No. __________

In the Supreme Court of the United States

CITY OF MODESTO, *ET AL.*,

Petitioners,

v.

ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

SUSANA ALCALA WOOD
City Attorney-City of Modesto
1010 10th Street, Suite 6300
Modesto, CA 95353
209-577-5284

JOHN E. MCDERMOTT
Counsel of record
Howrey LLP
550 S. Hope Street, Suite 1100
Los Angeles, CA 90071
213-892-1800

WILLIAM BRADFORD REYNOLDS
JERROLD J. GANZFRIED
Howrey LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
202-783-0800

Counsel for Petitioners City of Modesto, California, Jean Zahr, Jim Ridenour, Bob Dunbar, Janice Keating, Garrad Marsh, Will O'Bryant, Denny Jackman and Brad Hawn

QUESTIONS PRESENTED

1. Whether the California Voting Rights Act, by invalidating at-large voting systems solely on the basis of racially polarized voting, is a racial classification subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the California Voting Rights Act, by invalidating at-large voting systems solely on the basis of racially polarized voting where no racial injury or racial discrimination exists, is facially unconstitutional pursuant to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners City of Modesto, Jean Zahr, Jim Ridenour, Bob Dunbar, Janice Keating, Garrad Marsh, Will O'Bryant, Denny Jackman and Brad Hawn were defendants in Stanislaus County Superior Court and respondents in the California Court of Appeal.

Respondents Enrique Sanchez, Emma Pinedo and Salvador Vera were plaintiffs in Stanislaus County Superior Court and appellants in the California Court of Appeal.

RULE 29.6 STATEMENT

Because no petitioner is a corporation, there are no corporate relationships to disclose under Supreme Court Rule 29.6.

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ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the California Court of Appeal entered on December 6, 2006.

OPINIONS BELOW

The decision of California Superior Court of Stanislaus County granting Petitioners' motion for judgment on the pleadings is not reported. (App. 41a-51a.) The Opinion of the California Court of Appeal reversing the Superior Court's decision is reported at 51 Cal. Rptr. 3d 821 (2006). (App. 1a-40a.) The Order of the California Supreme Court denying discretionary review is reported at 2007 Cal. LEXIS 2772 (2007). (App. 52a.)

JURISDICTION

The California Supreme Court denied discretionary review on March 21, 2007. (App. 52a.) On June 7, 2007, Justice Kennedy extended the time within which to file a

petition for a writ of certiorari to July 19, 2007. (App. 53a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall … deny to any person within its jurisdiction the equal protection of the laws."

B. State Statutory Provisions

The California Voting Rights Act of 2001 is set forth in California Elections Code Sections 14025-14032. The complete text of these statutes is reproduced in the Appendix. (App. 55a-59a.)

STATEMENT OF THE CASE

Petitioners are the City of Modesto, Modesto City Councilmembers and the Modesto City Clerk. (App. 62a-63a.) Respondents are Latino residents and eligible voters of the City of Modesto in Stanislaus County, California. (App. 61a-62a, 70a-71a.)

The Modesto City Council consists of seven Councilmembers, one of whom is the mayor. (App. 63a.) All are elected at-large. (App. 64a.) The City of Modesto is a charter city and its at-large election system is contained in its charter and was approved by the City's voters. (App. 64a, 77a-80a.) In 2001, voters of Modesto rejected a ballot measure for district-based elections. (App. 66a-67a.)

Respondents filed suit on June 3, 2004, solely on the basis of the California Voting Rights Act ("CVRA" or

"Act"). (App. 60a.) The complaint asserts that Modesto's at-large election system, together with racially polarized voting, results in vote dilution under the Act.[1] *Id.* Plaintiffs seek district elections as a remedy. *Id.*, 7a.

The City asserted as an affirmative defense and as a cross-claim that the CVRA was unconstitutional under the Fourteenth Amendment. (App. 73a-76a; 20a). The Stanislaus County Superior Court granted the City's motion for judgment on the pleadings, holding that the Act is subject to strict scrutiny. (App. 43a.) The Superior Court then held that the legislative record of the Act lacks any findings of need that would justify the elimination of the majority district requirement for proving vote dilution under federal law and thus violated the Fourteenth Amendment. (App. 46a.) The Superior Court also invalidated the CVRA because it was not time limited and because its "liability without remedy" provision would result in attorneys' fees and expert witness costs that would be an unconstitutional gift of public funds. (App. 42a-43a.)

The California Court of Appeal, Fifth Appellate District, reversed. The state appellate court upheld the Act under rational basis review. (App. 24a.) It ruled that the CVRA is not a racial classification because it is a remedial, race neutral, "race-conscious" antidiscrimination statute that applies equally to all races. (App. 3a.) It then held that

[1] California Elections Code Section 14027 provides that an at-large method of election may not be imposed where it impairs the ability of a protected class "to elect" candidates of its choice or "to influence" the outcome of an election. Elections Code Section 14028(a) provides that a violation of Section 14027 is established "if it is shown that racially polarized voting occurs."

The fact that members of a protected class are not geographically compact "may not preclude a finding of … a violation of Section 14027 and this section." Section 14028(c). Minority electoral defeat is not required. Section 14028(b). Proof of intent to discriminate against a protected class is not required. Section 14028(d).

"curing vote dilution" was a legitimate state interest under its relaxed standard of review. (App. 24a.) The California Supreme Court denied petitioners' request for review. (App. 52a.)

REASONS FOR GRANTING THE WRIT

This Petition seeks plenary review and reversal of the California Court of Appeal decision below upholding the constitutionality of the California Voting Rights Act.

The Act is a significant departure from the federal Voting Rights Act ("VRA"), 42 U.S.C. § 1973. It invalidates at-large election systems solely on the basis of racially polarized voting. *See* Section 14028(a) ("A violation of Section 14027 is established if it is shown that racially polarized voting occurs"). Under the Act, racially polarized voting alone is regarded as vote dilution in at-large systems in all cases.

The Act does not require proof that a challenging minority group can form a single member district in which they will be the majority of the voters able to elect their preferred candidates, as required to prove vote dilution under both the federal VRA and this Court's pre-VRA Fourteenth Amendment cases. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971). It does not require proof of minority electoral defeat, also necessary to prove vote dilution under federal law. *Thornburg*, 478 U.S. at 48. It expressly authorizes "ability to influence" claims. Section 14027.

Thus, the Act does not require proof of "vote dilution" or racial discrimination in voting, as this Court has defined those terms under the federal Voting Rights Act and the Fourteenth Amendment. Indeed, it invalidates at-large election systems in expansive new circumstances that this

Court expressly has held do not constitute vote dilution, racial injury or racial discrimination in voting under the VRA or the 14th Amendment. The Act is not an antidiscrimination statute because it quite plainly invalidates at-large systems, solely on the basis of racially polarized voting, where no racial injury or racial discrimination exists.

Racially polarized voting is an explicit racial classification subject to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment. The opinion below erroneously applied deferential rational basis review to the Act because it purportedly is a remedial, race neutral, race-conscious antidiscrimination measure that applies equally to all races. This holding directly conflicts with this Court's racial classification cases, which explicitly reject such reasons for a lesser standard of review. The opinion below also committed fundamental error in simply accepting at face value the Legislature's wholly unsupported conclusion that racially polarized voting by itself is harmful or constitutes vote dilution.

The Act's racial classifications cannot survive strict scrutiny review. States may enact legislation to remedy racial discrimination only where there is prior intentional discrimination or they make findings that demonstrate a "strong basis in evidence" of racial harm. *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469, 497, 500 (1989); *Miller v. Johnson*, 515 U.S. 900, 922 (1995).

Fatally, however, the California Legislature did not make <u>any</u> findings that racially polarized voting by itself causes racial harm or injury in the absence of a majority district or minority electoral defeat, that would justify the invalidation of at-large systems, solely on the basis of race, as a remedy for discrimination. Without any findings, no court can conclude that the Act serves a compelling interest

or is narrowly tailored to advance any such interest. The Act is facially unconstitutional.

The need for review and reversal of the state court decision below is compelling. The Act will lead to widespread unjustified use of race to invalidate literally thousands of at-large systems in California cities, school districts and special districts, without proof of racial injury (App. 148a.) No public entity that elects at-large can survive challenge under the Act because, with California's multitudinous racial and ethnic, ancestry and language groups, there always will be groups that vote differently from one another. Public entities all over California will be subjected to attack under the Act, and considerable financial loss. The Act not only authorizes the award of fees and costs to prevailing plaintiffs but also expert witness fees and costs not typically recoverable under civil rights statutes. Section 14030. Many public entities will change their systems simply to avoid the potential cost. Given the national importance of the issues presented, and the practical consequences of the decision below in our most populous state, this Court's review is plainly warranted.

I. THE OPINION BELOW, IN FAILING TO APPLY STRICT SCRUTINY, DIRECTLY CONTRADICTS THIS COURT'S PRECEDENTS

A. The Act Operates Entirely And Only On The Basis Of Express Racial Classifications

Under the 14th Amendment, "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Under strict scrutiny, racial classifications are constitutional only if they are narrowly

tailored measures that further compelling governmental interests. *Id.*

No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. *Shaw v. Reno*, 509 U.S. 630, 642 (1993). Express racial classifications are "immediately" and "inherently" suspect (*Id.*; *Adarand*, 515 U.S. at 223) and are "presumptively" unconstitutional. *Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 272 (1979); *Miller*, 515 U.S. at 927.

The Act unquestionably classifies individuals by race. Elections Code Section 14032 authorizes any voter "who is a member of a protected class" to challenge an at-large election system under the Act. Section 14026(d) defines a "protected class" to mean "a class of voters who are members of a race, color or language minority group" as defined in the federal Voting Rights Act. (Emphasis added.) Thus, a voter may sue under the Act only on the basis of his or her race or ethnicity, and his or her membership in a "protected" racial, ethnic or language group. A voter cannot challenge at-large elections individually without regard to his or her racial identity, or on the basis of political affiliation, religion, gender, disability or any group basis other than race. The Act classifies all individuals who may sue on the basis of race.

More importantly, the Act invalidates at-large systems solely on the basis of race, *i.e.*, "racially polarized voting." Elections Code §§ 14026(e) and 14028. Elections Code Section 14028(a) provides, "A violation of Section 14027 is established if it is shown that racially polarized voting occurs …". Nothing more is required. Race, then, is the sole basis of liability. Race is "the factor," "decisive by itself" and "determinative standing alone." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* ("*Parents*"), 551 U.S. ___, 127 S. Ct. 2738, 2753 (2007). Racially polarized voting is an express racial classification that explicitly

distinguishes between individuals on racial grounds and thus falls within the core prohibition of the Equal Protection Clause. *Shaw*, 509 U.S. at 642; *Miller*, 515 U.S. at 904-05.

Racially polarized voting means that individuals in different racial groups vote differently from each other. Elections Code 14026(e) defines racially polarized voting as "voting in which there is a difference … in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate."

By definition, racially polarized voting divides and separates individuals on the basis of race and assigns them to specific race, color and language minority groups. Racially polarized voting then examines and compares the voting patterns of these respective racial groups. In this case, for example, the Complaint groups Latino voters against all Caucasian and other voters. (App. 60a-61a, 65a.) The Act will invalidate an at-large election system if any racial group votes differently than another racial group. On every application where racially polarized voting is proven, the Act necessarily will benefit a plaintiff racial group seeking districts (or some other alternate system) at the expense of other individuals and racial groups who would prefer to retain the at-large system. It undeniably distributes burdens and benefits solely on account of race, *i.e.*, the voting behavior of racial groups. Racially polarized voting inexorably leads to "different treatment based on a classification." *Parents,* 127 S. Ct. at 2792 (Kennedy, J., concurring).

This Court's precedents hold that government must treat citizens as individuals, not as members of a racial group or class. *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995); *Miller*, 515 U.S. at 911. It follows from this principle that "all governmental action based on race — a group

classification long recognized as 'in most circumstances irrelevant and therefore prohibited' — should be subjected to detailed judicial inquiry." *Adarand*, 515 U.S. at 227 (citation omitted).

The reason is that racial classifications "of any sort" pose the risk of lasting harm to our society. *Shaw*, 509 U.S. at 657. Racial classifications with respect to voting carry particular dangers. *Id.*

The Act operates entirely and only on the basis of racial classifications. Race alone determines who may sue and whether or not at-large systems are invalidated. Strict scrutiny is required.

B. The Opinion Below, In Concluding That The Act Contains No Racial Classification, Conflicts With This Court's Racial Classification Cases

Contrary to this Court's holdings, the opinion below incorrectly held that the Act is not a racial classification because it purportedly is a remedial, race neutral, "race conscious" antidiscrimination statute that applies equally to all races. This Court has never held that race-conscious state statutes or policies containing express racial classifications are immune to strict scrutiny review. Quite the contrary, this Court held that Michigan Law School's "race-conscious" admissions policy expressly using race as one of many factors was subject to strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 341-342 (2003). *See also Parents*, 127 S. Ct. at 2753-54, and at 2792, 2796-97 (Kennedy, J., concurring) (comparing race conscious measures that do not rely on racial classifications).

The opinion below erroneously holds that, because members of all racial groups purportedly may sue under the Act, it treats all races equally, and therefore strict scrutiny is inapplicable. That conclusion directly conflicts with this

Court's racial classification cases. In *Johnson v. California*, 543 U.S. 499, 506 (2005), the Court rejected the argument that neutral racial classifications that neither benefit nor burden one racial group or individual more than any other group or individual receive relaxed review. California defended its prison segregation policy in *Johnson* on the basis that all prisoners were equally segregated. Nonetheless, this Court held that racial classifications receive close scrutiny even when they may be said to "burden or benefit the races equally" or are "neutral." *Id.*, citing *Shaw*, 509 U.S. at 651, and *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

Following *Johnson,* the Ninth Circuit applied strict scrutiny to an allegedly neutral racial tiebreaker in school admissions that did not burden or benefit any particular racial group more than another. *Parents*, 426 F.3d 1162, 1172-1173 esp. n.12 (9th Cir. 2005) (en banc), *rev'd*, 551 U.S. ___, 127 S. Ct. 2738 (2007). The Ninth Circuit concluded that the racial tiebreaker was narrowly tailored to achieve a compelling interest in racial diversity in education. Reversing the judgment, five Justices of this Court applied strict scrutiny. *Parents*, 127 S. Ct. at 2751-52 and at 2785 (Kennedy, J., concurring.) The decision below cannot be squared with *Johnson* and *Parents*, which was issued after the decision in the present case.[2]

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[2] Nor can it be squared with the Court's earlier decisions, most notably *McLaughlin v. Florida*, 379 U.S. 184, 188-190 (1964) (striking down interracial cohabitation ban) and *Loving v. Virginia*, 388 U.S. 1, 8, 10 (1967) (striking down interracial marriage ban). The state statutes in *Loving* and *McLaughlin* did not single out any race for special advantage or disadvantage but imposed liability "only because [the people affected] were of different races … their conduct would not have been illegal had they both been white, or both Negroes." *McLaughlin*, 379 U.S. at 198 (Justices Stewart and Douglas concurring); *see also*, *Loving*, 388 U.S. at 11-12.

The opinion below plainly is in error in accepting at face value the Legislature's characterization of the Act as an antidiscrimination measure. This Court repeatedly has said that legislative expressions of benign or remedial purpose are not determinative and in fact given "little or no weight." *Croson*, 488 U.S. at 500. The *Croson* Court declared that mere recitation of a benign or compensatory purpose would impermissibly insulate state racial classifications from strict scrutiny. *Id.* at 490. Because racial classifications are suspect, "simple legislative assurances of good intention cannot suffice." *Id.* at 500. There is no place in equal protection analysis for "blind judicial deference to legislative or executive pronouncements of necessity." *Id.* at 501. Strict scrutiny is necessary to "smoke out" illegitimate uses of race to assure that the legislative body is pursuing a goal "important enough to warrant use of a highly suspect tool." *Id.* at 493; *Johnson*, 543 U.S. at 506. Labeling the Act an antidiscrimination measure does not avoid strict scrutiny.

In this case, petitioners vigorously dispute that the Act is an antidiscrimination measure. The Act invalidates at-large systems solely on the basis of race where no racial injury exists (*see infra* p.14-19) in order to achieve racial balance (*see infra* p. 21). It targets racially polarized voting in all at-large elections as "the problem" (App. 115a, 119a, 126a, 139a), and proceeds to address "the problem" by

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The statutes in *Loving* and *McLaughlin* treated interracial couples differently than all other couples because of their race. *See also Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 470, 474-75, 485, (1982) (racial educational issues treated differently than other educational issues), and *Hunter v. Erickson*, 393 U.S. 385, 392-393 (1969) (racial housing matters treated differently from all other housing matters). Similarly, the Act here facially treats racially polarized voting differently from all other voting, including all other polarized voting, *e.g.*, Republican v. Democrat. It facially treats racial preferences in voting differently from all other voting preferences, *i.e.*, political, religious, income, gender, etc.

invalidating all at-large systems, solely on the basis of racially polarized voting, without requiring proof of racial injury or racial discrimination.

This Court has held that racially polarized voting alone is not discrimination, declaring in *Thornburg* that, to be "legally significant," white bloc voting must "regularly defeat the choices of minority voters." *Thornburg*, 478 U.S. at 48. *See Valladolid v. City of National City*, 976 F.2d 1293, 1297 (9th Cir. 1992) (no violation because minority voters usually won). The Court also held that condemnation of racially polarized voting depends on proof that a racial group is sufficiently compact geographically to create a majority minority district in which it has the ability to elect candidates of its choice. *Thornburg*, 478 U.S. at 50. As this Court reasoned, ["u]nless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that practice," *id.* at 50 n.17, and *see Shaw*, 509 U.S. at 657; *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (without *Thornburg* showings, "there neither has been a wrong nor can be a remedy"). The Act, however, dispenses entirely with any requirement to prove that racially polarized voting actually causes racial injury. Plaintiffs need not prove a majority district or minority electoral defeat. Sections 14028(b) and (c). If "racially polarized voting occurs," regardless of whether it impairs the ability to elect or causes racial injury or discrimination, invalidation of at-large systems is mandated. Section 14028(a).

The legislative history, moreover, contains expressions of intent to achieve "more districts that would be truly representative of the protected classes of voters" (App. 147a) or governing boards "reflective of the communities they serve" (App. 137a, 150a, 152a); *see infra* p. 21. These pronouncements undermine the characterization of the Act as an "antidiscrimination" measure by the court below. *See*

Parents, 127 S. Ct. at 2752 (racial imbalance without more does not violate the Constitution). Strict scrutiny would reveal that the Act does not address discrimination but uses race to correct a perceived racial imbalance "problem" that is not a product of discrimination and causes no racial injury. Race-based legislation like the Act here must be closely scrutinized and constitutionally can be justified only by a compelling interest in remedying discrimination which the Act plainly does not require.

In any event, this Court never has held that a state statute is exempt from strict scrutiny because it is or is intended to be remedial. Quite to the contrary, this Court has held that all racial classifications, including those that are remedial, are subject to strict scrutiny. *Adarand,* 515 U.S. at 227; *Croson,* 488 U.S. at 493, 500; *Miller*, 515 U.S. at 904-05, 913-15, 922; *Parents*, 127 S. Ct. at 2752.

The Act operates entirely and only on racial classifications subject to strict scrutiny. Thus, the state appellate court's application of rational basis review to the Act is fundamentally at odds with this Court's jurisprudence and warrants plenary review and reversal. [3]

II. THE ACT IS FACIALLY UNCONSTITUTIONAL

In order for any racial classification to survive strict scrutiny, the State must demonstrate a compelling

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[3] The opinion erroneously suggests that strict scrutiny would imperil federal civil rights statutes. No support is offered for that assertion nor can we find any. This Court has made clear that all federal racial classifications are subject to strict scrutiny. *Adarand*, 515 U.S. at 227. Unlike the Act, federal civil rights laws require proof of racial injury before imposing liability, and thus actually do remedy discrimination, and satisfy strict scrutiny because they are narrowly tailored in scope and application.

governmental interest and establish that the classification is narrowly tailored to serve that interest and no others. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Croson*, 488 U.S. at 500; *Shaw*, 509 U.S. at 643-44; *Adarand*, 515 U.S. at 227. This showing requires findings of specific, identified discrimination, *Croson*, 488 U.S. at 510, and a "strong basis in evidence" of racial harm. *Miller*, 515 U.S. at 922.

This Court has held that remediation of discrimination serves a compelling governmental purpose and state statutes will be upheld if narrowly tailored in scope and application. *Parents,* 127 S. Ct. at 2752; *Freeman v. Pitts,* 503 U.S. 467, 494 (1992); *Croson,* 488 U.S. at 500. Racial classifications, however, actually must be remedial to serve a compelling state interest. *Shaw v. Hunt*, 517 U.S. 899, 915-916 (1996). Gross overinclusion will impugn any claim of remedial purpose and operation. *Croson*, 488 U.S. at 506.

The Legislature here failed to make any findings or to provide any evidence that racially polarized voting alone causes racial harm to justify the Act's departures from federal voting rights law. No reviewing court, then, can conclude that the Legislature's interest is "compelling" or that the Act's scope is "narrowly tailored." The Act is facially unconstitutional.

A. The Act Invalidates At-Large Systems Solely On The Basis Of Racially Polarized Voting Where No Racial Injury Or Discrimination Exists

This Court's seminal VRA case, *Thornburg v. Gingles*, held that plaintiffs must prove the existence of three necessary preconditions. 478 U.S. at 50-51. Under *Thornburg*'s first precondition, plaintiffs must create a hypothetical, single member district in which a challenging minority group will constitute an "effective voting majority"

that is "able to elect" candidates of their choice. *Id.* at 38-39, 50. The rationale for this requirement is that unless plaintiffs are "able to elect" in a single member district, the at-large system "cannot be responsible for minority voters' inability to elect." *Id.* at 50, *see esp.* n.17 ("Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice") (second emphasis added).

Proof of a majority district remedy, then, is an essential element of liability. *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) at 1530 ("the first *Gingles* precondition, informed by the second, dictates that the issue of remedy is part of the plaintiffs' prima facie case") and 1533 ("[T]he absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a finding of liability"); *Growe*, 507 U.S. at 40-41 ("Unless [the *Thornburg* preconditions] are established, there neither has been a wrong nor can be a remedy").

Numerous courts have dismissed voting rights cases where plaintiffs failed to prove a majority minority district under the first *Thornburg* precondition. *Romero v. City of Pomona*, 883 F.2d 1418, 1425-1427 (9th Cir. 1989); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947-48 (7th Cir. 1988); *Skorepa v. Chula Vista*, 723 F. Supp. 1384, 1390 (S.D. Cal. 1989). The fact that white bloc voting usually defeated minority-preferred candidates in those cases was insufficient to prove racial injury or vote dilution. There is no racial harm warranting remediation unless there is an "alternative system that would provide greater electoral opportunity to minority voters." *Holder v. Hall*, 512 U.S. 874, 887 (1994) (O'Connor, J., concurring). Put another

way, racially polarized voting alone is insufficient to prove racial injury.

The "majority district" requirement does not appear in the text of Section 2 or the Congressional legislative history for the VRA. It derives from the Court's pre-1982 vote dilution cases under the Fourteenth Amendment. *Whitcomb*, 403 U.S. at 156 (1971). It is constitutional in origin, designed to ensure the existence of a racial injury before imposing liability or relief on a racial basis to remedy discrimination.

The Act, however, eliminates *Thornburg*'s majority district requirement as an element of liability. Elections Code Section 14028(c) expressly provides that lack of geographic compactness "may not preclude a finding of … a violation of Section 14027 and this section."

The legislative history makes clear that the Act specifically was designed to circumvent *Thornburg*'s first liability precondition. (App. 116a-117a, 128a) ("this bill would make it easier to challenge at-large districts"); (App. 116a, 120a, 127a, 145a) (only 2 of 3 *Thornburg* preconditions need be met); (App. 120a) ("This bill would avoid that problem"); (App. 135a) (bill would avoid bright-line test). The Act's legislative history reflects a superficial and mistaken understanding of vote dilution. (App. 120a-121a) (geographic compactness "would not appear to be important" in assessing dilution). The Legislature viewed the majority district requirement as merely a remedial issue that takes "the cart before the horse (the discrimination issue)," instead of an essential condition of liability. (App. 126a, 146a.)

The Act compels liability on the basis of racially polarized voting alone, even though this Court has held under

both the VRA and the Fourteenth Amendment that, in the absence of a winnable majority-minority district, minority voters suffer no racial injury, racial vote dilution or racial discrimination in voting caused by the at-large election system. *Thornburg*, 478 U.S. at 50-51, esp. n.17; *Whitcomb*, 403 U.S. at 156. By focusing on racially polarized voting as the "problem" (App. 115a, 119a, 126a, 135a, 139a), the Legislature assumed harm even in the absence of a majority district. (App. 145a) ("the central issue here is whether one's voting rights are being abridged or violated, not whether voters are geographically compact enough that they could elect their own representative"). Thus, Section 14028(a) of the Act states that a violation of 14027 is established "if it is shown that racially polarized voting occurs." Under the Act, racially polarized voting by itself is regarded as vote dilution in all cases in at-large systems (but not in district systems).

By eliminating any requirement to prove a majority district or minority electoral defeat, both necessary to prove an impairment of the "ability to elect," the Act intended to authorize suits challenging at-large elections for impairment of a minority group's "ability to influence" the outcome of an election. Elections Code Section 14027. This was the real purpose of the Act as seen in Senator Polanco's letter to the Governor, justifying the elimination of the majority district requirement so that minority plaintiffs can obtain a remedy when they cannot prove a majority district. (App. 135a.) The legislative history makes that explicit. (App. 120a.) ("This Bill Addresses Racially Polarized Voting If It Impairs The Right Of Protected Groups To Influence The Outcome Of An Election") (emphasis added).

This Court, however, has never regarded minimizing racially polarized voting as a significant state interest apart from compliance with the VRA (which requires proof of a majority district) or as a remedy for prior discrimination

under the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. at 657. In *Shaw v. Reno*, 509 U.S. at 657, and *Bush v. Vera*, 517 U.S. 952, 982 (1996), the Court held that race-based districting, as a response to racially polarized voting, is "constitutionally permissible" only when a majority district can be created. *See also Miller*, 515 U.S. at 921.

On five occasions since 1986, moreover, this Court declined to sanction "influence" claims that would invalidate at-large systems where a majority district cannot be proved.[4] The Court also summarily affirmed lower federal court decisions rejecting influence claims.[5] Were "ability to influence" claims to be approved, *Thornburg*'s "ability to elect," vote dilution standard would be rendered superfluous.

There is a sound reason for the Court's restraint. Without a majority district requirement, the Act mandates absurd results. Census data for Modesto indicate that there are more than 75 separate, identifiable racial and ethnic groups and subgroups, at least 74 ancestry groups and 19 languages other than English spoken in the home. (App. 81a-108a.) Each of these groups is a "protected group" that

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4 *Thornburg*, 478 U.S. at 46, n.12; *Voinovich v. Quilter,* 507 U.S. 146, 154 (1993); *Growe*, 507 U.S. at 41 n.5; *Holder*, 515 U.S. at 900, esp. n.8 (Thomas, J., concurrence); *Johnson v. DeGrandy*, 512 U.S. 997, 1008-09 (1994). The Court rejected an influence claim in *LULAC v. Perry*, 548 U.S. ___, 126 S.Ct. 2594, 2624-26 (2006).

5 *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 378-79 (S. D. N. Y.) (three judge court), *aff'd summarily*, 5543 U.S. 997 (2004); *Turner v. Arkansas*, 784 F. Supp. 553, 567-70 (E. D. Ark. 1991) (three judge court), *aff'd summarily*, 504 U.S. 952 (1992); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three judge court), *aff'd summarily*, 540 U.S. 1013 (2003). *And see Cousin v. Sundquist,* 145 F. 3d 818, 828 (6th Cir. 1998) (holding that a claim of "an impairment of the minority's ability to influence the outcome of the election, rather than to determine it" was not cognizable under the VRA).

can sue under the Act in the absence of a majority district requirement. It is a certainty that one of these many groups will vote differently from at least one other group in every election. Without a majority district requirement, every at-large election system in California will fall.

If only one Hispanic were to reside in a city with 200,000 people and he or she votes for a candidate not favored by another group, a court must find liability under the Act, notwithstanding the obvious inability to create any remedy or a winnable district with only one Hispanic voter. As one case put it, "If 10% of the voters can 'swing' an election, perhaps so can 1% or 0.1%. A single voter is the logical limit." *Ill. Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 716 (N.D. Ill.) (three judge panel), *aff'd*, 506 U.S. 948 (1992) (emphasis added). If one group is large enough and concentrated enough to create a winnable district but other groups are too small to do so, the problem resolves itself under federal law. Under the Act, however, more than 100 distinct racial, ancestry and language groups in Modesto all have the same rights.

The Act, then, declares as discrimination what federal courts never have regarded as vote dilution, racial injury or racial discrimination, or as a significant state interest in remedying.

B. There Are No Findings To Justify Invalidation Of At-Large Systems Solely On The Basis Of Racially Polarized Voting Where No Racial Injury Or Discrimination Exists

States are not free to define discrimination any way they wish, or to declare circumstances to be discrimination that this Court has ruled do not constitute discrimination. The Fourteenth Amendment is an explicit constraint on state power, and states acting to remedy discrimination must do so

within the constraints of the Fourteenth Amendment. *Croson*, 488 U.S. at 490. This Court's definitions of racial discrimination in voting based on the Fourteenth and Fifteenth Amendments are binding on states.

Precisely because federal courts do not regard as discrimination what the Act here declares as illegal, the State must carry its burden under strict scrutiny to demonstrate that racially polarized voting alone, without proof of a majority district, causes racial harm or discrimination, remediation of which constitutes a compelling interest. There must be "a strong basis in evidence for its [the State's] conclusion that remedial action [is] necessary." *Croson*, 488 U.S. at 497, 500. The State must make findings that identify specific discrimination so that "the reasons for any [racial] classification be clearly identified and unquestionably legitimate." *Id.* at 510. Without findings, "there is simply no way of determining what classifications are 'benign' or 'remedial.'" *Id.* at 493.

The Legislature here failed to make any findings at all, much less the constitutionally required findings demonstrating a "strong basis in evidence" that racially polarized voting by itself causes racial harm in the absence of a majority district or minority electoral defeat. There are no findings or evidence presented of how racially polarized voting alone amounts to harm or injury or discrimination. There is no analysis demonstrating that districts that are not majority minority will result in minority electoral success.

Dissident legislators questioned what benefit would result from eliminating *Thornburg*'s majority district requirement. (App. 112a, 117a, 128a, 131a.) One legislator asked, "if a minority community is not sufficiently geographically compact to ensure that it can elect one of their members from a district, what is gained by eliminating the at-

large election system?" (App. 112a.) Another legislator asked, "How will single member districts change the results?" (App. 131a.). The Legislature never provides an answer to these questions.

The legislative history, however, is replete with conclusory statements about the importance of elected bodies reflecting the racial and ethnic composition of their constituents. (App. 137a, 150a, 152a, 154a.) (CVRA "will help ensure that California's electoral system is fair, open to, and representative of all California voters"); (App. 137a, 150a, 152a) ("it is important that governing boards of local jurisdictions reflect the communities they serve"), (App. 140a, 147a) ("California is now a state of minorities and it is only fitting that our law reflect this") and (App. 147a) (CVRA may lead to "more districts that would be truly representative of the protected classes of voters"). However desirable these goals are, an interest in achieving racial balance cannot justify judicial intervention in the absence of intentional discrimination or racial injury. Racial imbalance without more does not violate the Constitution. *Parents*, 127 S. Ct. at 2752. Racial balancing for its own sake is per se unconstitutional. *Grutter,* 539 U.S. at 330.

Both the Act and the opinion below (App. 7a-8a) mistakenly treat remedy as an issue to be addressed only after imposing liability. This Court's precedents, however, unequivocally hold that States may enact race-based legislation to remedy discrimination only on proof of intentional discrimination or where there is a "strong basis in evidence of racial harm." *Croson*, 488 U.S. at 497, 500 (constitutional violations); *Miller*, 515 U.S. at 922 ("When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather we insist on a strong basis in evidence of the harm being remedied"). The decision below

upholds the Act because it enlarges "the potential for relief" (App. 10a), but this Court's cases hold that the scope of a remedy is determined by the extent of a violation. *Milliken v. Bradley*, 418 U.S. 717, 744, 749 (1974); *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 279-80 (1986); and *Shaw,* 509 U.S. at 642-47; *Bush,* 517 U.S. at 976-81 and *Miller,* 515 U.S. at 920-22, holding that race-based districting is permissible only for constitutional or VRA violations. Thus, without proof of a majority district at the liability stage to demonstrate racial injury, there can be no wrong that would justify the race-based remedy of voiding an at-large system solely on the basis of race. *See Milliken*, 418 U.S. at 745.

Under the Act, once racially polarized voting is proven, the at-large system is declared illegal without more. (App. 146a.) Remedies are considered and imposed after a "violation" is established. The Act explicitly states that lack of majority district "may not preclude … a violation of Section 14027 … but may be a factor in determining an appropriate remedy." Section 14028(c). The ability to consider a majority district or any other alternative at the remedy stage, however, is too little, too late, constitutionally. The decision below also mentions the availability of remedies other than districts, including remedies that are not race-based, but this observation ignores the fact that invalidation of at-large systems, solely on the basis of race, is a race-based remedy that is impermissible without proof of racial discrimination that the Act does not require. Proof of these remedies is in any event not required as an element of liability before the at-large system is invalidated. There is not even any requirement to prove that the challenging minority group will do better under the alternative election method imposed at the remedy stage. The Act shoots first, declares the at-large system invalid and then replaces it with an alternative system without any requirement to prove that

plaintiffs will do better under the replacement election method.

C. The Act Is Facially Unconstitutional

Racial classifications are "simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz*, 539 U.S. at 270. In this instance, the Legislature failed to provide any justification for the invalidation of at-large systems, solely on the basis of race, as a remedy for discrimination, much less any nexus between justification and classification. Because of the lack of any findings, no court can conclude that the Act's racial classifications serve the compelling state interest of remedying discrimination, or that the scope of the Act is narrowly tailored to be strictly remedial. As no interest other than remediation of discrimination has been advanced, the Act is facially unconstitutional.

Nor is there merit to the suggestion below that, under *United States v. Salerno*, 481 U.S. 739, 745 (1987), the statute can be saved facially by narrower judicial application to only that racially polarized voting shown to cause racial injury. Neither *Salerno* nor any other decision of this Court provides an escape from the presumption of facial unconstitutionality requiring government to justify a racial classification where there is no nexus between justification and classification. *See, e.g., Parents,* 127 S. Ct. at 2794 (Kennedy J., concurring) ("*Gratz* involved a system where race was not the entire classification"). To suggest that a narrower application of the statute as reaching only racially polarized voting shown to be discriminatory or racially injurious can be scripted by the courts to save it facially from presumed unconstitutionality, is to ignore both the CVRA's very purpose (*i.e.,* to ban all at-large elections solely on the basis of racially polarized voting by eliminating *Thornburg*'s

first precondition) and its overarching infirmity (*i.e.,* no nexus between justification and classification).

CONCLUSION

The petition should be granted. The Court may wish to consider summarily vacating the decision below and remanding for reconsideration in light of *Parents.*

Respectfully submitted,

SUSANA ALCALA WOOD
City Attorney-City of Modesto
1010 10th Street, Suite 6300
Modesto, CA 95353
209-577-5284

JOHN E. MCDERMOTT
Counsel of record
Howrey LLP
550 S. Hope Street, Suite 1100
Los Angeles, CA 90071
213-892-1800

WILLIAM BRADFORD REYNOLDS
JERROLD J. GANZFRIED
Howrey LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
202-783-0800

Counsel for Petitioners
City of Modesto, California,
Jean Zahr, Jim Ridenour,
Bob Dunbar, Janice
Keating, Garrad Marsh,
Will O'Bryant, Denny
Jackman, and Brad Hawn