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ESSAY

THE CALIFORNIA SUPREME COURT REPLACES GINGLES PRONG ONE

*Bruce A. Wessel** & *Jason D. D'Andrea***

This Essay analyzes *Pico Neighborhood Association v. City of Santa Monica*,¹ the California Supreme Court's first decision interpreting the California Voting Rights Act of 2001 ("CVRA").² The CVRA was designed to give "greater protections to California voters than those provided by the [federal Voting Rights Act],"³ but limited to challenges to the use of at-large elections at the local level.⁴

The *Pico Neighborhood* plaintiffs filed suit against the City of Santa Monica (the "City") in 2016, alleging that the City's at-large method of conducting city council elections diluted the voting power of Latino voters.⁵ At that time, Latino residents made up

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¹ 534 P.3d 54 (Cal. 2023).

² CAL. ELEC. CODE §§ 14025–14032 (West 2023). California was the first state to enact a state voting rights act. Five other states followed. See Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 72 EMORY L.J. 299, 301 (2023).

³ *Pico Neighborhood Ass'n*, 534 P.3d at 59; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702). Efforts to expand the CVRA beyond at-large elections have failed. See Abby Sewell, *Gov. Jerry Brown Vetoes Expansion of State Voting Rights Act*, L.A. TIMES (Oct. 2, 2014, 11:48 AM), <https://www.latimes.com/local/lanow/la-me-pc-governor-veto-voting-rights-20141001-story.html> [perma.cc/M235-SV2J] (explaining that the vetoed measure, "sponsored by [then state] Sen. Alex Padilla [now a U.S. Senator], would have amended the law to also allow challenges to systems in which officials are elected by district.").

⁴ ELEC. §§ 14025–14032. In an at-large election system, each voter may cast a number of votes equal to the number of seats that are up for election. Every candidate runs citywide, and the candidates that receive a plurality of votes up to the number of seats to be filled are elected. See, e.g., ELEC. § 14026(a) (defining an at-large election method as "(1) [o]ne in which the voters of the entire jurisdiction elect the members to the governing body" or "(2) [o]ne in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.>").

⁵ *Pico Neighborhood Ass'n*, 534 P.3d. at 54, 59. The City has a seven-member council, elected at-large with four-year terms. Four council members are elected

almost 14 percent of the City’s voting-age population (“CVAP”).⁶ “[T]he extent to which [minority candidates] have been elected to the governing body of a political subdivision” is a relevant factor under the CVRA.⁷

In 2019, the trial court ruled for the plaintiffs and ordered the creation of seven single-member districts, including a 30 percent Latino CVAP district in the Pico neighborhood.⁸ But the court of appeal stayed and then reversed that judgment, holding that a change from an at-large system to districts “would not enhance Latino voters’ ability to elect the candidates of their choice or influence the outcome of an election in a ‘legally significant’ way,” because there were too few Latino voters in a 30 percent CVAP district.⁹ The California Supreme Court granted review “to determine what

in the presidential-year election (e.g., November 2020) and three in the mid-term election (e.g., November 2022). The top vote-getters are elected—three or four depending on the year—even if they only receive a plurality of the vote. As with all other California localities that use the plurality voting method—with the exception of the City of Burbank—there are no runoffs. *See* Nicholas Heidorn, *California Municipal Democracy Index 2016*, CA. COMMON CAUSE 27 n.169 (Dec. 2016), <https://www.commoncause.org/california/wp-content/uploads/sites/29/2018/03/california-municipal.pdf> [perma.cc/PCW4-SY36].

⁶ *Frequently Asked Questions*, Pico Neighborhood Association and Maria Loya v. City of Santa Monica, *Los Angeles Superior Court, Case Number BC616804*, CITY OF SANTA MONICA, <https://www.santamonica.gov/Election-Litigation-PNA-V-Santa-Monica-FAQ> [perma.cc/HY4M-J4U5] (last visited Mar. 25, 2024). 2020 census data shows that 17.2 percent of the City’s residents identified themselves as either Hispanic or Latino. *Santa Monica City, Cal.*, U.S. CENSUS, <https://www.census.gov/quickfacts/fact/table/santamonicacitycalifornia/RHI725222#RHI725222> [perma.cc/43AY-VB87] (last visited Mar. 25, 2024). And within the Pico neighborhood, approximately 33 percent of residents identify as Hispanic or Latino. Madeleine Greenberg, *How a Santa Monica Neighborhood Is Putting the California Voting Rights Act to Work*, DEMOCRACY DOCKET (Sept. 18, 2023), <https://www.democracydocket.com/analysis/how-a-santa-monica-neighborhood-is-putting-the-california-voting-rights-act-to-work> [perma.cc/5MR5-559Z].

⁷ CAL. ELEC. CODE § 14028(b); *see also* Complaint at 6, Pico Neighborhood Ass’n v. City of Santa Monica, No. BC616804 (Apr. 11, 2016). When the suit was filed, there was one Latino on the seven-member City Council. Antonio “Tony” Vazquez was elected to the council in 2012 and reelected in 2016. *See* Pico Neighborhood Ass’n v. City of Santa Monica, 2019 WL 10854474, at *8 (Sept. 13, 2019). In 2018, he was elected to the California State Board of Equalization where he currently serves. *See Antonio Vazquez, Member, Board of Equalization, 3rd District, About*, CA.GOV, <https://www.boe.ca.gov/vazquez/about.htm> [perma.cc/6H3D-9QDP] (last visited Mar. 25, 2024).

⁸ *Pico Neighborhood Ass’n*, 2019 WL 10854474, at *22–23.

⁹ *Pico Neighborhood Ass’n*, 534 P.3d at 61; *see also* *Pico Neighborhood Ass’n v. City of Santa Monica*, 265 Cal. Rptr. 3d 530, 550, 556 (Cal. Ct. App. 2020), *as modified on denial of reh’g* (Aug. 5, 2020), *depublished by* 474 P.3d 635 (Cal. Super. Oct. 21, 2020).

constitutes dilution of a protected class’s ability to elect candidates of its choice” under the CVRA.¹⁰

In August 2023, the California Supreme Court reversed and remanded the case. Writing for a unanimous court, Justice Kelli Evans explained that California law, by legislative design, does not require plaintiffs to demonstrate the possibility of creating a majority-minority district as a prerequisite for suit, making it easier for plaintiffs to challenge at-large voting systems than under federal law.¹¹ *Pico Neighborhood*, however, created a new requirement—it held that proof of “dilution” is a distinct element of the CVRA. To show “dilution,” a plaintiff must “identify a lawful alternative to the existing at-large system”¹² and “demonstrate a net gain in the protected class’s potential to elect candidates under [that] alternative system.”¹³ If the plaintiff cannot demonstrate a “net gain,” the plaintiff “has not shown the at-large method of election ‘impairs’ the ability of the protected class to elect its preferred candidates,” and cannot prevail.¹⁴

In making its case, the City raised the results of a 2020 election¹⁵ where the City’s voters—with a 79 percent turnout—had elected the “most racially diverse” council in the City’s history.¹⁶ Plaintiffs, in turn, disputed the City’s characterization of that election.¹⁷ Refusing to address the matter, Justice Evans stated in a footnote: “Given the limited issues before us, we express no view on the dispute” about how to characterize the result of the 2020 election.¹⁸

Pico Neighborhood “express[ed] no view on the ultimate question” of whether the City’s at-large voting system violates the CVRA.¹⁹ Rather, it remanded the case to the state appellate court to apply the newly established standard “in the first instance” and to address the other undecided questions in the case, including whether

¹⁰ *Pico Neighborhood Ass’n*, 534 P.3d at 61.

¹¹ *See id.* at 63.

¹² *Id.* at 71.

¹³ *Id.* at 69.

¹⁴ *Id.* at 69–70.

¹⁵ *See Pico Neighborhood Ass’n*, 534 P.3d at 60 n.1.

¹⁶ Faith E. Pinho, *Santa Monica Politics Upended by Pandemic, George Floyd Protests and Economics Woes*, L.A. TIMES (Dec. 20, 2020, 6:00 AM), <https://www.latimes.com/california/story/2020-12-20/new-guard-santa-monica-city-council> [perma.cc/UHD9-FFUF].

¹⁷ *See Pico Neighborhood Ass’n*, 534 P.3d at 60 n.1.

¹⁸ *Id.* Section 14028(b) provides: “One circumstance that may be considered . . . is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action.” CAL. ELEC. CODE § 14028(b) (West 2023).

¹⁹ *Pico Neighborhood Ass’n*, 534 P.3d at 71.

voting was racially polarized.²⁰ In February 2024, the court of appeal, without oral argument, promptly remanded the case to the trial court.²¹

The *Pico Neighborhood* decision includes an extensive discussion of federal law. While the CVRA was modeled after the federal Voting Rights Act (“VRA”), it was also designed to depart from federal law. It was meant to make it easier for courts to strike down at-large systems and thus make “the CVRA more expansive than the VRA.”²² Embodying that dichotomy, Justice Evans first relied on U.S. Supreme Court Justice Anthony Kennedy’s 1994 plurality opinion in *Holder v. Hall*²³ to define the term “dilution,” but then departed from federal law and rejected Justice Kennedy’s 2009 opinion in *Bartlett v. Strickland*.²⁴ Unlike Justice Kennedy in *Strickland*, Justice Evans embraced the idea of crossover districts where minority and majority voters together can elect candidates of the minority voters’ choice.²⁵

This Essay explains the holding of *Pico Neighborhood* and the new prerequisite for a CVRA suit that it establishes. Part I provides a brief overview of the CVRA. Part II shows how the California Supreme Court embraced federal case law in defining “dilution.” Part III then dives into a deeper analysis of *Pico Neighborhood*, exploring five topics key to understanding and applying the decision.²⁶ First, Part III discusses the opinion’s focus on the rule that candidates can win by a plurality of the vote, as it will be central to liability and remedy issues in future cases. When a majority of the vote is not required to win an election, smaller groups of minority voters below a majority are able to elect their preferred candidates.²⁷ Second, and relatedly, Part III addresses the importance of crossover voters in the California Supreme Court’s

²⁰ *Id.*

²¹ See *California Santa Monica Electoral System Challenge*, DEMOCRACY DOCKET (Apr. 12, 2016) (updated Feb. 9, 2024), <https://www.democracydocket.com/cases/california-santa-monica-electoral-system-challenge/> [perma.cc/DG2U-HGYF] (last visited Mar. 25, 2024).

²² *Pico Neighborhood Ass’n*, 534 P.3d at 66.

²³ 512 U.S. 874 (1994).

²⁴ 556 U.S. 1 (2009).

²⁵ See *Pico Neighborhood Ass’n*, 534 P.3d at 65–68. In *Strickland*, Justice Kennedy provided a helpful glossary of three different kinds of districts. A majority-minority district has a minority group with a majority of the voting-age population. *Strickland*, 556 U.S. at 13 (plurality opinion). An influence district is one where “a minority group can influence the outcome of an election even if its preferred candidate cannot be elected.” *Id.* A crossover district is a district “in which minority voters make up less than a majority of the voting-age population . . . [but] potentially[] is large enough to elect the candidate of its choice with help from voters who are members of the majority who cross over to support the minority’s preferred candidate.” *Id.*

²⁶ See *infra* Part III.

²⁷ See *infra* Part III.A.

approach, which rejected *Strickland*'s majority opinion view in favor of the one expressed in Justice David Souter's dissent.²⁸ Third, Part III identifies alternative electoral systems mentioned in *Pico Neighborhood* and analyzes the new judicial task of comparing existing at-large systems to alternative systems in the liability phase of a case.²⁹ Fourth, Part III explores the decision's reference to Section 5 of the VRA. Like the new test that is now a part of the CVRA, in historical Section 5 cases, existing electoral systems were compared to proposed systems.³⁰ Finally, Part III offers an interpretation of the "ability to influence" prong of the CVRA, a statutory interpretation question the California Supreme Court decided not to address in *Pico Neighborhood*, but which will likely arise in future cases.

I. OVERVIEW OF THE CVRA

The enactment of the CVRA followed two unsuccessful federal VRA challenges to at-large districts in the mid-1990s.³¹ "[P]rivate plaintiff enforcement of Section 2 [of the VRA] in California came to a halt after plaintiffs lost two particularly long and costly challenges to at-large election systems in the El Centro School District and City of Santa Maria . . . [meaning] voting rights enforcement remained effectively dormant in California until the passage of the [CVRA] in 2002."³² The California legislature passed the CVRA "to provide greater protections" than those offered under the VRA.³³

Specifically, the CVRA was designed to alter the first precondition of the framework established in the landmark 1986 decision *Thornburg v. Gingles*.³⁴ In *Gingles*, the U.S. Supreme Court established three "preconditions" a plaintiff must satisfy for a vote dilution claim under Section 2.³⁵ A plaintiff must show that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a reasonably configured district; (2) the minority group is politically cohesive; and (3) the white majority

²⁸ See *infra* Part III.B. In short, crossover voters consist of voters in a majority group that vote with members of a minority group to help elect the minority group's candidate of choice. See, e.g., *Cooper v. Harris*, 581 U.S. 285, 303 (2017).

²⁹ See *infra* Part III.C.

³⁰ See *infra* Part III.D.

³¹ See *Aldasoro v. Kennerson*, 922 F. Supp. 339 (S.D. Cal. 1995); see also *Ruiz v. City of Santa Maria*, 160 F.3d 543 (9th Cir. 1988).

³² Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 588–89 (2017).

³³ *Pico Neighborhood Ass'n v. City of Santa Monica*, 534 P.3d. 54, 59 (Cal. 2023).

³⁴ 478 U.S. 30 (1986).

³⁵ See *id.* at 50–51.

group votes sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate.³⁶ In the 2023 decision *Allen v. Milligan*,³⁷ the Court reaffirmed this test, noting that “*Gingles* has governed our Voting Rights Act jurisprudence since it was decided 37 years ago [and] Congress has never disturbed our understanding of § 2 as *Gingles* construed it.”³⁸

The second and third *Gingles* preconditions together are often referred to as demonstrating “racially polarized voting.”³⁹ Justice Evans explained that both the CVRA and the VRA require a plaintiff to show racially polarized voting, specifically “that the protected class members vote as a politically cohesive unit, while the majority votes ‘sufficiently as a bloc usually to defeat’ the protected class’s preferred candidate.”⁴⁰

To make it easier for a plaintiff to prevail, the CVRA eliminated the first *Gingles* precondition.⁴¹ Specifically, the CVRA does not require that plaintiffs “demonstrate that the members of the protected class would be geographically compact or concentrated enough to constitute a majority of a hypothetical single-member district.”⁴² This renunciation of the first *Gingles* precondition is significant, given that it frequently poses the most formidable obstacle to pursuing Section 2 VRA challenges.⁴³

But the CVRA did not prohibit the use of at-large systems altogether. Rather, the CVRA made at-large systems unlawful only when the use of the system “impairs the ability of a protected class

³⁶ *Id.*

³⁷ 599 U.S. 1 (2023).

³⁸ *Id.* at 19.

³⁹ See Todd Hendricks, *Racially Polarized Voting: An Overview*, FORDHAM L. VOTING RTS. & DEMOCRACY F. COMMENT. (Apr. 17, 2023), <https://fordhamdemocracyproject.com/2023/04/17/racially-polarized-voting-an-overview> [perma.cc/XWX6-XVRD] (explaining that “[t]he second prong is referred to as political cohesion. Qualitatively, this means most of the plaintiff group supports the same candidate most of the time. . . . Within the same analysis, the statistical model will also produce corresponding estimates of white voter preferences. That behavior informs the third prong, white-bloc voting, where the question is the degree to which white voters oppose minority-preferred candidates.”).

⁴⁰ *Pico Neighborhood Ass’n v. City of Santa Monica*, 534 P.3d. 54, 59 (Cal. 2023) (citing *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986), and CAL. ELEC. CODE § 14028(a) (West 2023)).

⁴¹ *Id.* at 63 (“[T]he CVRA made it easier to challenge at-large electoral systems by explicitly rejecting the first *Gingles* precondition”). Notably, other states followed California; state voting rights acts in New York, Oregon, Virginia, and Washington also eliminated the first *Gingles* precondition. See Greenwood & Stephanopoulos, *supra* note 2, at 310–11.

⁴² *Pico Neighborhood Ass’n*, 534 P.3d at 59.

⁴³ See Greenwood & Stephanopoulos, *supra* note 2, at 311 (noting that, over the last two redistricting cycles, more than one-third of Section 2 challenges have failed because plaintiffs could not make the requisite showing under the first *Gingles* precondition).

to elect candidates of its choice . . . as a result of dilution . . . of the rights of voters who are members of the protected class.”⁴⁴ A primary focus of the *Pico Neighborhood* decision was to discern the meaning of “dilution” as used in the CVRA.⁴⁵

II. IN DEFINING “DILUTION,” THE CALIFORNIA SUPREME COURT EMBRACED FEDERAL CASE LAW

Justice Evans first answered a disputed question of statutory interpretation: Is “dilution” a separate required element under the CVRA? Plaintiffs argued that it was not—in their view, proof of racially polarized voting alone is sufficient to prove “dilution” under the plain language of the CVRA.⁴⁶ They claimed that the statute provides that a violation “*is established* if it is shown that racially polarized voting occurs in elections . . . [in] the political subdivision.”⁴⁷

Justice Evans found the text of the CVRA “arguably . . . susceptible to plaintiffs’ reading,”⁴⁸ but rejected it. Looking at “the overall statutory structure,” she concluded that racially polarized voting “is not in itself sufficient” to prove a violation of the CVRA.⁴⁹ Rather, she agreed with the City and held that “dilution is a separate element under the CVRA.”⁵⁰ Justice Evans explained that one reason to reject plaintiffs’ construction was that it would find liability even if the problem “could not be remedied or ameliorated by any other electoral system.”⁵¹

Next, Justice Evans turned to the meaning of the term “dilution” as used in the CVRA.⁵² While the text of the VRA itself does not contain the word “dilution,” federal case law uses the term frequently.⁵³ Because the CVRA was modeled after the VRA, Justice Evans concluded that when construing “dilution” under the

⁴⁴ CAL. ELEC. CODE § 14027 (West 2023) (emphasis added).

⁴⁵ *Pico Neighborhood Ass’n*, 534 P.3d at 61 (stating that the court “granted plaintiffs’ petition for review to determine what constitutes dilution . . . within the meaning of the CVRA.”).

⁴⁶ *See id.* at 64.

⁴⁷ *Id.* (emphasis in original); *see also* ELEC. § 14028(a).

⁴⁸ *Pico Neighborhood Ass’n*, 534 P.3d at 64.

⁴⁹ *See id.*

⁵⁰ *Id.* at 65.

⁵¹ *Id.* (explaining that, in addition, plaintiffs’ construction would render “dilution” in Section 14027 of the CVRA “surplusage.”).

⁵² Section 14027 of the CVRA bars vote dilution: “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 . . . as a result of the *dilution* . . . of the rights of voters who are members of a protected class. . . .” ELEC. § 14027 (emphasis added).

⁵³ *See, e.g., Allen v. Milligan*, 599 U.S. 1, 15, 46–53 (2023) (Thomas, J., concurring).

CVRA, courts must “be mindful that it is a term of art with a settled meaning under section 2 of the VRA.”⁵⁴ Justice Evans’ assumption that dilution has “a settled meaning” is an overstatement—“vote dilution” is often used as a catchall term for any electoral practice or procedure that minimizes or cancels out minority voting strength.⁵⁵ Scholars are in debate as to the contours and foundations of vote dilution claims.⁵⁶

But regardless of whether “dilution” has a settled meaning, Justice Evans embraced the meaning of the term “dilution” as used in the U.S. Supreme Court’s 1994 *Holder v. Hall*⁵⁷ plurality decision, where Justice Kennedy’s plurality opinion explained: “The phrase dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.”⁵⁸ In short, the use of “dilution,” according to *Hall*, presents the question—dilution compared to what? Quoting the U.S. Supreme Court’s *Reno v. Bossier Parish School Board*,⁵⁹ which cites *Hall*, Justice Evans explained that “the very concept of vote dilution implies—and, indeed, necessitates—the existence of an ‘undiluted’ practice against which the fact of dilution may be measured.”⁶⁰

This is how dilution, as used in the CVRA, is now interpreted. To show dilution, a plaintiff must propose an “undiluted” practice as a comparison to the existing system.⁶¹ The *Pico Neighborhood* court held, “[t]o establish the dilution element, a plaintiff in a CVRA action must identify ‘a reasonable alternative voting practice’ to the existing at-large electoral system that will ‘serve as the benchmark ‘undiluted’ voting practice.’”⁶² The “reasonable alternative voting practice” benchmark must also be a “lawful alternative.”⁶³ Justice Evans explained that a “lawful

⁵⁴ *Pico Neighborhood Ass’n*, 534 P.3d at 64.

⁵⁵ See U.S. DEP’T OF JUST., GUIDANCE UNDER SECTION 2 OF THE VOTING RIGHTS ACT, 52 U.S.C. 10301, FOR REDISTRICTING AND METHODS OF ELECTING GOVERNMENT BODIES 6 (2021), <https://www.justice.gov/opa/press-release/file/1429486/download> [perma.cc/E2CU-AUKA]; see also *id.* at 3 (explaining that “[t]he essence of a . . . claim alleging vote dilution is that a certain electoral law, practice, or structure . . . cause[s] an inequality in the opportunities enjoyed by minority voters to elect their preferred representatives.”).

⁵⁶ See generally Heather K. Gerken, *Understanding the Right to An Undiluted Vote*, 6 HARV. L. REV. 1663 (2001).

⁵⁷ 512 U.S. 874 (1994) (plurality opinion).

⁵⁸ *Pico Neighborhood Ass’n*, 534 P.3d 54 at 64 (quoting *Holder v. Hall*, 512 U.S. 874, 880 (1994) (plurality opinion)).

⁵⁹ 520 U.S. 471 (1997).

⁶⁰ *Pico Neighborhood Ass’n*, 534 P.3d at 64–65 (quoting *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997)).

⁶¹ See *id.* at 65.

⁶² *Id.* (citing *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997)).

⁶³ *Id.* at 60.

alternative” system “may include, but is not limited to, single-member district elections.”⁶⁴

In addition, a plaintiff must demonstrate that “the protected class is not made worse off” in the city (or county or district) as a whole by the alternative.⁶⁵ Even if a plaintiff can show a real opportunity to win in one hypothetical single-member district, the plaintiff must also show “that the incremental gain . . . would not be offset by a loss of the class’s potential to elect candidates of choice elsewhere in the locality.”⁶⁶

Justice Evans noted that the trial court considered cumulative voting, limited voting, and ranked-choice voting as remedies,⁶⁷ explaining each in footnotes.⁶⁸ It is thus reasonable to assume that plaintiffs may advance these systems, in addition to single-member districts, as appropriate benchmarks for liability purposes in future cases. The three *Gingles* preconditions are all quantitative measures involving some manner of expert number-crunching.⁶⁹ The new *Pico Neighborhood* precondition—comparing the status quo electoral system to a hypothetical alternative—is a more subjective test involving comparing alternative electoral systems by courts. It remains to be seen how detailed these comparisons will need to be and what evidence and expert opinion courts will accept.

III. ANALYSIS OF *PICO NEIGHBORHOOD*

There is a great deal for litigants and courts to digest in the *Pico Neighborhood* decision. This part will first address the significance of plurality victories under Santa Monica’s current at-large system, a common feature of at-large voting systems. Second, this part will analyze the decision’s focus on crossover voters and differing degrees of polarization. A third focus will be the range of alternative voting systems that may be advanced in the liability phase. Fourth, this part will hone in on the mention of the non-retrogression rules of Section 5 of the VRA, and the requirement to show that minority voters will not be worse off under an alternative

⁶⁴ *Id.*

⁶⁵ *Id.* at 69.

⁶⁶ *Id.*

⁶⁷ *See id.* at 61 (noting that “[t]he trial court further found that the City’s at-large voting system unlawfully diluted the electoral strength of its Latino residents within the meaning of the CVRA, in that several alternative voting systems—e.g., district-based elections, cumulative voting, limited voting, and ranked choice voting—would better enable Latino voters ‘to elect candidates of their choice or influence the outcomes of elections.’”).

⁶⁸ *See id.* at 66 nn.6–8.

⁶⁹ *See, e.g.,* Hendricks, *supra* note 39 (explaining that, in practice, the *Gingles* preconditions are usually “discerned by expert witnesses using some form of regression” analysis).

system. Lastly, this part will discuss the meaning of the phrase “ability to influence the outcome of an election” in CVRA Section 14027,⁷⁰ which the *Pico Neighborhood* plaintiffs did not litigate but which will likely arise in future litigation.

A. A Plurality of the Vote Is Sufficient to Win

Santa Monica, like many other at-large jurisdictions, does not have a majority vote requirement; a plurality of the vote is sufficient to win election to the city council because of the number of candidates who run for office. Justice Evans repeatedly recognized this feature of Santa Monica’s at-large system: “[i]n the City . . . multiple candidates may vie for office, and a plurality can be sufficient to win;”⁷¹ “the record here shows that winning candidates often earn only a plurality of the vote;”⁷² and “the winner may prevail with far less than a majority of the vote.”⁷³

Indeed, as a factual matter, all seven members serving on the Santa Monica City Council in 2023 won with just a plurality of the vote.⁷⁴ This is the result of elections with many candidates running for a limited number of seats. In 2020, for example, there were twenty-one candidates for four seats.⁷⁵ As reported by the City, 10.59 percent of the total votes cast for City Council members was enough for election to the Council in 2020, and 12.53 percent was enough in 2022.⁷⁶ These reported percentages are of the total votes cast, with each voter having four votes in 2020 and three votes in

⁷⁰ CAL. ELEC. CODE § 14027 (West 2023).

⁷¹ *Pico Neighborhood Ass’n*, 534 P.3d at 67. Justice Evans reasoned that, “[b]ecause the CVRA applies exclusively to non-partisan elections, where there may be more than two candidates, the winner may prevail with far less than a majority of the vote.” *Id.* at 68. The mathematical reason that a plurality is sufficient to win in Santa Monica is because elections have had many more candidates than open seats, with many candidates drawing a meaningful share of the vote such that the top vote-getters do not get a majority of the vote. *See, e.g.*, SANTA MONICA, CAL., RES. NO. 11309, 2–5 (Dec. 8, 2020), <https://santamonica.gov/media/Document%20Library/Topic%20Explainers/Elections/November%202020%20Election%20Results.pdf> [perma.cc/X372-5XA3].

⁷² *Pico Neighborhood Ass’n*, 534 P.3d at 60.

⁷³ *Id.* at 68.

⁷⁴ *See* SANTA MONICA, CAL., RES. NO. 11309, *supra* note 71, at 4; *see also* SANTA MONICA, CAL., RES. NO. 11484, 3 (Dec. 6, 2022), <https://santamonica.gov/media/Document%20Library/Topic%20Explainers/Elections/November%202022%20Election%20Results.pdf> [perma.cc/DFM6-LDTL].

⁷⁵ *General Election 2020*, CITY OF SANTA MONICA (Nov. 1, 2023), <https://www.santamonica.gov/elections/2020-11-03> [perma.cc/W4LZ-VAW9]. In 2022, there were eleven candidates for three seats. *General Election 2022*, CITY OF SANTA MONICA (Nov. 1, 2023), <https://santamonica.gov/elections/2022-11-08> [perma.cc/LKQ9-TNDU].

⁷⁶ *See* SANTA MONICA, CAL., RES. NO. 11309, *supra* note 71, at 4; *see also* SANTA MONICA, CAL., RES. NO. 11484, *supra* note 74, at 3.

2022. Adjusting for that, the winners in 2020 and 2022 received votes from approximately 30 to 45 percent of the voters who voted in the election.⁷⁷

In contrast to Santa Monica’s plurality system, some California elections have a majority vote requirement.⁷⁸ For example, the non-partisan city council elections in the City of Los Angeles⁷⁹ and the non-partisan Board of Supervisors elections in the County of Los Angeles⁸⁰ both require a majority of the vote to win. In both Los Angeles City and County, if no candidate wins a majority of the vote in the primary election, the top two candidates go head-to-head in a runoff election.⁸¹ Similarly, because of the “Top Two” ballot measure passed in 2010 (with strong support from then Governor Arnold Schwarzenegger), all statewide and legislative elections in California have a primary ballot open to all voters with all candidates listed.⁸² A November runoff between the top two vote-getters follows, even if they are from the same party.⁸³

Justice Evans perceptively observed that “[b]ecause the CVRA applies exclusively to nonpartisan elections, where there may be more than two candidates, the winner may prevail with far less than a majority of the vote.”⁸⁴ As explained above, that accurately describes the City’s elections. Thus, whether minority-preferred candidates have won with a plurality of the vote will be a necessary part of the comparison of the existing at-large system to proposed alternatives. It also explains why requiring the possibility of majority-minority districts makes no sense under the CVRA. As

⁷⁷ Justice Evans explained the logical flaw in a majority or near majority requirement that because “a plurality can be sufficient to win . . . [r]equiring a protected class to demonstrate it could constitute a majority or near-majority of a hypothetical district would impose a threshold far higher than what the protected class’s preferred candidate would actually need to be elected.” *Pico Neighborhood Ass’n*, 534 P.3d at 67–68.

⁷⁸ See Heidorn, *supra* note 5, at 4.

⁷⁹ CITY OF L.A., CAL., ELEC. CODE § 108(a) (2012).

⁸⁰ See L.A. COUNTY CHARTER, art. II, § 4 (providing for the election of the Board of Supervisors); see also *Kerr v. Russell*, 285 P. 311, 311 (Cal. 1930) (explaining that a section of the California state constitution governing elections, which is a self-executing and applicable statewide, “provides for the election at the primary elections of nonpartisan county officers who receive votes on a majority of all the ballots cast for such officers.”).

⁸¹ See *supra* note 80 and accompanying text; see also CITY OF L.A., CAL., ELEC. CODE § 108(b).

⁸² See *Primary Elections in California*, CAL. SEC. STATE (Nov. 1, 2023), <https://www.sos.ca.gov/elections/primary-elections-california> [perma.cc/W3BP-QQQ5].

⁸³ See *Electoral Systems in California*, BALLOTPEDIA (Nov. 1, 2023), https://ballotpedia.org/Electoral_systems_in_California#cite_note-winnertakeall-8 [perma.cc/FZ5Y-TU55] (last visited Mar. 25, 2024). An exception is presidential elections, which are partisan, and each party has its own primary.

⁸⁴ *Pico Neighborhood Ass’n v. City of Santa Monica*, 534 P.3d. 54, 68 (Cal. 2023).

Justice Evans explained: “[The] *Gingles*’ majority-minority requirement is a poor fit for the CVRA . . . Requiring a protected class to demonstrate it could constitute a majority or near-majority of a hypothetical district would impose a threshold far higher than what the protected class’s preferred candidate would actually need to be elected.”⁸⁵ The *Pico Neighborhood* decision thus exposes a flaw in federal jurisprudence: requiring the creation of a majority-minority district (as federal law requires), where the challenged election system does not have a majority-vote requirement to win, imposes a threshold that is too high.

B. The Degree of Polarization and Number of Crossover Voters

In *Bartlett v. Strickland*,⁸⁶ the U.S. Supreme Court, by a five-to-four vote, ruled that the ability to create a majority-minority CVAP district is a mandatory precondition under *Gingles*.⁸⁷ This ruling rejected the argument that it is sufficient to show that minority voters and crossover voters together would have the potential to elect a minority-preferred candidate in a single-member district.⁸⁸ Justice Kennedy’s opinion in *Strickland* explained that the majority-minority “rule draws clear lines for courts and legislatures alike” and “relies on an objective numerical test.”⁸⁹

Justice Evans criticized the court of appeal for following *Strickland* in ruling for the City. She noted that “[t]he Court of Appeal [in *Pico Neighborhood*] effectively embraced the *Strickland* approach in interpreting the CVRA,” and concluded that it was an “err[or] to import[] the VRA’s majority-minority requirement into the CVRA.”⁹⁰ She cited both the text and the legislative history of the CVRA to show that the clear legislative intent was to reject the first *Gingles* precondition.⁹¹

⁸⁵ *Id.* at 67–68.

⁸⁶ 556 U.S. 1 (2009) (plurality opinion).

⁸⁷ *See id.* at 19–20 (“[A] party asserting § 2 liability must show . . . that the minority population in the potential district is greater than 50 percent.”)

⁸⁸ *See id.* at 20.

⁸⁹ *See id.* at 17–18. In rejecting what he called “cross-over district claims,” Justice Kennedy said that such claims “would create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates” because “[i]t is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority’s preferred candidate.” *Id.* at 16.

⁹⁰ *Pico Neighborhood Ass’n*, 534 P.3d at 65.

⁹¹ *See id.* at 66 (noting that “[t]he Legislature’s rationale for rejecting the majority-minority requirement seems clear enough: It would make little sense to require CVRA plaintiffs to show that the protected class could constitute a majority of a hypothetical district, given that the CVRA is not limited to ability-to-elect claims nor are its remedies limited to district elections.”); *see also id.* at 69 (“[B]y eliminating *Gingles*’s geographic compactness requirement, the Legislature

Importantly, Justice Evans established that the correct analysis under the CVRA requires that courts examine the minority vote “when combined with available crossover votes.”⁹² Justice Evans explained that “[r]ather than quibble over whether a protected class falls on one side or the other of an undefined near-majority line, we think it more sensible to inquire directly whether the prospect of crossover support from other voters under a lawful alternative electoral scheme would offer the protected class, whatever its size, the potential to elect its preferred candidates.”⁹³

Justice Evans made arguments similar to Justice Souter’s *Strickland* dissent, and a comparison of the two opinions is illuminating.⁹⁴ Justice Souter observed that “a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.”⁹⁵ Justice Souter went on to explain that “a functional analysis leaves no doubt that crossover districts vindicate the interest expressly protected by section 2: the opportunity to elect a desired representative.”⁹⁶ In the 2009 dissent, Justice Souter further explained “that the threshold population sufficient to provide minority voters with an opportunity to elect their candidate of choice is elastic [and there] is no reason to create an arbitrary threshold.”⁹⁷ This presages the same point Justice Evans made in 2023 that, because of the importance of crossover support, there is no reason to quibble about how many minority voters are in a district.

Justice Evans recognized that “a high degree of polarization may . . . effectively require a protected class to constitute a substantial or very substantial minority of voters,” because “[t]he higher the degree of polarization, the greater the percentage required by the protected class to demonstrate it would be able, in combination with crossover voters, to elect its preferred candidate.”⁹⁸

That Justice Kennedy’s viewpoint prevailed over Justice Souter’s in *Strickland* had significant ramifications in federal voting

rejected any requirement the protected class constitute a majority of a hypothetical district.”)

⁹² *Id.* at 67.

⁹³ *Id.*

⁹⁴ In the five-to-four vote, Justice Souter’s dissent was joined by Justices Stevens, Ginsburg, and Breyer. Justice Ginsburg also issued a brief dissent, petitioning Congress to reverse the Court’s decision and clarify the “appropriate reading” of Section 2. *See Strickland*, 556 U.S. at 44 (Ginsburg, J., dissenting).

⁹⁵ *Id.* at 27 (Souter, J., dissenting).

⁹⁶ *Id.* at 32.

⁹⁷ *Id.* at 33.

⁹⁸ *Pico Neighborhood Ass’n*, 534 P.3d at 67.

rights law. It empowered courts to throw out cases if a majority-minority district could not be created and eliminated the possibility of court-imposed crossover districts.⁹⁹ In *Pico Neighborhood*, Justice Evans made clear that California voting rights law rejects Justice Kennedy's approach, and instead follows Justice Souter's reasoning, making the CVRA broader than federal law.

In his dissent in *Strickland*, Justice Souter explained that a "functional approach will continue to allow dismissal of claims for districts with minority populations too small to demonstrate an ability to elect, and with 'crossover' voters too numerous to allow an inference of vote dilution in the first place."¹⁰⁰ This dynamic will also exist in CVRA cases going forward as well.

Ultimately, the number of crossover voters in a jurisdiction is important in CVRA cases, both in deciding whether there is legally significant racially polarized voting and, if so, whether there are sufficient minority and crossover voters to create a district where the minority-preferred candidate has the potential to win.

C. Alternative Election Systems

As a procedural matter, Justice Evans explained the difference between the liability and the remedy phase in CVRA cases: "[T]he inquiry at the liability stage is simply to prove that a solution is possible . . . [a]t the remedial stage the focus will shift to which electoral system is appropriate and tailored to remedy the violation."¹⁰¹ Thus, under the CVRA's new regime, a robust discussion of potential remedies will occur at the start of the case. Plaintiffs will likely cite the work of scholars and advocates of alternative voting systems beyond at-large and single-member districts.

FairVote, a non-profit election reform organization that has been at the forefront of advocating for ranked-choice voting, filed an amicus brief in *Pico Neighborhood*, focusing on remedies and proposing three alternatives: limited voting, cumulative voting, and single-transferable-vote ranked-choice voting (all of which are mentioned by Justice Evans).¹⁰² Following *Pico Neighborhood*,

⁹⁹ See, e.g., Michael Li & Yuru Rudensky, *Rethinking the Redistricting Toolbox*, 62 How. L.J. 713, 723–24 (2019); Dale E. Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, HARV. CIV. RTS-CIV. LIBERTIES L. REV. 421–26 (2015).

¹⁰⁰ *Strickland*, 556 U.S. at 33–34 (Souter, J., dissenting).

¹⁰¹ *Pico Neighborhood Ass'n*, 534 P.3 at 68–69 (citations omitted).

¹⁰² See Brief for FairVote as Amici Curiae Supporting Respondents at 16–24, *Pico Neighborhood Ass'n v. City of Santa Monica*, No. BC616804 (2019). Justice Evans mentions these three alternative systems as having been considered by the trial court. See *Pico Neighborhood Ass'n*, 534 P.3d at 61.

FairVote scholars published an article advancing their views about these three benchmark alternatives.¹⁰³ As for the first two—limited voting, where voters get only one vote in a seven-seat election, and cumulative voting, where voters get seven votes and can cast multiple votes for one candidate—FairVote scholars are candid that these alternatives might not work.¹⁰⁴ Specifically, under either a limited voting or cumulative voting system, they contend that to win representation, minority communities must coalesce around a candidate before the vote takes place.¹⁰⁵ For example, if “the Latino community is large enough to elect one candidate of choice, but two Latino candidates run, the candidates may split the vote and both lose.”¹⁰⁶

The FairVote scholars are strong advocates for the third benchmark, proportional ranked-choice voting, a special method of ranked-choice voting for multiple-candidate elections.¹⁰⁷ This system is in use in Cambridge, Massachusetts, and involves complexities in the counting process involving a quota, a first count, and a transfer of the surplus.¹⁰⁸

Using Cambridge as an example, the “quota” is determined by dividing the number of ballots by the number of open seats plus one, and then adding one to that result.¹⁰⁹ For example, if there are 25,000 ballots cast for nine council seats, the quota is 2,501 (i.e., $25,000/10 + 1$). There is a “first count,” and if any candidates have

¹⁰³ See G. Michael Parsons et al., *Pico & Proportional Ranked Choice Voting*, FAIRVOTE (Aug. 31, 2023), <https://fairvote.org/pico-proportional-ranked-choice-voting> [perma.cc/S26R-YBPA].

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ *Id.*; see also *Local Elections in Texas Demonstrate the Power – And Limits – of Cumulative Voting Rights*, FAIRVOTE (May 19, 2017), https://fairvote.org/texas_cumulative_voting_rights [perma.cc/8VXQ-67LB] (explaining that a key limitation to cumulative voting is that it may “reduce the amount of choice for all voters” and “distort the true interests of many voters.”)

¹⁰⁷ Under a ranked-choice system for single-winner elections, voters rank candidates in their order of preference with every ballot’s top choice counted. If no candidate receives a majority, the last-place candidate is removed and the remaining candidate on the ballot is counted, with the process continuing until one of the candidates receives a majority of votes. See generally Hillary Bendert et al., *Third Parties and the Electoral College: How Ranked Choice Voting Can Stop the Third-Part Disruptor Effect*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 332, 336 (2023). Proportional ranked-choice voting can be implemented for elections where more than one candidate is elected to a multi-member body—such as a city council. See generally *Types of RCV*, RANKED CHOICE VOTING RES. CTR. (Oct. 1, 2023), <https://www.rcvresources.org/types-of-rcv> [perma.cc/V2ZV-83YU].

¹⁰⁸ See *Cambridge Municipal Elections*, CITY OF CAMBRIDGE ELECTIONS COMM’N (Oct. 1, 2023), https://www.cambridgema.gov/~link.aspx?_id=D58142E0FBC64BEDB4B0F92D957FD453&_z=z [perma.cc/8ULU-GGPY] (last visited Mar. 25, 2024).

¹⁰⁹ See *id.*

more than 2,501 first-place votes on that count, those candidates are elected.¹¹⁰ For the candidates elected on the first count, the next step is “transferring the surplus,” which involves looking at the second choice of the surplus votes over the quota for the winning candidate and transferring those surplus votes to other candidates who did not meet the quota, adding that to their first choice votes.¹¹¹ Cambridge’s Elections Commission explains that its technique “for selecting ballots to transfer from a candidate’s surplus to bring the candidate down to the quota” is known as the “Cincinnati Method.”¹¹² Specifically, the method is as follows: “[T]he ballots of the candidate who has surplus [are randomly drawn] and transferred to a continuing candidate until the original candidate is credited with ballots equaling no more than the quota.”¹¹³

After the surplus for the candidate or candidates over the quota are transferred, there is a second count.¹¹⁴ If no one reaches the quota on the second count, the candidate with the lowest number of first-place votes is eliminated, and those votes are reallocated.¹¹⁵ This process continues until nine candidates have reached the quota.¹¹⁶

According to the City of Cambridge, this method “ensures minority representation with majority control. Any group of votes that number more than one-tenth of the vote cast can be sure of electing at least one member of the nine-member Council, but a majority group of votes can be sure of electing a majority of the Council.”¹¹⁷ A system that guarantees minority success and majority control involves policy choices that courts adjudicating CVRA claims would need to consider carefully.

While alternative voting systems are discussed in scholarly works and used in some jurisdictions, single-member districts are in widespread use, and thus, easier to explain. Given that plaintiffs have the burden of proof, courts will need to carefully scrutinize proposed alternative systems given the “net gain” requirement that plaintiffs will have to demonstrate.

Justice Evans underscored that remedies in CVRA cases are not limited to district elections.¹¹⁸ Given that possible remedies are now part of the liability phase in CVRA cases, California courts will thus be part of the national debate about alternative electoral systems in the years to come. Ranked-choice voting is often used in elections

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Pico Neighborhood Ass’n v. City of Santa Monica*, 534 P.3d. 54, 66 (2023).

to choose one candidate, such as mayoral elections. Ranked choice is sometimes called instant runoff because, on the last count in the process, someone wins with a majority of the vote. This takes the place of a second runoff election where the top two vote-getters face off against each other. Ranked choice systems are more complex where the voters are choosing multiple members of a governing body in the one election, as in Cambridge. Because Cambridge has used ranked-choice in electing a nine-member city council for decades, its procedures will likely be part of the discussion of alternative systems in future CVRA cases.¹¹⁹

D. Do No Harm: The Non-Retrogression Standard of Section 5

The maxim “first, do no harm” guides the medical profession. Justice Evans invoked a comparable rule for the CVRA: “The dilution element . . . ensures the protected class is not made worse off.”¹²⁰ Specifically, Justice Evans explained that “unless the plaintiff can demonstrate a net gain . . . under an alternative system” the lawsuit cannot proceed.¹²¹

Under *Pico Neighborhood*, courts are now tasked with comparing the status quo with alternative voting systems. Justice Evans explained that “a successful plaintiff must show not merely that the protected class would have a real electoral opportunity in one or more hypothetical districts, but also that the incremental gain in the class’s ability to elect its candidate of choice in such districts would not be offset by a loss of the class’s potential to elect its candidates of choice elsewhere in the locality.”¹²² As the decision made clear, “it remains the plaintiff’s burden to demonstrate . . . [that the change from at-large voting] would improve the protected class’s overall ability to elect its preferred candidates.”¹²³

This new threshold question—the “not made worse off” test—requires a baseline assessment of the electoral success of the protected class under the existing at-large system. This part of the new test is consistent with the electoral success provision in Section 14028(b), providing that courts consider “the extent to which candidates who are members of [and are preferred by voters of] the protected class . . . have been elected to the governing body” of the defendant jurisdiction.¹²⁴ If the protected class has had no electoral success under the at-large system, plaintiffs will have an easier time arguing that alternative systems are better. But where the protected

¹¹⁹ In a footnote, Justice Evans describes in detail how ranked-choice voting works in elections “to fill more than one seat, such as for a city council.” *Id.* at 66 n.8.

¹²⁰ *Id.* at 69.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ CAL. ELEC. CODE § 14028(b) (West 2023).

class has won elections under the at-large system, plaintiffs' threshold burden will be harder to meet.

Applying this new rule to the trial court's remedy creating seven single-member districts in Santa Monica, the question is whether increased ability to elect in a more heavily Latino district in the Pico neighborhood would be offset by reduced ability to elect in the other six single-member districts.

There is scholarly literature that asks whether the creation of heavily minority single-member districts helps or hurts minority influence.¹²⁵ In the twentieth century, many VRA cases involved successful efforts to change at-large systems, which often resulted in all-white local governing bodies, to single-member district systems, thereby facilitating the election of some minority candidates.¹²⁶ While viewing this as progress, some commentators asked whether long-term objectives should aim for something more substantial.¹²⁷ They observed that merely creating a single minority seat did not necessarily provide minority voters the ability to influence policy outcomes.¹²⁸ Consequently, these discussions gave rise to various ideas for alternative voting systems. This debate continues today; the *Pico Neighborhood* decision will, over time, create case law analyzing alternative voting systems. In the trial court, in this case, the focus was on switching from at-large elections to district elections, which has happened more than eighty times in

¹²⁵ See, e.g., Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991); Mark E. Rush, *Candidates of Their Choice? Paradoxical Impact of the Voting Rights Act in Virginia*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 289 (2023).

¹²⁶ See Rush, *supra* note 125, at 290 n.13 (noting that “[i]n practice, states drew districts large enough to ensure that white voters constituted a majority and held at-large winner-take-all elections for all seats in the district. This, in turn, locked Black voters out of representation.”).

¹²⁷ See, e.g., Guinier, *supra* note 125.

¹²⁸ Professor Lani Guinier, for example, acknowledged that while the use of single-member districts “may result in the election of more [B]lack officials,” she argued that meaningful voter participation entailed more. See Guinier, *supra* note 125, at 1080. Specifically, by just relying on single-member districts to ensure minority representatives, Professor Guinier argued that this “ignores the [voting rights] movement’s [larger] concern with broadening the base of participation and fundamentally reforming the substance of political decisions.” *Id.* Professor Guinier recommended that representatives instead “be elected through a system of cumulative voting from multi-member districts, rather than by plurality voting from single-member districts.” Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 420 (1995) (citing LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994)); see also Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 7 TEX. L. REV. 1589, 1593 (1993) (explaining that “[d]istricting breeds gerrymandering as a means of allocating group benefits; the operative principle is deciding whose votes get wasted.”).

California.¹²⁹ Future cases will likely address alternative systems that do not involve single-member districts, as the *Pico Neighborhood* decision encourages.¹³⁰

In explaining the new standard, Justice Evans invoked the non-retrogression jurisprudence of Section 5 of the VRA.¹³¹ While the U.S. Supreme Court, in effect, rendered Section 5 unenforceable in *Shelby County v. Holder*,¹³² Justice Evans cited two earlier Section 5 cases—*Beer v. United States* and *Georgia v. Ashcroft*.¹³³ By definition, in Section 5 preclearance cases, the local government wants to make a change to the status quo and must show that the change would not hurt minority voters.¹³⁴ In contrast, in CVRA

¹²⁹ More than eighty California cities have begun or completed the switch from at-large to district elections. Zachary L. Hertz, *Does a Switch to By-District Elections Reduce Racial Turnout Disparities in Local Elections? The Impact of the California Voting Rights Act*, 22 ELECTION L.J. 213, 214 (2023). However, the scholarly research attempting to answer whether this increases minority groups' ability to influence elections is inconclusive: some research finds that the switch improves Latino representation; some findings conclude no effect; some findings suggest a negative relationship; and some studies contend that the switch to district elections increases diverse representation "only when a minority group is highly concentrated and is a relatively large share of the population." *Id.* at 214. In 2021, Professors Loren Collingwood and Sean Long specifically analyzed whether the CVRA improved minority representation on city councils. See Loren Collingwood & Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, 57 URB. AFF.'S REV. 731, 731–732 (2021) (finding that shifting from at-large to district elections leads to, on average, a 10 and 12 percent increase in minority representation). At the same time, they found that this improved representational effect is concentrated in cities with larger shares of Latinos—as compared to cities with smaller shares of Latinos that "tend not to see an increase" in representation. *Id.* at 734.

¹³⁰ *Pico Neighborhood Ass'n v. City of Santa Monica*, 534 P.3d. 54, 66 (Cal. 2023) (noting that the CVRA's remedies are not limited to district elections).

¹³¹ See *id.* at 69–70.

¹³² 570 U.S. 529 (2013). In *Shelby County v. Holder*, the Court struck down Section 4's preclearance formula. See *id.* at 557. This formula required specific jurisdictions with histories of racial voting discrimination to obtain approval from the U.S. Department of Justice before implementing any changes to their election laws. See Erwin Chemerinsky, *Making it Harder to Challenge Election Districting*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 13, 16–17 (2022). Without a Section 4 formula, Section 5 became unenforceable. See *id.* at 17.

¹³³ *Pico Neighborhood Ass'n*, 534 P.3d at 69–70. Justice Evans quotes from *Beer v. United States*: "[T]he purpose of § 5 [of the VRA] has always been to [ensure] that no voting-procedure changes would be made that would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 70 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Additionally, Justice Evans also quotes *Georgia v. Ashcroft*: "In examining whether the new plan is retrogressive, the inquiry must encompass the entire [jurisdiction] as a whole." *Id.* at 69 (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003)).

¹³⁴ See generally *About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUST. CIV. RTS. DIV. (June 21, 2023), <https://www.justice.gov/crt/about-section-5-voting-rights-act> [perma.cc/C9RC-RDQY] (last visited Mar. 25, 2024).

cases, the defendant local government wants to preserve the status quo, and the plaintiff has to prove that a change would not hurt minority voters. Throughout the *Pico Neighborhood* decision, Justice Evans examined U.S. Supreme Court case law, occasionally adhering to its precedents and at other times deviating from them.¹³⁵ Her citations to the Section 5 cases occupy more of a middle ground, offering the lower courts a generalized framework for how courts compare one electoral system with an alternative system.¹³⁶

E. The Relevance of the Ability to Influence Election Outcomes

Section 14027 prohibits at-large election systems if they “impair[] the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election.”¹³⁷ Justice Evans addressed the ability-to-elect prong but did “not decide the scope of the CVRA’s ability-to-influence prong” because “[p]laintiffs did not argue . . . an influence theory distinct from their . . . ability to elect [theory].”¹³⁸ Justice Evans observed that the CVRA addresses the “ability to influence the outcome of an election,” while the VRA does not.¹³⁹ She explained that “the influence prong suggests a focus broader than the [protected] class’s ability to elect its preferred candidates,”¹⁴⁰ and that this would include both “forming a coalition with another group to elect a candidate acceptable to each” or “blocking an unacceptable candidate.”¹⁴¹

At least in theory, a plaintiff could advance an alternative election system that would increase the minority group’s ability to elect one council member but, at the same time, decrease the minority group’s ability to influence the outcome of the election of other council members. The ability to elect and ability to influence prongs could be an issue at the same time.

Although not addressed in *Pico Neighborhood*, courts may conclude that the “ability-to-influence” prong should go hand-in-hand with the “ability-to-elect” prong. The holding of *Pico Neighborhood* could be rewritten as follows: “To replace at-large

¹³⁵ See *supra* Parts II, III.B, III.D.

¹³⁶ See, e.g., *Pico Neighborhood Ass’n*, 534 P.3d at 69–70.

¹³⁷ *Id.* at 63 (quoting CAL. ELEC. CODE § 14207 (West 2023)).

¹³⁸ *Id.* at 71.

¹³⁹ See *id.* at 70 (explaining that “[u]nlike its federal analogue, the CVRA prohibits the use of an at-large electoral system that dilutes not only the ability of a protected class ‘to elect candidates of its choice,’ but also ‘its ability to influence the outcome of an election.’” (quoting CAL. ELEC. CODE § 14207 (West 2023))).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 71 (quoting Brief for Attorney General Rob Bonta as Amici Curiae Supporting Neither Party at 19, *Pico Neighborhood Ass’n v. City of Santa Monica*, No. S263972 (Cal. 2021)).

[elections] with district elections under a dilution theory, a successful plaintiff must show not merely that the protected class would have a real electoral opportunity [or ability to influence the election] in one or more hypothetical districts, but also that the incremental gain in the class’s ability to elect its candidates in such districts would not be offset by a loss of the class’s potential to elect its candidates of choice [or ability to influence the election outcomes] elsewhere in the locality.”¹⁴²

The question boils down to: What is the ability to influence election results under the current system, and how would that change, for better or worse, under the alternative system? The ability to elect and the ability to influence provisions of the CVRA do not need to be treated as separate and distinct theories. Rather, they can be read together to require consideration of coalition politics and crossover voting in the jurisdiction as part of the overall analysis of proposed changes to an existing election system.

The *Pico Neighborhood* decision answered the question on which review was granted—the meaning of the word “dilution” in the phrase “as a result of the dilution . . . of the rights of voters who are members of a protected class” in Section 14027 of the CVRA.¹⁴³ But the California Supreme Court punted on addressing how to interpret and apply the “ability to influence the outcome of an election” prong of Section 14027, something Justice Evans identified as a “notable difference[.]” between California and federal law.¹⁴⁴ When questions about this arise in future CVRA cases, this Essay suggests that the ability to elect candidates and the ability to influence the election of candidates need not be considered separate and distinct prongs, but instead as one broad concept to be examined when deciding whether an at-large system impairs the voting strength of minority voters as a result of dilution.

CONCLUSION

Throughout this Essay, we have discussed *Pico Neighborhood*’s repeated citations to and analysis of U.S. Supreme Court voting rights cases, and references to the CVRA legislative history as to where California wanted to give rights to voters that federal law does not. This Essay looks behind Justice Evans’s references to federal law to explore how California law, as established by *Pico Neighborhood*, fits with and departs from federal law.

In replacing the rigid but easy-to-apply *Gingles* prong one with a new, more nuanced test as the core holding of *Pico*

¹⁴² *Id.* at 69.

¹⁴³ *Id.* at 59.

¹⁴⁴ *Id.* at 63.

Neighborhood, the California Supreme Court correctly interpreted the CVRA and followed the California legislature's clear repudiation of *Gingles* prong one. The new test will make CVRA litigation more complex as courts grapple with comparisons between the status quo and proposed alternative voting systems, and analyze whether the alternatives benefit minority voters. The *Pico Neighborhood* decision's focus on crossover voters is particularly important as the number of crossover voters in a jurisdiction informs both the required CVRA racially polarized voting analysis (under *Gingles* prong three), and how changes to voting systems might affect minority voter influence and the electoral success of minority-preferred candidates. *Pico Neighborhood* underscores the rule that at-large voting systems remain permissible under California law, as the legislature intended, and that plaintiffs have the burden of demonstrating that a court-imposed change to such systems is legally required.