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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PICO NEIGHBORHOOD ASSOCIATION, ET AL. V. CITY OF SANTA MONICA

After a Published Decision By California Court of Appeal,
Second Appellate District, Division Eight,
Case No. B295935
(Subsequently Depublished by this Court)

Appeal from The Superior Court of Los Angeles County
Case No. BC616804
Honorable Yvette M. Palazuelos

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF;
***AMICI CURIAE* BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE—ASIAN LAW CAUCUS, ASIAN AMERICANS ADVANCING JUSTICE—LOS ANGELES, AND ASIAN LAW ALLIANCE IN SUPPORT OF PLAINTIFFS-RESPONDENTS**

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Asian Americans Advancing Justice–Asian Law Caucus ("Advancing Justice–ALC"), Asian Americans Advancing Justice–Los Angeles ("Advancing Justice–LA"), and Asian Law Alliance ("ALA") respectfully request permission to file the *amici curiae* brief in support of Plaintiffs-Respondents which is combined with this application.

Founded in 1972, Advancing Justice–ALC is a nonprofit, public-interest organization that promotes, advances, and represents the legal and civil rights of Asian Pacific American communities. Advancing Justice–ALC strives to create informed and educated communities empowered to assert their rights and actively participate in American society, through the provision of legal services, educational programs, community organizing, and advocacy. Advancing Justice–ALC also helps set national policies on voting rights, language access, and census taking. Advancing Justice–ALC has worked in jurisdictions that have transitioned to district-based election systems because of the California Voting Rights Act ("CVRA"), helping Asian American and immigrant community members advocate for elected representation and district lines that better reflect their communities.

Since 1983, Advancing Justice–LA has been a leading legal and civil rights organization for Asian Americans and Pacific Islanders ("AAPIs"). Today, Advancing Justice–LA serves more than 15,000 individuals and organizations in California every

year. The mission of Advancing Justice–LA is to advocate for civil rights, provide legal services and education, and build coalitions to positively influence and impact AAPIs and create a more equitable society. To that end, Advancing Justice–LA works with community partners in advocating on behalf of underrepresented communities for fair voting practices, including transitions from at-large to by-district voting under the CVRA. Advancing Justice–LA devotes considerable resources toward fair voter representation advocacy, including under the CVRA.

ALA, founded in 1977, is the only legal services organization in Santa Clara County that focuses on legal issues impacting the Asian American community. ALA has a long history of involvement with voting rights issues. In 1982, ALA, along with Latino civil rights groups, pursued a case to preserve bilingual services at the County of Santa Clara Social Services Department. In 1988, ALA worked with Latino civil rights groups to challenge the County of Santa Clara's planned implementation of a "ten minute" voting rule. In the 1990s, ALA successfully advocated alongside Chinese and Vietnamese communities for bilingual ballots and voting assistance. ALA has represented Asian American voters in CVRA actions. Because of ALA's work under the CVRA, jurisdictions have transitioned to electoral systems that provide Asian American voters the opportunity to exercise greater political power in local elections. ALA continues to fight for fair representation of Asian American communities through its engagement and education work on voting, census, and redistricting.

As leading organizations serving Asian American communities, *amici* have an interest in judicial precedent that will impact the ability of minority groups to vindicate their rights under the CVRA. The CVRA is an important tool to combat the legacies of institutional and societal discrimination against Asian Americans to ensure that all communities are able to participate equally in our democracy. The statute's protections are vital to *amici*'s advocacy for fair representation for Asian Americans, including *amici*'s work on CVRA cases and support for communities in jurisdictions transitioning to district elections. The proposed *amici curiae* brief will assist the Court in deciding this matter by explaining (1) why and how the Legislature tailored the CVRA to address unlawful vote dilution in this diverse, multiethnic State, and (2) why a flexible application of the CVRA is particularly important to ensure voting rights access for Asian American communities.

No party or counsel for any party authored this brief, participated in its drafting, or made monetary contributions intended to fund the drafting or submission of the applicants' proposed brief. The applicants certify that no other person or entity, other than the applicants and their counsel, authored or made any monetary contribution intended to fund the drafting or submission of this brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

This application is timely. It is being submitted within 30 days of the filing of Petitioners' reply brief on May 12, 2021. (See *id.*, rule 8.520(f)(2).)

For these reasons, the applicants request that this Court accept and file the attached *amici curiae* brief.

Respectfully submitted,

Dated: June 11, 2021 KEKER, VAN NEST & PETERS LLP

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The California Voting Rights Act of 2001 ("CVRA") is tailored to address California's unique voting rights challenges and to remedy insidious forms of racial discrimination that, despite progress, still plague our State. The CVRA—and, specifically, its lack of a geographical compactness requirement—is essential to protecting the voting rights of Asian Americans and other minority groups in California. California is more residentially integrated than the rest of the nation, and much more so than the areas in which federal Voting Rights Act ("FVRA") enforcement has traditionally occurred. The California Legislature crafted the CVRA to address vote dilution as it manifests amidst this State's richly multiethnic demographics. The CVRA's flexibility is especially important to Asian American communities, which tend to be less residentially segregated compared to other racial groups in this State.

The CVRA draws from the general framework of the FVRA, but incorporates crucial deviations in order to protect the voting rights of minority communities in California. Most saliently, the CVRA's drafters rejected the FVRA requirement that a minority group be sufficiently large and geographically compact to

constitute a majority in a single-member district. Under the CVRA, a plaintiff may prove a violation based on evidence that an existing at-large system "impairs the ability of a protected class to elect candidates of its choice ***or*** its ability to influence the outcome of an election." (Elec. Code, § 14027, emphasis added.[1]) "The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of [] a violation" of the CVRA. (§ 14028, subd. (c).)

The CVRA's standard for establishing unlawful vote dilution should be interpreted in a manner consistent with this approach. A definition of dilution which hinges on a minority group's ability to constitute a majority or "near-majority" in a single-member district, as Defendant City of Santa Monica proposes, is inconsistent with the CVRA's deliberate rejection of the FVRA's compactness requirement. Instead, the CVRA embraces a case-specific, fact-intensive analysis that authorizes courts to combat racially polarized voting whenever it diminishes the ability of a protected group to influence elections—regardless

[1] All further statutory citations are to the Election Code unless otherwise specified.

of whether that group is sufficiently large or compact to elect its preferred candidate in a single-member district.

The CVRA's flexible approach ensures that diffuse residential patterns do not diminish the ability of any minority group to access the CVRA's protections. The statute is particularly important to Asian Americans in California, for whom political and social integration often remains elusive despite their generally high rates of residential interspersal with members of other racial groups. Asian Americans' political opportunities are still shaped by the formalized ostracism that generations suffered through immigration prohibitions and denials of fundamental rights and privileges. The effects of racial exclusion manifest in more subtle ways today, such as through insufficient language assistance and disproportionately low voter outreach. The CVRA's protections remain crucial to ensure that Asian Americans—and all other minority groups—have an opportunity to influence California's political processes.

II. ARGUMENT

A. To prove vote dilution under the CVRA, a plaintiff must establish that racial bloc voting diminished a minority group's ability to play a substantial role in the electoral process.

1. The Legislature intended the CVRA to provide broader protections than the FVRA.

The California Legislature drafted the CVRA to "provide a broader cause of action for vote dilution" than the FVRA. (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 669.) Such breadth is important to provide minority communities which may be relatively small or geographically diffuse, such as many Asian American communities, with an effective cause of action against dilutive at-large voting systems.

The federal statute requires a plaintiff asserting a vote dilution claim to establish three prerequisites: (1) that "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that "the minority group . . . is politically cohesive"; and (3) that the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances []—usually to defeat the minority's preferred candidate." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 50–51.) The first of these so-called *Gingles*

preconditions, known as the compactness requirement, expressly requires the minority group to be concentrated enough to constitute a majority in a potential single-member district. The second and third preconditions, when found in combination, establish "racially polarized voting" or "racial bloc voting." (*Id.* at 56–57.)

Upon satisfying these preconditions, a FVRA plaintiff then must establish, "based on the totality of the circumstances," that the challenged electoral process is "not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (52 U.S.C. § 10301, subd. (b).) The *Gingles* Court articulated a non-exhaustive list of factors relevant to the totality-of-the-circumstances determination. (See *Gingles, supra,* 478 U.S. at pp. 45–46.)

While the FVRA was landmark legislation for voting rights advocates, its efficacy proved to be dulled in California. In the decades following the FVRA's enactment, non-white elected officials remained dismally underrepresented in California local governance. (See, e.g., Pets.' Mot. for Jud. Notice, Ex. A, p. 162

["In 2000, Latinos comprised 33% of California's population . . . [but] Latinos represented only 2.8% of the total number of county elected officials in California."]).

In *Romero v. City of Pomona* (9th Cir. 1989) 883 F.2d 1418, 1425, the court's reasoning demonstrated the unexpected results of applying the FVRA's compactness requirement in California jurisdictions. There, notwithstanding Pomona's sizable African American and Latino populations, the court dismissed the plaintiffs' claims upon finding, among other things, that "Pomona is *so integrated* that it is impossible to construct a single-member district with a majority of black or Hispanic eligible voters." (*Id.* at p. 1425, fn.12, emphasis added.) In *Aldasoro v. Kennerson* (S.D. Cal. 1995) 922 F.Supp. 339, the plaintiffs drew a hypothetical single-member district with a Hispanic citizen voting age population ("CVAP") exceeding fifty percent, but the court still concluded that the plaintiffs failed to satisfy the first *Gingles* precondition because the "eligible voter majority [was] not a registration or turnout majority." (*Id.* at p. 373.)

Cases such as these, where minority groups were unable to show they could constitute a majority in a single-member district, propelled the enactment of standalone California voting rights

legislation. The CVRA's drafters were resolute in designing an adaptable, State-specific solution to the scourge of minority vote dilution. Senator Richard Polanco, the bill's sponsor, explained: "[The CVRA] is necessary because the federal Voting Rights Act's remedy fails to redress California's problem of racial bloc voting." (Press Advisory, Sen. Polanco, *California's New Voting Rights Act*, Senate Bill 976, Signed Into Law (July 10, 2002).) The first *Gingles* precondition meant that "[i]f the minority community were at 49 percent, then the federal courts cannot provide a remedy" for vote dilution. (*Id.*) That "artificial threshold," Senator Polanco stated, "often serve[d] to deny minority voting rights in California simply because the minority community is not sufficiently compact." (*Id.*)

Given the shortcomings of the FVRA section 2 framework, at least when applied in this State, the California Legislature sought to expand voting rights protections beyond existing federal law.

2. The Legislature crafted the CVRA to account for California's integrated, multiethnic demographics.

"The reality in California is that no racial group forms a majority" (*Sanchez, supra*, 145 Cal.App.4th at p. 666), and the

State is more racially integrated than the nation as a whole. Consider Los Angeles County, which includes the City of Santa Monica: It is "less [segregated] than the nation, and segregation has declined somewhat over time as the region has become more diverse." (See Policy Link & USC Program for Environmental and Regional Equity ("PL&PERE"), *An Equity Profile of the Los Angeles Region* (2017), p. 77.)

The CVRA's drafters recognized that California's multiethnic demographics are fundamentally different from the black-white dynamics that motivated the enactment of the FVRA. As Senator Polanco elaborated, racial bloc voting "is particularly harmful to a state like California due to its diversity." (Assem. Comm. on Elections, Reapportionment & Constitutional Amends., analysis of Senate Bill 976 (2001–2002 Reg. Sess.) Apr. 2, 2002, p. 3.) Because "any racial group [in California] can experience the kind of vote dilution the CVRA was designed to combat," the Legislature sought to provide Californians with a better, more flexible tool to promote fair elections. (*Sanchez, supra,* 145 Cal.App.4th at p. 666; see also Assem. Com. on Judiciary, analysis of SB 976 (2001–2002 Reg. Sess.) Apr. 9, 2002, p. 2, quoting bill author ["'We need statutes to ensure that

our electoral system is fair and open. [The CVRA] gives us a tool to move us in that direction[.]'"].)

Thus, for the CVRA, the Legislature removed the *Gingles* compactness precondition—finding that geographical compactness was not "important [] in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system." (*Sanchez, supra,* 145 Cal.App.4th at p. 669; see also § 14028, subd. (c).) Put differently, the drafters recognized that a minority group's voting power may be unlawfully diluted even if that group is not geographically concentrated or cannot form a majority in a single-member district.

The Legislature also removed the totality-of-the-circumstances requirement. Those totality factors—including the jurisdiction's "history of discrimination" and "denial of access to those processes determining which groups of candidates will receive financial or other support"—were deemed "probative, but not necessary" to establish a violation. (§ 14028, subd. (e).)

Thus, the CVRA standard for vote dilution incorporates *only* the second and third *Gingles* preconditions: political cohesion of the minority group, and a majority voting bloc

sufficiently cohesive to usually defeat the minority's preferred candidate. The Legislature acknowledged the established meaning of the term "racially polarized voting" by incorporating into the definition relevant "case law regarding enforcement of the federal Voting Rights Act." (§ 14026, subd. (e).) But establishment of racially polarized voting need not rely on federal case law's "methodologies for estimating group voting behavior"; rather, methodologies approved to establish racially polarized voting in cases enforcing the federal Voting Rights Act may—but need not—be used. (*Id.*)

The Legislature, through these modifications, created a flexible cause of action tailored to California's unique demographics, furnishing a wide range of remedies to combat vote dilution. Racially polarized voting—standing alone—constitutes a CVRA violation where an at-large system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." (§§ 14027, 14028, subd. (a).) Indeed, unlike under the FVRA, "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of [] a violation." (§ 14028, subd. (c).) The California Legislature sought to remedy

dilution caused by racial bloc voting wherever it may occur, regardless of whether the protected class harmed by it was dispersed throughout a jurisdiction or too small to constitute a majority in a single-member district.

Legislators expressly recognized the benefits of a vote dilution standard that eliminates a geographical compactness requirement—the opportunity to favorably influence elections and increase voter participation. "[A]lthough a particular group *may be too small to ensure that its own candidate is elected*, the group may still be able to *favorably influence the election of a candidate*. This influence may only come about with district rather than at-large elections." (Pets.' Mot. for Jud. Notice, Ex. A, pp. 111–113 [Stmt. of Sen. Polanco to Assem. Elections & Reapportionment Com., Apr. 2, 2002], emphasis added; *id.* at pp. 115–116 [Stmt. of Ali, on behalf of Sen. Polanco to Senate Elections & Reapportionment Com., May 2, 2001].)

This emphasis on a minority group's ability to "favorably influence" an election provides a less onerous standard to challenge the fairness of an at-large system than does the FVRA, which requires that a minority group be sufficiently concentrated such that its members "could elect their own representative if

they were in a single district." (Pets.' Mot. for Jud. Notice, Ex. A, p. 86 [Enrolled Bill Report of SB 976, June 11, 2002].) The drafters further recognized that a "more equitable, representative system may encourage more people to participate and vote." (*Id.*, p. 87)

Moreover, the CVRA grants courts wide discretion to "implement appropriate remedies . . . tailored to remedy the violation." (§ 14029.) Remedies may take many forms, such as crossover districts or coalition districts, or alternative at-large voting systems such as cumulative voting, limited voting, and ranked choice voting. (*Sanchez*, *supra* 145 Cal.App.4th at p. 670.) The CVRA's wide range of available relief presents a significant departure from the FVRA, where the only cognizable solution to unlawful vote dilution is the creation of a majority-minority district. (See *Bartlett v. Strickland* (2009) 556 U.S. 1, 15 ["Only once, in dicta, has this Court framed the first *Gingles* requirement as anything other than a majority-minority rule."] [plurality opn.]; *Growe v. Emison* (1993) 507 U.S. 25, 41 [unless all three *Gingles* prerequisites are established, "there neither has been a wrong nor can be a remedy" under the FVRA].)

In sum, the CVRA is designed to address unlawful vote dilution in California's integrated, multiethnic jurisdictions. The Legislature intended the statute to apply widely and flexibly, because minority communities in California—often more integrated than those elsewhere in America—had achieved little success in addressing vote dilution prior to its enactment.

3. The CVRA affords courts substantial flexibility to determine, on a case-by-case basis, whether there is a violation.

Section 14027 of the CVRA provides that an at-large election system may not be 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." It is well-understood that "the power to influence the political process is not limited to winning elections." (*Gingles*, *supra*, 478 U.S. at p. 99 [O'Connor, J., concurring in judgment] [internal quotations omitted]; *see also Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, 991 [minority group influence encompasses the ability to "have a significant impact at the ballot box most of the time"].) A protected class has the ability to influence the outcome of an election where it may

"play a substantial, if not decisive, role in the electoral process." (See *Georgia v. Ashcroft* (2003) 539 U.S. 461, 482.[2]) The CVRA expressly rejected a bright-line majority-minority requirement as inconsistent with California's integration and multiculturalism. (See, e.g., Pets.' Mot. for Jud. Notice, Ex. A, p. 100.) Thus, the actionable diminution of a protected group's role in the electoral process will necessarily differ from case to case.

The case-specific nature of the CVRA's dilution inquiry is a feature, not a flaw, of its remedial framework. Voting rights cases are "inherently fact-intensive." (*Nipper v. Smith* (11th Cir. 1994) 39 F.3d 1494, 1498.) The evidence "must be evaluated with a functional, rather than a formalistic, view of the political process," which the U.S. Supreme Court described as necessitating a "searching practical evaluation of the past and present reality" of the electoral system's operation. (*Id*. at p. 1498, internal quotation marks omitted [quoting *Gingles, supra,*

[2] The City dismisses *Georgia v. Ashcroft* as "irrelevant" because it addressed section 5 of the Voting Rights Act, rather than section 2. (AB, p. 40.) But the *Georgia* Court's discussion of influence districts was not limited to the context of section 5's preclearance requirements. Indeed, in describing influence district and emphasizing their importance, the Court drew upon seminal section 2 precedent, including *Gingles*. (*Georgia v. Ashcroft* (2003) 539 U.S. 461, 482.)

478 U.S. at p. 45].) The CVRA demands a "fact-intensive expedition through the factors for ascertaining racially polarized voting while also enabling greater flexibility around variables like geographic compactness" and other probative circumstances. (*Yumori-Kaku v. City of Santa Clara* (2020) 59 Cal.App.5th 385, 425.) To determine whether racial bloc voting exists, courts must conduct a "practical, commonsense assay of all the evidence." (*Uno, supra,* 72 F.3d at p. 989.) These inquiries, while flexible and fact-based, are guided by objective standards developed in case law—both under the FVRA and the CVRA.

4. The City's proposed "near-majority-plus-crossover-support" rule for proving dilution is fundamentally inconsistent with the CVRA's rejection of a compactness requirement.

The City urges this Court to adopt a "near-majority-plus-crossover-support" rule for ascertaining dilution. That proposal—a back-door compactness requirement—does little to protect minority group members who live interspersed with members of other racial groups, and therefore undermines the Legislature's purpose to stymie racially polarized voting in all its forms.

The City presents a parade of horribles that would purportedly accompany a fact-intensive, case-specific analysis of

dilution. (AB, pp. 26-27.) None withstand scrutiny. The U.S. Supreme Court has long recognized that a group's electoral influence under various systems may be quantified and compared. (See, e.g., *Georgia*, *supra*, 539 U.S. at p. 482 ["In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."].) Moreover, the determination that a minority group possesses "near-majority" strength is no less speculative than these other measures of influence. The City's "near-majority-plus-crossover-support" proposal still considers whether minority-preferred candidates who usually lost under an at-large election system "are reliably supported by enough crossover votes that they would likely win" in a proposed hypothetical district. (AB, p. 35.) And, contradictorily, the City claims that application of Plaintiffs' dilution analysis would hurt minority voters by reducing their electoral influence—despite arguing that those minority voters had only marginal influence in the first place because their numbers did not rise to the level of a "near-majority." (AB, pp. 44–45.)

Finally, the City's slippery-slope assertion that considering "influence" as part of the CVRA's dilution analysis would

"effectively mandate districts everywhere" (AB, at p. 39) ignores the CVRA's other requirements. To prevail on a CVRA claim, a plaintiff must prove racially polarized voting, in which there is a difference "in the choice of candidates . . . preferred by voters in a protected class, and in the choice of candidates . . . preferred by voters in the rest of the electorate." (§ 14026, subd. (e).) No colorable interpretation of dilution could excise that requirement. But, under the City's proposal, even after racially polarized voting has been established, the relief would be available for only the most powerful minority groups—those who can comprise a near-majority in a proposed district and demonstrate reliable support from crossover votes. Nothing in the CVRA's text or legislative history limits its protection in this artificially restrictive way.

B. Flexible CVRA application is crucial for Asian Americans to access voting rights protections.

The Legislature incorporated flexibility into the CVRA to ensure voting rights protections for minority communities, despite more integrated residential patterns in this State. Such statutory adaptability is crucial for Asian Americans, who are generally unlikely to reside in a neighborhood where Asian

Americans comprise a majority of residents and for whom, therefore, the traditional FVRA remedy of a majority-minority district is not apt. "[T]he Asian American experience is unusually multiracial and almost evenly divided between those who live in predominantly white neighborhoods and those who live in more heavily Latino and/or black neighborhoods." (Cho & Cain, *Asian Americans as the Median Voters: An Exploration of Attitudes and Voting Patterns on Ballot Initiatives* in Asian Americans and Politics: Perspectives, Experiences, Prospects (Chang edit., 2001), p. 136.) Nationally, Asian Americans tend to be less residentially segregated from Whites among major ethnic and racial groups. (Ong et al., *Race, Ethnicity, and Income Segregation in Los Angeles*, UCLA Center for Neighborhood Knowledge (June 24, 2016), p. 12.[3]) And while 61% of White Californians and 59% of Latino Californians live in neighborhoods where they constitute a racial majority, the same is true for only 21% of Asian Californians and 7% of Black

[3] *Available at* https://knowledge.luskin.ucla.edu/wp-content/uploads/2018/01/Race-Ethnicity-and-Income-Segregation-Ziman_2016.pdf [last accessed June 11, 2021].

Californians.[4] In Los Angeles County, 5% of census tracts are majority Asian and 4% of tracts majority Black, compared with 30% majority White tracts, 36% majority Hispanic tracts. (Ong et al., p. 15.) It is common for Asian Americans to live in neighborhoods interspersed with other racial groups.

Residential integration, however, has not yet translated into political and social integration for Asian Americans. The COVID-19 pandemic has laid bare extensive racism and xenophobia in the United States. In the past year, rates of reported violence and harassment against Asian Americans have surged. (Jeung et al., Stop AAPI Hate National Report, Stop AAPI Hate (3/19/20-2/28/21).[5]) Anti-Asian sentiment is not limited to interpersonal interactions, but also infects the rhetoric

[4] Amici base these numbers on recent American Community Survey results from the U.S. Census Bureau. (See *2018 Data Profiles*, American Community Survey, U.S. Census Bureau, *available at* https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2018/ [last accessed June 11, 2021].) Amici identified the total number of Asians who lived in California "census tracts," geographic subdivisions within each county, where Asians represented more than 50 percent of the tract's population and compared that to the total population of Asians in California. Amici repeated that calculation for each major racial demographic.

[5] *Available at* https://secureservercdn.net/104.238.69.231/a1w.90d.myftpupload.com/wp-content/uploads/2021/03/210312-Stop-AAPI-Hate-National-Report-.pdf [last accessed June 11, 2021].

of high-profile politicians. (Rogers et al., *Trump Defends Using 'Chinese Virus' Label, Ignoring Growing Criticism,* N.Y. Times (Mar. 18, 2021)[6]; Shepherd, *John Cornyn criticized Chinese for eating snakes. He forgot about the rattlesnake roundups back in Texas.*, Wash. Post (Mar. 19, 2020, 5:32 AM).[7])

Societal anti-Asian sentiment is not new. For generations since the mid-nineteenth century, federal and state governments implemented and enforced official anti-Asian policies, restricting or outright banning immigration from Asian countries and denying full rights and privileges to individuals of Asian descent living in the United States. (See, e.g., Chinese Exclusion Act, Pub. L. No. 47-126 (May 6, 1882) 22 Stat. 58 [limiting immigration from China, and designating Chinese immigrants ineligible for citizenship]; Immigration Act of 1924, Pub. L. No. 68-139 (May 26, 1924) 43 Stat. 153 [substantially limiting immigration from other "undesirable" groups including Middle Easterners, Indians, Southeast Asians, Indonesians, and

[6] *Available at* https://www.nytimes.com/2020/03/18/us/politics/china-virus.html [last accessed June 11, 2021].

[7] *Available at* https://www.washingtonpost.com/nation/2020/03/19/coronavirus-china-cornyn-blame/ [last accessed June 11, 2021].

Japanese]; Cal. Const., art. II, § 1 as ratified 1879 [providing that "no native of China" possessed the right of suffrage, despite the passage of the Fifteenth Amendment nine years earlier]; *Perez v. Lippold* (1948) 32 Cal.2d 711, 713 [recounting Civil Code prohibitions on interracial marriage between whites and individuals of "Mongolian" or "Malay" ancestry]; Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship* (2010) 87 Wash. U.L. Rev. 979, 991–994 [describing discriminatory anti-Japanese motivations and enforcement of California's Alien Land Law, which broadly restricted "aliens ineligible for American citizenship" from owning or leasing agricultural land for more than three years]; United States, Exec. Office of the President [Franklin D. Roosevelt]: Authorizing the Secretary of War to Prescribe Military Areas (Exec. Order No. 9066 (Feb. 19, 1942)) [authorizing forced evacuation and incarceration of all persons of Japanese ancestry].)

Notoriously, in 1854, the California Supreme Court decided *People v. Hall*, holding that a Chinese person could not testify against a white person at trial. (*People v. Hall* (1854) 4 Cal. 399.) The Court warned of the "actual and present danger" that a rule

permitting Chinese witness testimony against white persons "would admit [Chinese persons] to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls." (*Id.* at p. 404.) Given this history, Asian Americans in California know all too well that the measurement of political influence cannot be reduced to the simple test of whether voters can elect their preferred candidate.

As a result of exclusionary anti-Asian immigration policies that endured in this country for several generations, Asian Americans, as a whole, are a "remarkably recently arrived population." (Wong et al., Asian American Political Participation (2011), p. 63.) In the present day, many official discriminatory laws and policies have fallen out of favor. Yet lingering effects of state-sponsored exclusion continue to limit the political participation and representation of Asian Americans. (See *Yumori-Kaku v. City of Santa Clara* (2020) 59 Cal.App.5th 385, 403 [considering trial expert opinion that "mechanisms of political exclusion leave legacies" and "'even if Asians are gaining in terms of economic mobility, they are not seen as fully part of the civic fabric of the United States'"].)

For example, overall lower levels of English language proficiency are directly correlated with lower voting and participation rates in political activities. (See Wong, *supra*, at pp. 66–67.) Nearly six in ten Asian Americans are foreign born, including 71% of Asian American adults. (Budimen & Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, Pew Res. Ctr. (Apr. 29, 2021).[8]) Seventy-five percent of Asian Americans speak a language other than English and, of those, 47% are limited-English proficient ("LEP"), meaning that they self-identify as speaking English less than "very well." (2013-2017 American Community Survey 5-Year Estimates.) LEP rates vary among ethnic groups. Over half of Vietnamese Americans and nearly half of Bangladeshi Americans are LEP. (Asian Americans Advancing Justice, *Voices of Democracy: Asian Americans and Language Access During the 2012 Elections* (2013), p. 4.) More than 40% of Cambodian, Chinese, Hmong, Korean, Laotian, and Taiwanese Americans are LEP and have some difficulty with English. (*Id.*) Even as to groups with higher

[8] *Available at* https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/ [last accessed June 11, 2021].

average rates of English proficiency, such as Japanese and Filipino Americans, almost 20% are LEP. *(Id.*)

California's local governments often fail to accommodate the needs of LEP voters, even when mandated to do so by law. The U.S. Department of Justice has brought legal actions against several California cities and counties under section 203 of the FVRA, for the jurisdictions' failure to provide voting materials translated into Asian languages. (See, e.g., Consent Decree, Judgment, & Order, *United States v. Alameda County, et al.*, No. C-11-3262 (N.D. Cal. Oct. 19, 2011), ECF No. 21 [consent decree mandating that Alameda County provide bilingual language assistance at the polls, as well as election materials in Spanish and Chinese]; Agreement and Order, *United States v. City of Walnut, et al.*, No. CV 07-2437 (C.D. Cal. Nov. 9, 2007), ECF No. 22 [consent decree requiring that the City of Walnut, California translate election materials and provide assistance for LEP Chinese- and Korean-American voters].)

Moreover, voter outreach remains an unmet need for Asian Americans. Based on a national survey, only 29% of Asian American adults were contacted by one of the political parties leading up to the 2016 election, compared to 44% of white adults

and 42% of Black adults. (Ramakrishnan et al., National Asian American Survey, "2016 Post-Election National Asian American Survey" (2017), p. 7.[9]) Other minority groups receiving similarly low rates of contact from political parties include Latino adults (27%) and Native Hawaiian and other Pacific Islander adults (26%). (*Id.*)

Political and social integration often remains elusive for Asian Americans. Asian Americans remain subject to a stereotype that they are "perpetual foreigners," perceived as unintegrated into American society and denied their identities as full Americans. (See, e.g., Huynh et al., *Perpetual Foreigner in One's Own Land: Potential Implications for Identity and Psychological Adjustment* (2011) 30 J. Soc. & Clin. Psychol. 133.) Barriers preventing Asian Americans from accessing elected positions of civic influence create a feedback loop, further entrenching perceptions that Asian Americans do not truly belong in the shared project of our democracy.

[9] *Available at* http://naasurvey.com/wp-content/uploads/2017/05/NAAS16-post-election-report.pdf [last accessed June 11, 2021].

This historical and present discrimination, including use of dilutive voting systems such as at-large elections, has hampered Asian Americans' ability to elect candidates from their communities. Asian American and Pacific Islanders ("AAPIs") make up 6.1% of the U.S. population, but they hold less than 1% of elected offices. (Reflective Democracy Campaign, "Asian American Pacific Islander [AAPI] Political Leadership (May 2021), p. 2."[10]) For AAPI communities in California, the negative differential between political representation relative to population is staggering, at 58.8%. (*Id.*, p. 4.)

In light of persistent structural obstacles to political participation and representation, it is crucial that Asian Americans, among other underrepresented groups, continue to access robust CVRA protections. Considering this State's overall residential patterns, a majority or near-majority compactness requirement would limit many Asian American communities' ability to invoke the CVRA in order to influence election outcomes.

[10] *Available at* https://wholeads.us/wp-content/uploads/2021/05/reflectivedemocracy-AdvanceAAPIPower-may2021.pdf [last accessed June 11, 2021].

Recent elections in state jurisdictions illustrate that equitable districting—sometimes only in the shadow of CVRA enforcement—can meaningfully advance political integration, even when protected groups would not comprise a near-majority in a district. Take, for example, Sunnyvale in Santa Clara County. Historically, few Asian Americans and Latino individuals had been elected to serve on the Sunnyvale City Council, despite substantial portions of Asian American and Latino voting populations in the city, and numerous unsuccessful campaigns by non-white candidates. In response to a legal demand letter in 2018,[11] Sunnyvale agreed to transition to a district system that afforded influence districts for its Asian American and Hispanic residents: Sunnyvale's District 2 was drawn with 35% Asian and Pacific Islander and 17% Hispanic citizen CVAP; District 4 was drawn with 36% Asian and Pacific Islander and 14% Hispanic CVAP; and District 6 was drawn with

[11] Ltr. from Goldstein, Borgen, Dardarian, & Ho, to City Clerk, City of Sunnyvale (Oct. 2, 2018), *available at* https://sunnyvaleca.legistar.com/LegislationDetail.aspx?ID=3756725&GUID=053BCA6F-5BB8-4309-8868-4CBCDD038475 [click "Certified Letter from GBDH"].

30% Asian and Pacific Islander and 15% Hispanic CVAP.[12] In the first election following that redistricting, the residents of Sunnyvale elected their the most diverse slate of city council members in the city's history, including a Latina councilmember and a Pakistani-American councilmember.[13] Sunnyvale provides a clear illustration of how non-traditional voting rights remedies, such as influence districts, can strengthen representation and political integration of protected groups in California.

The CVRA is an important tool for increasing representation and affording Asian Americans the opportunity to participate in the electoral process, whether by electing candidates of their choice or otherwise influencing the outcome of an election.[14] Thus, this Court should preserve a flexible

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[12] Map 120D, Att. 1, p. 4, *available at* https://sunnyvaleca.legistar.com/LegislationDetail.aspx?ID=4223789&GUID=7DB104C0-925B-4C99-908E-4AE2480BBBB7&Options=ID%7cText%7c&Search=district+map [click "Preferred Draft Maps and Sequencing"].

[13] Election 2020 Local Results, Cupertino Today (12/2/20 10:00 AM) *available at* https://cupertinotoday.com/2020/11/03/election-2020-local-results/ [last accessed June 11, 2021].

[14] Ranked choice voting is another potentially appropriate non-district CVRA remedy where communities are residentially integrated. Under a ranked-choice system, the threshold to win is lowered depending on the number of seats up for election. When electing three seats, the election threshold is just over 25%; when electing four seats, the threshold is just over 20%. (See

application of the CVRA, both in the identification of and the potential remedies to unlawful vote dilution.

III. CONCLUSION

For the foregoing reasons advanced by *amici*, this Court should reverse the judgment of the court of appeal.

Respectfully submitted,

Dated: June 11, 2021 KEKER, VAN NEST & PETERS LLP

By: _____
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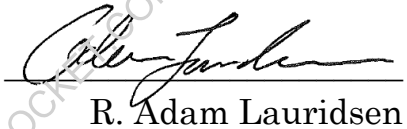
Yanos, *Reconciling the Right to Vote with the Voting Rights Act* (1992) 92 Colum. L. Rev. 1810, 1860.)

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court 8.520(b)(1) and 8.204(c), I certify that the attached *amici curiae* brief uses 13-point Century Schoolbook font and contains 5,200 words, which is less than the total words permitted by the rules of court. For this Certificate of Compliance, the undersigned relies on the word count of Microsoft Word, the computer program used to prepare this brief.



R. Adam Lauridsen

PROOF OF SERVICE

I am employed by Keker, Van Nest & Peters LLP, 633 Battery Street, San Francisco, CA 94111. I am over the age of eighteen years and am not a party to this action. On June 11, 2021, I served the following documents:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE–ASIAN LAW CAUCUS, ASIAN AMERICANS ADVANCING JUSTICE–LOS ANGELES, AND ASIAN LAW ALLIANCE IN SUPPORT OF PLAINTIFFS AND RESPONDENTS

BY U.S. Mail: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Keker, Van Nest & Peters LLP for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

Hon. Yvette M. Palazuelos Judge Presiding Los Angeles County Superior Court 312 North Spring Street Los Angeles, CA 90012	*Trial Court*

In addition, I electronically served the attached document to the following parties via TrueFiling system.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 11, 2021, at San Francisco, California.

Sandy Giminez