, and protecting minority electoral "influence." Were that not the case, none of the *amicus* cities herein could have been forced to abandon at-large voting, as it is impossible to draw majority-minority districts in any of them (or in Poway, for that matter).

There were several reasons for the *Bartlett* Court's holding, summed up in the principle that a statute that protects minority electoral "influence" does not remedy discriminatory vote dilution, but rather ensures maximally effective voting for minority voters. *Id*. at 15-16.

First, the Court recognized that, for an influence district to have any meaningful impact on minority voting power, *substantial* non-minority crossover is necessary to elect a minority-preferred candidate. But the existence of such crossover voting conflicts with the premise that the structure of the electoral system has a discriminatory effect because it permits "majority bloc voting" to defeat minority preferences. *See id*. at 16-17 (noting this tension). Statutorily protecting minority "influence" in an electoral system is nothing more than handicapping electoral outcomes based on the race of the voters.

Alternatively, if non-minority crossover voting were absent, minority voters "standing alone [would] have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." *Id*. at 14. Election losses

would not be attributable to the discriminatory effects of the voting system, but merely to insufficient numbers. "For an electoral system to dilute a minority group's voting power, there must be an alternative system that would provide greater electoral opportunity to minority voters," *Holder v. Hall*, 512 U.S. 874, 887 (1994), and "'unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.'" *Gingles*, 478 U.S. at 50 n.17.

Accordingly, the *Bartlett* Court held that interpreting Section 2 to allow claims for "influence" districts would raise "serious constitutional concerns under the Equal Protection Clause," because "it would unnecessarily infuse race into virtually every redistricting," 556 U.S. at 21 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.)), and it would make race the "predominant" consideration in structuring every electoral system. *Id*.

And that is exactly what has happened in California—because the CVRA protects minority voting "influence," every local jurisdiction in the State that uses at-large voting must determine whether to abandon that system based solely on whether plaintiffs can show a statistical disparity in the electoral choices of the racial groups.

B. The CVRA Purports to Relieve Plaintiffs of the Obligation to Prove Discriminatory Effects Under the Totality of the Circumstances, Which Has Been Held to Be Fundamental to Section 2's Constitutionality.

In Section 2 vote dilution cases, it is *necessary* for plaintiffs to prove the existence of racially-polarized voting, but such proof, standing alone, is not *sufficient* to establish discriminatory vote dilution. *Johnson*, 512 U.S. at 1011. Rather, once the *Gingles* preconditions are established, Section 2 requires courts to undertake a "searching practical evaluation" of the facts, and a "'functional' view of the political process" to ascertain, under the totality of the circumstances, whether the challenged system actually has discriminatory effects. *Gingles*, 478 U.S. at 44-45. This Court has held that even when racially-polarized voting is established, "courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes" to determine whether the electoral system is discriminatory or not, *i.e.*, whether it results in vote dilution. *Id*. at 1011-12. Applying this rule, numerous cases have found no vote dilution—voting discrimination—even when racially-polarized voting was established. *See, e.g.*, *id.* at 1008 and 1011-12 (district court's finding of vote dilution was error, *though racially-polarized voting was undisputed*).[6]

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[6] *See also* note 5, *supra* (citing cases).

As an en banc panel of the Fifth Circuit held in one such case, the "totality" requirement serves the fundamental purpose of distinguishing "illegal vote dilution" from "political defeat." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1999) (en banc), *cert. denied*, 510 U.S. 1071 (1994):

> The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color.' *Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense 'discriminatory,' and any distinction between deprivation and mere losses at the polls becomes untenable*.

Id. (emphasis added). In other words, once it is found that minority voters and other voters tend to vote differently in a given at-large system, the courts then proceed to determine whether those differences are the result of discrimination or merely politics.

Notably, Congress's adoption of the "totality" analysis has been a significant factor in leading courts to affirm the constitutionality of Section 2 when challenged. In *Major v. Treen*, 574 F. Supp. 325, 342-49 (E.D. La. 1983), a three-judge court upheld Section 2's constitutionality thus:

> the self-limiting character of § 2 effectively refutes the overbreadth argument. Since this statute does not impose an absolute ban on

> specific election practices, *or allow liability to attach without a finding of dilution under the totality of circumstances in a given case*, the fear that § 2 will precipitate a nationwide revision of state election laws is groundless. Only a state law shown to discriminatorily impact against minority voters will run afoul of § 2.

Id. at 348 (emphasis added).

The following year, another three-judge court adopted *Major*'s analysis in toto, *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984), and this Court summarily affirmed that decision (sub nom.) in *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984).

Likewise, in *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004), the Ninth Circuit observed:

> *After careful consideration, Congress found that the results test would be a carefully crafted measure to remedy purposeful discrimination*. Congress examined twenty-three reported cases in which the results test was applied. It found that the test did not prohibit any particular voting procedure per se, that it did not assume racial bloc voting, that it was not aimed at achieving proportional representation, that a limited number of cases were filed, and that plaintiffs did not always win. Congress also determined that section 2 is "self-limiting" because of the numerous hurdles that plaintiffs must cross to establish a vote dilution claim. In fact, calling section 2's test a "results test" is somewhat of a

> misnomer because the test does not look for mere disproportionality in electoral results. Rather, plaintiffs must establish that under the totality of the circumstances, the challenged procedure prevents minorities from effectively participating in the political process.

Id. at 909 (emphasis added). The CVRA, however, exists to undermine the "carefully crafted measure" that is the FVRA.

II. The Ninth Circuit Improperly Failed to Apply Strict Scrutiny in Accordance with the Precedents of this Court, Because It Ignored the Threshold Race-Based Decision Central to the Operation of the CVRA.

If the totality analysis is important to upholding the FVRA's constitutionality, it is all the more relevant to state legislation. The Fourteenth and Fifteenth Amendments *restrict* the power of States to engage in race-based decisionmaking, while *granting* power to Congress to enforce their provisions. Thus, legislation enacted pursuant to Congress's enforcement power is subject to the relatively deferential "congruence and proportionality" standard set forth in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

As to States, however, this Court has held that "race-based decisionmaking is inherently suspect," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), and is generally subject to strict scrutiny, even when the law is characterized as a remedy for discrimination. *See Adarand Constructors v. Pena*, 515 U.S. 200, 227

(1995); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (majority opinion) (citing *Adarand*); *id*. at 739 n.16 (plurality opinion) (same); *id*. at 758 (Thomas, J., concurring) (same); *id*. at 783 (Kennedy, J., concurring) (same).

The Ninth Circuit held that "a finding of racially polarized voting triggers the application of the CVRA," Pet. App. at 4a, but it concluded erroneously that rational basis review applied to the CVRA. It held that:

> the allegations of the operative complaint fail to plausibly state that Higginson is a victim of racial gerrymandering. Racial gerrymandering occurs when a political subdivision "intentionally assign[s] citizens to a district on the basis of race without sufficient justification." Plaintiff alleges no facts concerning the City's motivations for placing him or any other Poway voter in any particular electoral district. Similarly, he fails to cite any language in the CVRA that mandates how electoral districts can or should be drawn.

Pet. App. at 3a-4a (internal citations omitted).[7] Based on this, it concluded the CVRA was a "race-neutral" law. *Id*. at 4a.

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[7] This confusion may flow from Petitioner Higginson's reliance on this Court's decisions governing racial gerrymandering. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017); *Miller*, 515 U.S. at 916. But these decisions are merely a particular application of the broader principle that this Court has set down—all race-based decisionmaking triggers strict scrutiny.

Respectfully, this misses the point. By focusing solely on the districts drawn *after* Poway decided to abandon its at-large system, the court ignored the threshold governmental decision that was *entirely* race-based: the decision to abandon the at-large system because of statistical differences in how voters of different races vote. The districts themselves are the poisoned fruit of the initial, racially-based decision.

Illustrative is the Arizona Court of Appeal's decision in *McComb v. Superior Court*, 189 Ariz. 518, 943 P.2d 878 (Ariz. Ct. App. 1997), *rev. den.*, CV-97-0334-PR (Ariz. Sept. 16, 1997). In *McComb*, the court invalidated an Arizona statute, which provided that school districts with minority enrollment of 25 percent or more could use "ward" voting, while all other districts were required to vote at-large. Relying on this Court's racial gerrymandering cases, the Arizona court applied strict scrutiny because decisionmaking was based on purely racial considerations, and, because the statute required no evidence of actual discrimination, held it unconstitutional.

In addition, the Ninth Circuit's reliance on dicta about remedies in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015), curiously misses the holding, which is pertinent here: "[D]isparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, e.g., if such liability were imposed based solely on a showing of a statistical disparity." *Id*. at 2522. That is exactly what

the CVRA was designed to do—impose liability based on bare statistical racial disparities.

Insofar as the racial gerrymandering cases Petitioner cites are exceptional at all, it is that they allow *some* consideration of race without triggering strict scrutiny, so long as those racial considerations do not "predominate" over non-racial considerations—as they do with respect to a city's option to use at-large voting under the CVRA. *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001). In most other contexts, *any* consideration of race in governmental decisionmaking triggers strict scrutiny. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (law school admissions program that considered applicants' race as just one non-predominant factor in an "individualized, holistic review of each applicant's file," without quotas, still subject to strict scrutiny).

The CVRA expressly states that a violation is established based on racial voting patterns. Cal. Elec. Code § 14028(a). Thus, strict scrutiny applies. The Ninth Circuit erred in applying rational basis review.

III. The CVRA Cannot Survive Strict Scrutiny, Because it Is not Narrowly-Tailored to Eradicating Discrimination.

California's Attorney General has never attempted to defend the CVRA under the strict scrutiny standard, nor could he. The law is not narrowly-tailored advance a compelling state interest.

The only interest this Court has ever held to justify predominantly race-based decisions regarding the structure of a jurisdiction's electoral system is "eradicating the effects of past racial discrimination," *Shaw v. Reno*, 509 U.S. at 656, *i.e.*, unconstitutional, purposeful discrimination, *see, e.g.*, *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring); *Sanchez v. Colorado*, 97 F.3d 1303, 1328 (10th Cir. 1996). It has also assumed that complying with Section 2 is a compelling interest because the FVRA is carefully designed to identify actual discrimination in voting practices. *Id*. *See also Abbott v. Perez*, 138 S. Ct. 2305, 2314-15 (2018).[8]

The CVRA is not narrowly-tailored to either of these interests. Unlike the constitutional prohibitions against discrimination, the CVRA requires no showing of discriminatory purpose, and the CVRA is self-consciously designed to "untailor" the carefully crafted scheme of Section 2, which at least requires proof that the at-large electoral system is the problem, and of discriminatory "effects" under the totality of circumstances. The CVRA thus fails strict scrutiny.

[8] As Justice O'Connor—the author of the plurality opinion in *Bush v. Vera*—explained in a separate concurring opinion, this assumption was justified because Section 2 is structured to enforce the Fourteenth and Fifteenth Amendments' proscriptions on "purposeful discrimination" in voting. 517 U.S. at 992**.** Her other rationale was that the Supremacy Clause makes a State's compliance with federal law a compelling interest—a justification irrelevant to the CVRA, which is state legislation.

CONCLUSION

Amici respectfully request that the Court grant the petition for certiorari to address the significant constitutional defects of the CVRA.

Respectfully submitted,

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