

No. B251793

IN THE
Court of Appeal

**STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE**

JUAN JAUREGUI, et al.
Plaintiffs and Respondents,

vs.

CITY OF PALMDALE,
Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
L.A.S.C. NO. BC483039
HONORABLE MARK V. MOONEY, JUDGE

**FAIRVOTE'S AMICUS CURIAE BRIEF
IN SUPPORT OF PLAINTIFFS/RESPONDENTS**

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I. STATEMENT OF INTEREST

FairVote is a 501(c)(3) non-profit organization incorporated in the District of Columbia whose mission is to advocate for fairer political representation through election reform. FairVote's mission rests on the belief that implementing voting methods like ranked choice voting, cumulative voting, and other non-winner-take-all at-large election methods will lead to representation in government more reflective of society's diversity. FairVote encourages public officials, judges, and the public to explore constitutionally permissible remedies for unlawful elections other than exclusive use of single-member districts. FairVote has consistently presented arguments promoting the use of fair representation voting as a legal and effective remedy, including in areas where race is a divisive and controlling factor.¹

FairVote has previously filed amicus curiae briefs in cases involving the permissibility of fair representation voting as a remedy under both the California Voting Rights Act and the Federal Voting Rights Act. *See, e.g., Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010). FairVote has also published scholarship promoting the use of fair representation voting. *See, e.g.,* Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. Rich. L. Rev. 959, 988–1002 (2013); Andrew Spencer, *The Voting Rights Act, Jerome Gray and Fair Voting in Alabama*, FairVote (Mar. 8, 2013), <http://www.fairvote.org/the->

¹ As used herein, “fair representation voting” refers to nondiscriminatory, non-winner-take-all at-large elections that employ cumulative, single or ranked choice voting. These voting systems, which are explained below, also are sometimes referred to as “alternative” or “modified” at-large voting systems.

voting-rights-act-jerome-gray-and-fair-voting-in-alabama. Because of its familiarity with remedies in racial minority vote dilution cases, FairVote is particularly well-suited to expound on this issue.

II. SUMMARY OF ARGUMENT

FairVote submits this brief to highlight the nondiscriminatory at-large voting methods that can be implemented to effectively remedy minority voter dilution like that found in the City of Palmdale (“Palmdale”). In a legal and effective manner, fair representation voting grants groups of like-minded voters an opportunity to elect preferred candidates; in so doing, it avoids the unfortunate political reality where 51% of the voters can consistently elect 100% of their preferred candidates, leaving 49% of the voters, often racial minorities, unable to realize their electoral preferences at all, year after year.

As applied in the United States, fair representation voting typically describes three candidate-based at-large voting methods that can be used in nonpartisan elections: ranked choice voting, cumulative voting and single voting. These voting methods have a documented history of effective use in this country and are currently employed in about 100 cities. *See* Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Pub. L. Rev. 97, 98 (2010). They achieve fair and open elections, and are consistent with federal law, the California Civil Rights Act (CVRA), and the Palmdale charter. These systems promote equal opportunity for all voters, increase voter engagement, and facilitate the attainment of a truly representative body of elected officials.²

² While FairVote acknowledges that the trial court in this case did not order the use of a fair representation voting system as a remedy for Palmdale’s

III. AN INTRODUCTION TO FAIR REPRESENTATION VOTING

Although single-member districts are often used to remedy voting rights violations, fair representation voting under appropriate conditions can promote higher voter participation and fairer representation, and can provide more flexibility as communities change. Indeed, contrary to Palmdale’s assertions, fair representation voting systems are established at-large voting methods that offer a variety of improvements over winner-take-all voting. This section outlines those benefits and describes options for at-large fair representation voting.³

A. Benefits of Fair Representation Voting

Fair representation voting systems provide nearly everyone with a real chance to elect a preferred candidate in every election and make it likely that large groups of like-minded voters (those who vote for similar candidates) will win seats if their share of the vote is above a minimum threshold. Grounded in the principle of “one person, one vote, *one value*,” fair representation voting systems allow voters to vote directly for candidates. And unlike winner-take-all at-large systems, which tend to over-represent majority viewpoints at the expense of minorities, fair representation voting systems actually enhance the ability of cohesive

violation of the CVRA, FairVote writes to affirm the viability and legality of such systems in light of Palmdale’s contrary assertions. Additionally, should this Court accept Palmdale’s position that its charter requires at-large elections, fair representation voting in certain forms would be a lawful remedy for Palmdale’s CVRA violations.

³ As discussed more fully in section IV.A. below, at-large elections are a permissible remedy under the CVRA, provided they are not implemented in a discriminatory manner. Cal. Elec. Code § 14027 (“[a]n at-large method of election may not be imposed or applied in a manner that impairs” voting rights).

minority groups to elect candidates of their choice. These systems allow a politically cohesive minority group that comprises a sufficient percentage of the voting population to elect at least one candidate of its choice with a percentage of the vote that is generally lower than the plurality or majority required in a winner-take-all single-seat district election.

Political scientists represent this winning percentage of voters, known as the “threshold of exclusion,” with the following mathematical formula: one divided by the sum of one plus the number of seats to be filled (plus one vote).⁴ Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333, 340–41 (1998). Courts regularly rely on this formula to analyze whether voting proposals are acceptable remedies for particular voting law violations. *See, e.g., United States v. Euclid City School Bd.*, 632 F. Supp. 2d 740, 761 (N.D. Ohio 2009); *Cottier v. City of St. Martin*, 475 F. Supp. 2d 932, 936–37 (D.S.D. 2007); *Cane v. Worcester Cnty.*, 847 F. Supp. 369, 372 (D. Md. 1994), *rev’d on other grounds*, 35 F.3d 921 (4th Cir. 1994); *Dillard v. Chilton Cnty. Bd. of Educ.*, 699 F. Supp. 870, 874 (M.D. Ala. 1988). A minority group whose population exceeds the threshold of exclusion will have sufficient voting strength to elect a candidate of choice even when the majority casts all available ballots in an organized majority bloc vote. *See* Mulroy, *supra*, at 339 n.26. By increasing the number of seats to be filled in any given election, fair

⁴ For example, in a single-seat race, a candidate would need one-half (one over one plus one) of the votes cast (plus one vote), or a majority, to be guaranteed to win. For a two-seat race, a candidate would need one-third (one over one plus two) of the votes cast (plus one vote); for a three-seat race, a candidate would need a quarter (one over one plus three) of the votes cast (plus one vote); and so on. Because this threshold requires less than a majority, it allows cohesive minority interests a fair shot at obtaining some degree of representation.

representation voting systems lower the threshold of exclusion (as compared to single member district voting).⁵ This way, voters in the majority have the power to elect most seats, but they do not have the power to deny representation to substantial groups of like-minded voters in the minority.

In addition to accomplishing the explicit goals of the CVRA in a lawful way, fair representation voting also promotes many of the goals underlying election laws in general by providing for fairer and more democratic elections. For example, fair representation voting frees jurisdictions from frequent redistricting and prevents partisan gerrymandering, as no new boundaries need to be drawn when demographics change. Fair representation voting also avoids the problem of “virtual representation” because individuals are not grouped by district; thus, a majority voting bloc cannot easily dilute individual or group voting strength. Additionally, fair representation voting often increases voter participation and satisfaction by enhancing the likelihood that each voter will have an effect on the election and will be able to elect a candidate of his or her choice.

B. Methods of Fair Representation Voting

1. Ranked Choice Voting

In jurisdictions that employ ranked choice voting (also commonly referred to as “single transferable vote” or “preference voting”), voters rank their preferences among candidates.⁶ In doing so, voters mark their

⁵ Conversely, because staggering elections lowers the number of seats that are up for election at any one time, it raises the threshold of exclusion.

⁶ A form of ranked choice voting is used today in several California cities, including Oakland, San Leandro and San Francisco, and has been upheld as

favorite candidate, but may also then indicate their second and additional choices in order of preference. After the first choice ballots are tallied, candidates who meet or surpass the winning threshold are elected. *See* Edward Still, *Alternatives to Single-Member Districts*, in *Minority Vote Dilution* 249 (Chandler Davidson ed. 1989). Then the ballots beyond the threshold are added to the totals of the remaining candidates according to voters' next-choice preferences.⁷ Once these “surplus” ballots are re-allocated, the candidate with the fewest votes is eliminated and each ballot cast for that candidate is then reallocated to the voter’s next-choice preference at full value. This process of allocating “surplus” votes and eliminating last-place candidates continues until all seats are filled. Voters may rank as many or as few candidates as they want, knowing that indicating a lower choice candidate will never hurt the electoral chances of a higher choice candidate.

This use of rankings guarantees that voters will generally not have wasted their votes either by voting for candidates who gain votes in excess of the threshold or by voting for candidates who have no chance of meeting it (because their votes will be reallocated to other ranked candidates). Jurisdictions using ranked choice voting tend to result in representation that

constitutional in a unanimous ruling by a panel of the U.S. Court of Appeals for the Ninth Circuit. *See Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011). These current uses in California involve single winner elections, where one candidate is elected. While allowing a consensus winner to be chosen in a single election, single winner forms of ranked choice voting do not guarantee that voters in the minority will be able to elect a candidate of choice.

⁷ In the most precise method, currently used for multi-seat elections in Minneapolis (MN), every ballot cast for a candidate who meets the threshold is allocated to the voter’s next choice at an equally reduced value.

accurately reflects the preferences of the voters, whether based on race, political party, or however the voters express their preferences.

Another value of ranked choice voting—for those in the minority and majority alike—is that candidates will not “split” the vote if they receive less than the threshold of support necessary to win, thereby ensuring that all voter groups exceeding the threshold will elect their fair share of candidates. This quality is particularly important where relatively large shares of the vote are required to win a seat. Candidates who end up below that threshold will not be “spoilers”; instead, their backers will have their votes added to the total of their next choice candidate. This characteristic is particularly important for communities with emerging minority groups and shades of difference within groups because it accommodates voters having more choices and more influence.

2. Single Voting

The simplest fair representation voting method is the single vote system, which is a variant of what the parties to this case have referred to as “limited voting” (an unfortunate term for a system that expands representation).⁸ Under winner-take-all multi-seat elections (such as Palmdale’s previous system), voters ordinarily are given a number of votes equal to the number of seats to be elected, thereby allowing a majority group to decide the outcome of every single seat. By contrast, in the single vote system, voters have a single, more potent vote. The candidates that receive the most votes are elected. *See* Richard L. Engstrom, *Modified Multi-Seat Election Systems As Remedies For Minority Vote Dilution*, 21 *Stetson L. Rev.* 743, 757-62 (1992).

⁸ The term arises from the fact that, in limited voting systems, voters have fewer votes than the number of seats that are up for election.

Like all fair representation voting systems, the single vote system significantly increases the likelihood that voters will participate in meaningful elections that result in fairer representation when compared to a winner-take-all system. Voters who are part of a minority group may maximize their representation under a single vote system by concentrating their votes on a single candidate. See Richie & Spencer, *The Right Choice for Elections, supra*, at 987. Many jurisdictions throughout the United States use either the single vote system or some other limited voting variant. See FairVote, *Electing Candidates with Fair Representation Voting: Ranked Choice Voting and Other Methods 3* (2013), available at <http://www.fairvote.org/assets/FairVotingMethods2014.pdf>.

Although FairVote believes that ranked choice voting best achieves the goal of fair political representation, single voting can be an appropriate alternative for jurisdictions concerned that they might not be able to administer ranked choice voting immediately. Indeed, since ranked choice voting is a type of single vote system, its use is especially appropriate as part of a transition to ranked choice voting once a jurisdiction adopts software and equipment to simplify the vote-counting process. The single vote system may also be a practical solution for courts to order while litigation remains ongoing, as it requires no districts and minimal changes to administration practices.

3. Cumulative Voting

Under disfavored at-large elections (such as the Palmdale process rejected by the trial court), voters may cast as many votes as there are seats to be filled in the election, giving each vote to a different candidate, thereby often shutting out the preferred candidates of minority groups.⁹ Cumulative

⁹ Winner-take-all at-large and multi-seat district schemes require each candidate to gain more than 50% support, effectively shutting out minority

voting systems avoid this result by removing the restriction on a voter casting more than one of his or her votes for a single candidate. For example, in an election for five seats, a voter may give a single vote to five different candidates or, if the voter indicates support for only one candidate, that candidate will receive all five of the voter's votes, thus ensuring that every voter casts five undiluted votes.¹⁰ See Engstrom, *supra*, at 98. The winning candidates are the five who receive the most votes—a simple plurality rule.

Cumulative voting provides minority voters a greater opportunity to elect representatives of their choice because it allows voters to concentrate their votes effectively.¹¹ Voters may effectuate a strong preference for a single candidate by casting more than one vote for that person. And as long as voters do this without splitting their votes among

viewpoints, which in jurisdictions with racially polarized voting results in the dilution of racial minority representation. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); *Sanchez*, 145 Cal. App. 4th at 666.

¹⁰ Similarly, if that voter chooses to vote for only two candidates, each one will receive 2 ½ votes. The chosen candidates equally divide the 5 votes allotted to the voter.

¹¹ This opportunity improves when a minority group votes cohesively. Conversely, splitting between two or more preferred candidates may cause a minority group to fail to achieve fair representation. Voters whose preferred candidate does not have enough votes to win will not have a second chance to have their votes count. “For example, suppose racial minority voters make up 25% of a jurisdiction that has a history of racially polarized voting and that uses . . . cumulative voting to elect a five-member city council. With a threshold of exclusion of 17%, either one or two of the minority voters’ candidates of choice should be elected. However, by running two candidates, they risk electing zero candidates of choice, because if the 25% vote is split evenly between the two candidates, neither would be elected.” Richie & Spencer, *supra*, at 987. As a result, cumulative voting may create incentives for parties to limit candidacies to the number of seats they expect to have a chance to win.

similar candidates, a minority group need not constitute a plurality of the voters in an election in order to elect a preferred candidate.

Cumulative voting, therefore, remains a practicable and effective antidote to the dilutive effects of some at-large voting schemes. It is not winner-take-all (such as Palmdale’s discredited system), and under appropriate circumstances it can allow minorities an even better opportunity to gain representation than single-seat districts. Mulroy, *supra*, at 339–43. Concerns that have led many courts, including the trial court here, to disfavor winner-take-all at-large systems plainly do not apply to cumulative voting methods.

IV. FAIR REPRESENTATION VOTING IS CONSISTENT WITH FEDERAL LAW, STATE LAW, AND THE PALMDALE CHARTER.

Fair representation voting systems satisfy the statutory requirements of the CVRA and the requirements of the California constitution, and are consistent with the Palmdale charter. They also satisfy federal requirements—both the “one person, one vote” and race-neutrality constitutional requirements. Fair representation voting is, in short, entirely lawful.

A. Fair Representation Voting is Consistent with California Statutory and Constitutional Law.

Fair representation voting satisfies the statutory requirements for a valid remedy under the CVRA, which obligates courts to order “appropriate remedies . . . tailored to remedy the violation” when they find unlawful election practices. Cal. Elec. Code § 14029. On its face, the CVRA permits the imposition of alternative at-large voting systems, including the fair representation methods described in the previous section, so long as

they do not involve racially polarized voting that results in minority vote dilution. *See id.* § 14029.

Section 14027 of the Election Code establishes that “[a]n at-large method of election may not be imposed . . . *in a manner that impairs the ability of a protected class to elect candidates* of its choice or its ability to influence the outcome of an election.” *Id.* § 14027 (emphasis added). The qualifying phrase, “in a manner that”, serves to limit the way in which an at-large method of voting may be implemented; the provision forbids only at-large elections that are conducted in a discriminatory manner. *See, e.g., Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 666 (2006) (“[The CVRA] simply gives a cause of action to members of [a protected class] that can establish that its members’ votes are diluted *through the combination of racially polarized voting and an at-large election system.*”) (emphasis added). The expression of such a limitation was only necessary because the legislature intended for at-large methods of election to be generally permissible.

The fact that section 14029 identifies district-based elections as a possible remedy does not foreclose courts from ordering other remedies, including the fair representation voting systems previously discussed. Under the language of section 14029, courts may implement “appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.” Cal. Elec. Code § 14029. The use of the term “including” and the nesting of the clause mentioning district-based elections indicates that the reference to district-based elections merely illustrates one example of possible “appropriate remedies.” *Id.* Had the California legislature intended to outlaw the imposition of at-large elections in general, it could have easily spoken in simple, absolute terms. The

language of the statute shows that the legislature instead chose to leave courts the flexibility to consider a wide range of remedies.

The California Court of Appeal for the Fifth Appellate District has expressly noted the availability of alternative at-large systems as remedies under the CVRA. *See Sanchez*, 145 Cal. App. 4th at 670. In summarizing the plaintiff’s argument that alternative at-large systems, including fair representation voting methods, could be applied under the CVRA, the *Sanchez* court noted that “a court could impose a remedy not involving districts at all, relying instead on one of several alternative at-large voting systems” *Id.* at 670. The court went on to describe cumulative voting and then expounded, “in a cumulative voting system, a politically cohesive but geographically dispersed minority group can elect a single candidate . . . although it would be unable to elect any candidates in a conventional winner-take-all at-large system and could not form a majority in any feasible district in a district system.” *Id.* And although the court did not rule on the permissibility of alternative at-large systems as remedies,¹² its thoughtful summary of the plaintiff’s position on alternative at-large systems did not offer a single criticism or objection.

Contrary to Palmdale’s assertion, California law does not prohibit alternative at-large systems. The 1922 Court of Appeal decision in *People ex rel. Devine v. Elkus*, 59 Cal. App. 396, 399 (1922), on which Palmdale relies for its assertion that limited voting systems are unconstitutional, was premised on Article II, section I of the California Constitution. Article II, section I, however, was repealed and removed from the Constitution in 1972, over forty years ago. *See Cal. Const. Code art. II, § I* (West 1983).

¹² The court never reached that question because it rejected the trial court’s finding that the CVRA was facially unconstitutional and remanded the case. *See id.*

The repeal of the constitutional provision grounding the *Elkus* decision stripped *Elkus* of its precedential value—a status confirmed by the fact that *Elkus* has been cited only ten times in the 90 years since it was decided. Moreover, none of those cases cited it for the proposition that alternative at-large voting systems violate the California constitution. See *Spreckles v. Graham*, 194 Cal. 516, 541 (1924) (citing *Elkus* for the proposition that the right to vote is fundamental); *Communist Party of the U.S.A. v. Peek*, 20 Cal. 2d 536, 542 (1942) (same); *Cawdrey v. City of Redondo Beach*, 15 Cal. App. 4th 1212, 1226 (distinguishing itself from *Elkus*); *Mackey v. Thiel*, 262 Cal. App. 2d 362, 365 (1968) (distinguishing itself from *Elkus*); *Nielsen v. Richards*, 69 Cal. App. 533, 538 (1924) (citing *Elkus* dicta for a principle of constitutional interpretation); *Otsuka v. Hitge*, 64 Cal. 2d 596, 604 (1966) (citing *Elkus* dicta for a principle of interpretation); *Miller v. Greiner*, 60 Cal. 2d 827, 833 (1964) (citing *Elkus* for a principle of statutory interpretation); *Brown v. Boyd*, 33 Cal. App. 2d 416, 421 (1939) (citing *Elkus* for the principle that the Constitution is supreme); *Rand v. Collins*, 214 Cal. 168, 175 (1931) (finding *Elkus* inapplicable); *Harder v. Denton*, 9 Cal. App. 2d 607, 609 (1935) (distinguishing *Elkus*).¹³

And even if the underpinnings of the *Elkus* decision had not been removed from the California Constitution long ago, the election process that was declared unconstitutional in *Elkus* differs meaningfully from forms of fair representation at-large voting that this brief presents, making the decision distinguishable. Under the election method challenged in *Elkus*,

¹³ Two jurisdictions, Massachusetts and New York, have explicitly declined to follow *Elkus*. See *Johnson v. City of New York*, 9 N.E.2d 30, 38, 43 (N.Y. 1937); *Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222, 235 (Mass. 1941).

voters ranked the candidates: first choice, second choice and so on. At random, the votes were counted and each vote went (entirely) towards its first choice candidate—until the point at which the candidate ranked first on the ballot had already received enough votes to be elected. At that point, the remaining ballots ranking that same candidate first went (entirely) towards whomever the voter on those “excess” ballots had listed as their second choice candidate. This process would be repeated until all the seats were filled or until the number of vacant seats equaled the number of remaining candidates. The court found that this voting system effectively limited some voters to voting for only one candidate, an effect that it concluded violated Article II, Section 1 given that the election covered nine distinct City Council offices. *Elkus*, 59 Cal. App. at 398.

Fair representation voting need not have any such limiting effect. For example, with cumulative voting, voters retain the option to cast a single vote for as many candidates as seats up for election. Under modern forms of ranked choice voting (such as the system used in Minneapolis to elect multi-member winners), each vote cast for a candidate who surpasses the threshold of exclusion is assigned a transfer value based on the threshold and the number of votes received by the candidate.¹⁴ That results in every voter having the power to rank as many candidates as there are seats up for election and the potential to help elect as many candidates as there are seats, thereby avoiding all of the concerns the *Elkus* voting scheme raised. *See Still, supra*, at 249.

¹⁴ For example, if 8,000 votes were needed to win and a candidate was ranked first by 10,000 voters (2,000 in excess of the threshold, creating a surplus of 2,000 votes), 80 percent of each vote would go to that candidate (thereby reaching the threshold needed to win) and the remaining 20% of each vote would go to the candidate ranked next on that ballot.

B. Fair Representation Voting is Consistent with the Palmdale Charter.

As Plaintiffs-Respondents establish in their brief, the Palmdale Charter does not require a particular method of electing its City Council. As such, there is no potential for conflict between Palmdale's Charter and the CVRA's election requirements or its potential remedies, including fair representation voting. Thus, fair representation voting is consistent with the Charter.

Even if the Palmdale Charter required at-large elections, however, at-large fair representation voting would remain consistent with the Charter. Fair representation voting contains the defining element of an at-large system: officials are elected by and represent the whole membership of the jurisdiction rather than a subset of its members. Fair representation voting does not involve districts. The difference between fair representation voting and the at-large election Palmdale has employed up to this point is the manner in which the votes are counted and credited to candidates. But the Charter does not touch on any of these differences (though they are, as the rest of this brief explains, incredibly important). Consequently, because both election models are at-large models, Palmdale cannot persuasively argue that fair representation voting violates the Charter while simultaneously arguing that the current elections are consistent with the Charter. As an at-large voting system, fair representation voting is consistent with the Charter whether or not the Charter requires at-large elections.

Finally, contrary to Palmdale's suggestion, neither the Charter nor the ordinance contains any language requiring a "traditional" at-large system, whatever that might be. *See* Palmdale Muni. Code § 2.08.020 ("The

electors shall elect a Mayor and four City Council members on a citywide basis by the voters of the entire city.”). Indeed, different versions of at-large election systems are employed throughout California. *See, e.g.,* Richie & Spencer, *supra*, at 962, 988–1002 (describing both the “general ticket” and “numbered posts” forms of winner-take-all at-large voting systems, including examples from California cities). The citizens of Palmdale adopted only a principle of at-large elections; they created no requirement on the precise voting method. And contrary to the urging of Palmdale, the language of the Charter and the ordinance should not be overridden by the voters’ purported subjective intent (of which there is no evidence).

C. Fair Representation Voting Complies with Federal Constitutional Requirements of “One Person, One Vote” and Race-Neutrality.

Fair representation voting satisfies the constitutional principle of “one person, one vote,” as established by the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 559 (1964). This principle prohibits states and political subdivisions with general governing powers from drawing single-member districts that encompass substantially unequal population sizes. *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 479, 485–86 (1968).

“One person, one vote” requires that every vote within a particular jurisdiction have roughly equal voting strength. Fair representation voting systems guarantee voters such equal voting strength. *See Vill. of Port Chester*, 704 F. Supp. 2d at 452; *Cottier*, 475 F. Supp. 2d at 939 (cumulative voting “achieves precise population equality because the entire City of Martin is contained in one district and all voters in that district receive three votes”); *McCoy v. Chicago Heights*, 6 F. Supp. 2d 973, 984

(N.D. Ill. 1998), *rev'd on other grounds sub nom. Harper v. City of Chicago Heights*, 223 F.3d 593 (7th Cir. 2000); *Cane v. Worcester Cnty.*, 847 F. Supp. 369, 374 n.8 (D. Md. 1994), *rev'd on other grounds*, 35 F.3d 921 (4th Cir. 1994).

Indeed, fair representation voting systems (and ranked choice voting in particular) guarantee “one person, one vote” *better* than winner-take-all single-member districts. Single-member districts do not account for differences in voting versus non-voting populations, for variable voter turnout rates, or for population shifts between redistricting periods, potentially leading to substantial differences between districts in the number of votes needed to be elected and, therefore, the strength of each individual vote. Fair representation voting, however, relies on a single threshold of exclusion for all voters within a jurisdiction, which remains reflective of the number of votes cast throughout the jurisdiction and depends only on the number of seats to be filled. Consequently, because each candidate always needs the exact same number of votes to be elected, each vote truly does have equal voting strength.

Fair representation voting also satisfies the requirement of race-neutrality established by the Supreme Court in *Shaw v. Reno*, 509 U.S. 630 (1993). *See, e.g., Vill. of Port Chester*, 704 F. Supp. 2d at 453 (upholding at-large cumulative voting as an appropriate and constitutional remedy); *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 965 F. Supp. 72, 79–80 (D.D.C. 1997) (noting that the use of a fair representation voting system did not raise constitutional concerns under *Shaw*), *rev'd on other grounds*, 142 F.3d 468 (D.C. Cir. 1998); *Euclid City Sch. Bd.*, 632 F. Supp. 2d at 771 (imposing alternative at-large system of limited voting as remedy). If a jurisdiction purposefully uses race as a

“predominant factor” in drawing district boundaries, the Equal Protection Clause of the Fourteenth Amendment compels courts to review the electoral scheme under strict scrutiny, a standard that few statutes survive. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Because it is not built around racial classifications, fair representation voting enables racial minorities to elect candidates of choice without the need for any “racial gerrymandering” designed to create majority-minority single-member districts. *See Vill. Of Port Chester*, 704 F. Supp. 2d at 453 (finding that cumulative voting avoids the constitutional concerns with racial gerrymandering). Indeed, the ability of fair representation voting to remedy racial minority vote dilution without running afoul of *Shaw* has led scholars to argue that it should be preferred to single-seat districts wherever appropriate. Mulroy, *supra*, at 379–80.

The policy justifications for striking down race-conscious districting in *Shaw* do not apply to fair representation voting. 509 U.S. at 647-648. *Shaw* expressed concern that race-conscious districting may exacerbate racially polarized voting and racial balkanization. 509 U.S. at 648. Fair representation voting, however, helps to break down racially polarized voting and promotes the ability of racial and ethnic groups to work together, as has occurred in Cincinnati, New York City, and Cambridge under ranked choice voting. Mulroy, *supra*, at 353. Internationally, ranked choice voting also has been credited with fostering religious harmony in Northern Ireland, as compared to the single-member plurality system that inflamed religious tensions. *See id.* at 354. In these ways, fair representation voting not only fully complies with federal and state electoral law but also furthers the fundamental goals of voting rights laws: access, empowerment and transparency in the electoral process.

V. FAIR REPRESENTATION VOTING CAN BE AN EFFECTIVE REMEDY.

Fair representation voting is not a new or emerging idea, nor are such systems merely theoretical remedies for the lack of minority representation. Legal scholars have long viewed fair representation voting as an effective means of guaranteeing political representation for otherwise suppressed minority voting groups, and these voting systems have been used effectively to promote minority representation in hundreds of jurisdictions.

Since the mid-19th century, scholars, politicians, and others have advocated various fair representation voting systems as an effective strategy for promoting representation of minority groups. *See* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Leg. F. 241, 258-59 (1995)(citing an 1867 speech by a U.S. Senator advocating cumulative voting). Over the 19th and early 20th centuries, single-member districts generally won out over fair representation systems in the United States, albeit with notable exceptions that included more than 100 jurisdictions that used a fair representation system. *See* Richie & Spencer, *supra*, at 964-67. More recent legal scholarship, however, has returned attention to fair representation voting systems, and these systems are now firmly established in the academic literature. *See generally* Lani Guinier, *More Democracy*, 1995 U. Chi. Leg. F. 1 (1995); Pildes & Donoghue, *supra*.

Nor is fair representation voting merely an academic pursuit, as such systems have been effectively implemented in numerous jurisdictions. As early as 1995, election law scholars noted a “quiet proliferation of alternative voting systems in the United States.” *See* Pildes & Donoghue, *supra*, at 260. In the years since, jurisdictions across the United States have

continued to adopt fair representation voting systems as a means of providing greater representation to minority groups, in many cases as part of a settlement of Voting Rights Act litigation based on the dilution of minority votes. As of 2010, more than 100 local governing bodies across seven states—including school boards, city councils, and county commissions across North Carolina, Alabama, Texas, and South Dakota—were using cumulative or limited voting systems, almost all of which had been adopted in response to actual or threatened litigation alleging that minority votes were submerged in at-large elections. *See Engstrom, supra*, at 98.¹⁵ Ranked choice voting, too, has been used in major cities throughout the United States, including New York, Cincinnati, and Cleveland, and currently is being used in multi-seat elections in Minneapolis and Cambridge, Massachusetts. *See Richie & Spencer, supra*, at 982.¹⁶

Academic reviews of fair representation voting systems have highlighted not only the increasing adoption of such systems but also their effectiveness as a remedy for legal violations. Under fair representation voting, many jurisdictions with minority populations that had gone unrepresented under winner-take-all at-large systems (such as Palmdale's) elected representatives preferred by those minority populations for the first time. *See, e.g.*, Pildes & Donoghue, *supra*, at 272-73 (first black representative); Engstrom, *supra*, at 125 (first Latino representative); Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and*

¹⁵ Prof. Engstrom also noted the increasing trend of defendant jurisdictions bringing alternative voting systems to the table as a remedy. *See id.*

¹⁶ Internationally, ranked choice voting is the most widely used of the three fair representation systems, with every voter in Australia, Ireland, New Zealand, Northern Ireland and Scotland having an opportunity to vote in multimember ranked choice voting elections.

Latino Representation: Exit Surveys in Fifteen Texas Communities, 78 Soc. Sci. Q. 973, 975 (1997) (first Latino and Native American representatives). Although a given minority group was not always able to elect a representative of its choice (particularly when the minority group's share of the population was small and did not reach the threshold of exclusion),¹⁷ *see* Brischetto, *supra*, at 975, in one case, a minority group with as little as 11.3% of the jurisdiction's population was able to elect its representative of choice. *See* Pildes & Donoghue, *supra*, at 262.¹⁸ Indeed, when New York City attempted to move *away* from a ranked choice voting system to a system with a higher threshold of exclusion, the Department of Justice refused to allow the change under the Voting Rights Act because ranked choice voting offered minority groups a significantly greater opportunity to elect candidates of their choice. *See* Bill Lann Lee, Letter to Eric Proshansky, Assistant Corporation Counsel, New York City (Feb. 4, 1999), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_020499.php. In cities and counties across the country, fair representation voting systems are giving minority groups a voice and a stake in their government that they had never before enjoyed.

VI. CONCLUSION

For the foregoing reasons, this Court should reject Palmdale's arguments attacking the legality, feasibility and effectiveness of fair representation voting. Fair representation voting systems comply with

¹⁷ This outcome is more likely when the threshold of exclusion is raised, such as by reducing the number of seats available through staggered elections. Low turnout also can be influenced by the schedule of elections.

¹⁸ Studies also find that voters view alternative voting systems as easy (or easier) to understand than their previous systems, particularly when some voter education is provided. *See, e.g.*, Brischetto, *supra* (citing positive voter survey data); Engstrom, *supra*, at 127-29 (same).

federal and state law, are a powerful tool in the eradication of discriminatory electoral practices, and have demonstrated an ability to bring about a more transparent, representative, and accessible democracy.

Respectfully submitted,

DATED: January 16, 2014

By /s/ Anthony Basich
Anthony Basich
Counsel for Amicus Curiae FairVote

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief Amicus Curiae of FairVote in Support of Plaintiffs-Respondents is in compliance with the requirements of Rule 8.204(c)(1) of the Rules of the California Court of Appeals because the brief contains 6,174 words, including footnotes and quotations as calculated by the computer program used to prepare the brief.

Respectfully submitted,

DATED: January 16, 2013

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PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On January 16, 2014, I served a copy of the within document(s): AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/RESPONDENTS

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 16, 2014, at Los Angeles, California.

Mae F. Chester

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In Re: **AMICUS CURIAE BRIEF IN SUPPORT OF
PLAINTIFFS/RESPONDENTS**

Case No.: B251793

Caption: JUAN JAUREGUI, et al. v. L.A.S.C./CITY OF PALMDALE

Filed: IN THE COURT OF APPEAL, Second Appellate District, Division 5

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No. B251793

IN THE
Court of Appeal

**STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE**

JUAN JAUREGUI, et al.
Plaintiffs and Respondents,

vs.

CITY OF PALMDALE,
Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
L.A.S.C. NO. BC483039
HONORABLE MARK V. MOONEY, JUDGE

**APPLICATION OF FAIRVOTE FOR LEAVE TO FILE AMICUS
CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/RESPONDENTS**

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TO THE HONORABLE PAUL TURNER, PRESIDING JUSTICE OF
THE ABOVE-ENTITLED COURT:

Pursuant to Rule 8.200(c) of the California Rules of Court, FairVote respectfully requests permission to file the attached amicus curiae brief in support of Plaintiffs/Respondents (hereafter “Plaintiffs”) in the above-captioned appeal.¹

I. STATEMENT OF INTEREST

FairVote is a 501(c)(3) non-profit organization incorporated in the District of Columbia whose mission is to advocate for fairer political representation through election reform. That mission rests on the belief that implementing fair representation voting methods, such as ranked choice voting, cumulative voting and other non-winner-take-all at-large election systems, will lead to representation in government more reflective of society’s diversity. FairVote encourages public officials, judges, and the public to explore constitutionally permissible remedies for unlawful elections other than the exclusive use of single-member districts, and has consistently presented arguments promoting the use of fair representation voting as a legal and effective remedy, including in areas where race is a divisive and controlling factor.

FairVote has previously filed amicus curiae briefs in cases involving the permissibility of fair representation voting as a remedy under both the California Voting Rights Act (the “CVRA”) and the Federal Voting Rights Act. *See Sanchez v. Modesto*, 145 Cal. App. 4th 660 (2006); *U.S. v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010). FairVote has also published scholarship promoting the use of fair representation voting. *See e.g., Rob Richie & Andrew Spencer, The Right Choice for Elections: How*

¹ FairVote’s brief also is being lodged concurrently herewith.

Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress, 47 RICHMOND L. REV. 959, 988–1002 (2013); e.g., Andrew Spencer, *The Voting Rights Act, Jerome Gray and Fair Voting in Alabama*, FairVote (Mar. 8, 2013), available at <http://www.fairvote.org/the-voting-rights-act-jerome-gray-and-fair-voting-in-alabama>. Because of its familiarity with remedies in racial minority vote dilution cases, FairVote is particularly well-suited to expound on this issue.

II. PURPOSE OF BRIEF

In the accompanying brief, FairVote focuses on the issue of appropriate, lawful and effective remedies for unlawful elections in response to the assertion by Defendant/Appellant City of Palmdale (“Palmdale”) that fair representation voting systems are not authorized by the CVRA and conflict with Palmdale law. FairVote writes to affirm the legality and effectiveness of fair representation voting methods as a corrective remedy for the CVRA violations. Additionally, should this Court accept Palmdale’s position that its Charter requires at-large elections (as opposed to single-member district elections as ordered by the Superior Court), fair representation voting would be a lawful remedy for Palmdale’s CVRA violations. In this way, FairVote draws on its work with fair representation voting systems to supplement, without duplicating, the arguments made by Plaintiffs in their brief.

III. CONCLUSION

In light of the foregoing, FairVote respectfully requests that this Court permit the filing of FairVote's concurrently lodged amicus curiae brief.

Respectfully submitted,

DATED: January 16, 2014

HOGAN LOVELLS US LLP

By /s/ Anthony Basich

Anthony Basich
Attorney for Amicus Curiae
FAIRVOTE

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On January 16, 2014, I served a copy of the within document(s): APPLICATION OF FAIRVOTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/RESPONDENTS

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No. B251793

IN THE
Court of Appeal

**STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE**

JUAN JAUREGUI, et al.
Plaintiffs and Respondents,

vs.

CITY OF PALMDALE,
Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
L.A.S.C. NO. BC483039
HONORABLE MARK V. MOONEY, JUDGE

**PROPOSED ORDER GRANTING APPLICATION OF FAIRVOTE FOR
LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF
PLAINTIFFS/RESPONDENTS**

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WHEREAS the application of FairVote for permission to file a brief as amicus curiae having been read and filed, and good cause appearing therefor,

IT IS HEREBY ORDERED that FairVote be, and hereby is, permitted to file the proposed brief attached to this application as amicus curiae herein; and

PERMISSION IS HEREBY GRANTED to any party to this appeal to serve and file an answering brief within _____ days thereafter.

DATED: January ____, 2014

PRESIDING JUDGE

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On January 16, 2014, I served a copy of the within document(s): PROPOSED ORDER GRANTING APPLICATION OF FAIRVOTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/RESPONDENTS

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery Service agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 16, 2014, at Los Angeles, California.

Mae F. Chester

SERVICE LIST

In Re: **APPLICATION OF FAIRVOTE FOR LEAVE TO FILE AMICUS
CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/RESPONDENTS**

Case No.: B251793

Caption: JUAN JAUREGUI, et al. v. L.A.S.C./CITY OF PALMDALE

Filed: IN THE COURT OF APPEAL, Second Appellate District, Division 5

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| <p>California Court of Appeal Clerk's Office Second Appellate District, Division Five Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013</p> <p><i>VIA LEGAL SUPPORT UNLIMITED and ELECTRONIC SERVICE THROUGH CALIFORNIA COURT OF APPEAL WEBSITE</i></p> | <p>California Court of Appeal</p> |
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| <p>Frederick Bennett Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012</p> <p><i>VIA U.S. MAIL</i></p> | <p>Respondent</p> |

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