Filed 08/28/2023

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JAMES V. LACY et al.,
 	
    Plaintiffs and Respondents,
 	
v.
 	
CITY AND COUNTY OF SAN FRANCISCO et al.,
 	
    Defendants and Appellants.
	A165899
	
	(City & County of San Francisco Super. Ct. No. CPF-22-517714)
	
	ORDER MODIFYING OPINION; AND ORDER DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

The opinion filed August 8, 2023 is modified as follows:

(1)   In the second paragraph, that starts with " 'Generally courts will only consider issues properly raised by the parties on appeal. [Citations.] However, the Supreme Court has recognized two exceptions to this rule,' " on page 29, change the (*Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 473.) to be (*Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 473 (*Sacramento County*).).

(2) Insert the following footnote at the end of the same paragraph, after ". . . we will consider the new argument." on page 29:

> In a petition for rehearing, Plaintiffs argue Government Code section 68081 requires this court to order supplemental briefing on the vote dilution issue before deciding it. The parties had an opportunity to address the issue in briefs responding to the amicus briefs. In that

1

brief, Plaintiffs provided a short substantive argument on the vote dilution issue and suggested this court "consider" supplemental briefing or a remand to the trial court. That Plaintiffs did not elect to discuss the issue in greater depth does not mean they are entitled to additional briefing. "[Government Code] [s]ection 68081 does not require that a party actually have briefed an issue; it requires only that the party had the opportunity to do so." (*People v. Alice* (2007) 41 Cal.4th 668, 677.) Plaintiffs' rehearing petition also contends *Sacramento County, supra,* 195 Cal.App.4th 440 does not support this court's consideration of the vote dilution argument, and that this court should not consider the argument because the parties did not have the opportunity to develop a factual record below. In their response to the amicus briefs, however, Plaintiffs argued this court should consider the issue, and cited *Sacramento County.* Moreover, in their rehearing petition, Plaintiffs fail to explain why further factual development is necessary, much less provide examples of evidence—or even general types of evidence—they would seek to present relevant to the vote dilution issue.

This footnote will become footnote number 29, renumbering all subsequent footnotes accordingly.

This order does not effect a change in the judgment.

Plaintiffs' August 23, 2023 petition for rehearing is denied.

SIMONS, Acting P.J.

WE CONCUR:

BURNS, J.
CHOU, J.

Lacy v. City & County of San Francisco (A165899)

Trial Court: City and County of San Francisco Superior Court

Trial Judge: Hon. Richard B. Ulmer, Jr.

Counsel: David Chiu, City Attorney, Wayne Snodgrass, and James
                   M. Emery, Deputy City Attorneys for Defendants and
                   Appellants

                   Keker, Van Nest & Peters, R. Adam Lauridsen, Connie P.
                   Sung, and Stephany Martinez Tiffer for Ron Hayduk,
                   Hiroshi Motomura, and Jennifer M. Chacón as Amicus
                   Curiae on behalf of Defendants and Appellants

                   Orrick Herrington & Sutcliffe, Mark S. Davies, Sheila
                   Baynes, Kufere Laing, and John Palmer for Oakland
                   and San Diego Unified School Districts as Amicus
                   Curiae on behalf of Defendants and Appellants

                   ACLU Foundation of Northern California, Angélica
                   Salceda; and ACLU Foundation of Southern California,
                   Julia A. Gomez for Caregiver Organization as Amicus
                   Curiae on behalf of Defendants and Appellants

                   Law Office of Chad D. Morgan, Chad D. Morgan for
                   Plaintiffs and Respondents

                   Public Interest Legal Foundation, J. Christian Adams; and
                   Lex Rex Institute, Alexander Haberbush for J. Kenneth
                   Blackwell as Amicus Curiae on behalf of Plaintiffs and
                   Respondents

                   Immigration Reform Law Institute, Lorraine G. Woodwark
                   as Amicus Curiae on behalf of Plaintiffs and
                   Respondents