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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

11 | LADONNA YUMORI KAKU, et al.,

12 | Plaintiffs,

13 | vs.

14 | CITY OF SANTA CLARA, and DOES 1 to 50,

15 | Defendants.

Case No. 17CV319862

STATEMENT OF DECISION

16

17   Plaintiffs Ladonna Yumori Kaku, Wesley Kazuo Mukoyama, Umar Kamal, Michael

18 Kaku, and Herminio Hernando (collectively, "Plaintiffs") allege that the at-large elections for

19 City Council seats for the City of Santa Clara ("City") violate the California Voting Rights Act

20 ("CVRA"). The City denies any violation. The liability phase of trial commenced on April 23,

21 2018 in Department 5, the Honorable Thomas E. Kuhnle presiding. At the conclusion of trial the

22 parties agreed the Court could issue a Proposed Statement of Decision ("PSOD") without first

23 announcing a tentative decision. The Court issued its PSOD on May 15, 2018. The parties

24 subsequently submitted written objections. Having received and considered the parties'

25 objections, the Court now issues its final Statement of Decision.

26 **I.   INTRODUCTION**

27   Members of Santa Clara's City Council are elected at-large for numbered seats and serve

28 staggered four-year terms. The CVRA provides that "[a]n 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. . . ." (Elec. Code § 14028, subd. (a).)[1] Asian Americans ("Asians") are a protected class. Voters in Santa Clara have never elected an Asian to the City Council. Plaintiffs argue that while Asian voters have overwhelmingly supported Asian candidates in local elections, the will of these voters has been impaired by a voting majority comprising non-Hispanic white and black voters.[2] The liability phase of trial determines if the City's at-large, numbered seat method of selecting City Council members violates the CVRA.[3] If liability is found, a trial to determine an appropriate remedy will follow.

II.   BACKGROUND

A.   Demographics

The 2010 U.S. Census reported the City had approximately 115,000 residents. At present approximately 125,000 people reside there. As described in more detail below, the expert witnesses relied on surnames as a proxy for race/ethnicity classifications. This enabled them to separate the City's population into three groups: non-Hispanic whites and blacks ("NHWBs"), Latinos, and Asians. The table below displays the percentage of City residents, eligible voters and actual voters who fall into each group in the 2012-2016 time period.

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

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

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

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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.

Third, Dr. Lewis testified that the problems inherent in applying EI where there is a low degree of homogeneity make it difficult to establish there is "cohesion in voting across the diverse national-origin communities that exist within the City of Santa Clara's broader Asian community." (Lewis Direct at 5.)

Fourth, while Dr. Lewis applied EI to the 2016 City Council elections only as a "proof of concept," he testified that evidence of polarized voting was weak.

IV.   LEGAL FRAMEWORK

A.   At-Large Elections and Polarized Voting

The trial considered the City's at-large method for electing City Council members. 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. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 47 ("*Gingles*"); *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667-68) ("*Sanchez*"); § 14028, subd. (e) [stating as a probative factor "practices or procedures that may enhance the dilutive effects of at-large elections...."].)

To protect against voter dilution, the CVRA provides:

> 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.

(§ 14027.) The term "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.)." (§ 14026, subd. (d).) Asians are a protected class.[5]

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[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 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, 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).)

The CVRA is violated if there is racially polarized voting. (§ 14028, subd. (a).) The phrase "racially polarized voting" means:

> [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 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.

(*Id.* § 14026, subd. (e).)

B. The *Gingles* Preconditions

The reference to "case law regarding enforcement of the federal Voting Rights Act of 1965" (the "FVRA") in the definition of "racially polarized voting" implicates the U.S. Supreme Court opinion cited above – *Gingles*. To determine if the FVRA is violated, *Gingles* instructs courts to first determine if three "preconditions" are met. If that showing is made, *Gingles* requires courts to consider the "totality of the circumstances" in determining if the challenged electoral process impermissibly impairs the minority group's ability to elect representatives of its choice. (*Gingles, supra,* 478 U.S. at 44-45.)

The CVRA is patterned after the FVRA and incorporates federal case law interpreting provisions in the FVRA. The statutes, however, differ in at least four respects. First, under the CVRA the first *Gingles* precondition – if there is a compact majority-minority district – is not considered until the remedy phase. (§ 14028, subd. (e).) Second, *Gingles's* "totality of the circumstances" analysis is augmented with express circumstances and factors spelled out in the CVRA. (§§ 14028, subds. (b), (e).) Third, the CVRA does not consider "proof of an intent on the part of the voters or elected officials to discriminate against a protected class. . . ." (§ 14028, subd. (d).) Fourth, the CVRA protects minority voting rights not only to elect minority-preferred representatives but also to "influence the outcome of an election." (§ 14027.) These differences are consistent with the legislative intent for the CVRA to "provide a broader cause of action for vote dilution than was provided for by federal law." (*Sanchez, supra,* 145 Cal.App.4th at 669.)

The liability phase of trial considers the second and third *Gingles* preconditions, which are: "the minority group must be able to show it is politically cohesive" and "the minority must

1 be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the

2 absence of special circumstances, such as the minority candidate running unopposed – to defeat

3 the minority's preferred candidate." (*Gingles, supra,* 478 U.S. at 51.) In other words, *Gingles*

4 states that racially polarized voting is shown where "there is a consistent relationship between

5 the race of the voter and the way in which the voter votes, or to put it differently, where

6 [minority] voters and [nonminority] voters vote differently." (*Id.* at 53, n.21 [internal citation

7 and editing omitted].) This "consistent relationship" between race and voting may be established

8 by evidence of statistically significant differences between the voting patterns of a minority and

9 nonminority group. (*Id.* at 53.)

10 Under the FVRA courts are required to conduct "a searching practical evaluation of the

11 past and present reality" to determine whether minority groups can participate equally in the

12 political process and elect candidates of their choice. (*Gingles, supra,* 478 U.S. at 79-80

13 [internal quotations omitted].) Individual elections can be given more or less weight depending

14 on the circumstances, including "the absence of an opponent, incumbency, or the utilization of

15 bullet voting." (*Id.* at 51.)

16 **C.   Evidence of Impaired Voting Rights**

17 The CVRA states, "The methodologies for estimating group voting behavior as approved

18 in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec.

19 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to

20 prove that elections are characterized by racially polarized voting." (§ 14026, subd. (e).)

21 Federal courts have approved complicated statistical methods to prove FVRA violations,

22 including EI.

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

24 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
25 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
26 body of a political subdivision that is the subject of an action. . . .

27

28 (§ 14028, subd. (b).) The CVRA also declares as probative of a violation:

[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 |

1   While the Court does not believe the language is ambiguous, if it were, there would be at

2   least two reasons why it would embrace trivariate analyses. First, the CVRA seeks to overcome

3   bloc voting. To fulfill the purposes of the CVRA, Plaintiffs should be able to compare voting

4   differences between Asians and an NHWB bloc because that difference is what is allegedly

5   causing dilution. The Court agrees that requiring a comparison of Asians on the one hand, and

6   NHWB and Latinos on the other hand, could hide the very thing the CVRA seeks to expose.

7   Second, section 14026, subdivision (e), expressly references the FVRA, and cases under that law

8   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.

13   (*Aldasoro v. Kennington, supra,* 922 F.Supp. at 345.) Moreover, unless the City shows that

14   NHWBs and Latinos together voted cohesively, it would be improper under the FVRA to include

15   them together in the majority bloc. (*Id.* at 375 ["Numerous cases have refused to combine

16   groups that were shown not to be politically cohesive."].)

17   For all of these reasons, the Court finds Dr. Kousser's trivariate analysis may be

18   considered in assessing whether the CVRA was violated.

19   **B.   Methodological Disputes in Measuring Political Cohesion**

20   *Gingles* requires a minority group be politically cohesive. Political cohesion may be

21   established by "showing that a significant number of minority group members usually vote for

22   the same candidates. . . ." (*Gingles, supra,* 478 U.S. at 56.) "Statistical proof of political

23   cohesion is likely to be the most persuasive form of evidence, although other evidence may also

24   establish this phenomenon." (*Monroe v. City of Woodville* (1989) 881 F.2d 1327, 1331.)

25   The parties agree that EI is considered the best practice for modeling candidate support

26   among voters of a racial group. (Lewis Direct at 31; TR1 134:15-22.) But while EI may be the

27   best method for analyzing election results, the parties sharply disagree on whether it is useful for

28   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.

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.

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.　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

1 | determining the voting behavior of different racial groups within Santa Clara (TR3 54:27-
2 | 56:23.); and (3) some information is better than none. (TR3 59:13-22.) The Court concludes
3 | that the EI results presented by Dr. Kousser are less reliable than those generated in more
4 | segregated communities, but his EI results are nonetheless probative. (See *Luna v. County of*
5 | *Kern* (2018) 291 F.Supp.3d 1088, 1124-25 ["The court need not insist on mathematical
6 | exactitude in assessing racial polarization."] (*"Luna"*); *Rodriguez v. Harris County, supra,* 964
7 | F.Supp.2d at 768 ["The Court finds the ecological inference data imprecise. . . but the data is
8 | nevertheless probative on the question of racial bloc voting]; *Fabela v. City of Farmers Branch,*
9 | *supra,* 2012 WL 3135545 at *10-11 & nn. 25, 33; *Perez v. Pasadena Indep. Sch. Dist.* (1997)
10 | 958 F.Supp. 1196, 1220-22, aff'd 165 F.3d 368; *Benavidez v. City of Irving, supra,* 638
11 | F.Supp.2d at 724-25; *Aldasoro v. Kennington, supra,* 922 F.Supp. at 347.)[7]
12 | Third, like the methodological difficulties posed by homogeneity, the Court understands
13 | the City's concerns that aggregation bias may compromise the EI results. Dr. Lewis's analysis
14 | of party registration to illustrate this point, however, is fraught with uncertainties and
15 | inconsistencies. The Court reaches the same conclusion as another court to which this argument
16 | 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.
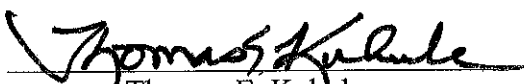
Fourth, the Court has considered other factors the CVRA considers probative including the history of discrimination and the extent to which members of a protected class bear the

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