Civil No._____

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**SECOND APPELLATE DISTRICT**

---

CITY OF SANTA MONICA,

*Petitioner-Defendant*,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

*Respondent*,

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

*Plaintiffs and Real Parties in Interest*.

---

# PETITION FOR PEREMPTORY WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS (SEPARATELY BOUND)

---

From the Superior Court of the State of California
for the County of Los Angeles (Department 28)
The Hon. Yvette M. Palazuelos (213-633-0528), Judge Presiding
Case No. BC616804

Cal. Gov't Code, § 6103

**STAY REQUESTED**

**(*Stay of Trial Scheduled to Begin on July 30, 2018*)**

---


CITY OF SANTA MONICA
LANE DILG (277220)
City Attorney
GEORGE CARDONA (135439)
Special Counsel
SUSAN COLA (178360)
Deputy City Attorney
1685 Main Street, Room 310
Santa Monica, California 90401
Telephone: (310) 458-8336

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS JR. (132099)
MARCELLUS MCRAE (140308)
WILLIAM E. THOMSON (187912)
KAHN A. SCOLNICK (228686)
TIAUNIA HENRY (254323)
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

*Attorneys for Petitioner-Defendant*
City of Santa Monica

TO BE FILED IN THE COURT OF APPEAL **APP-008**

| | |
|---|---|
| **COURT OF APPEAL** Second District **APPELLATE DISTRICT, DIVISION** | COURT OF APPEAL CASE NUMBER: |
| ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 187912<br>NAME: William Thomson<br>FIRM NAME: Gibson, Dunn & Crutcher LLP<br>STREET ADDRESS: 333 South Grand Avenue<br>CITY: Los Angeles STATE: CA ZIP CODE: 90071<br>TELEPHONE NO.: 213-229-7000 FAX NO.: 213.229.6891<br>E-MAIL ADDRESS: WThomson@gibsondunn.com<br>ATTORNEY FOR (*name*): City of Santa Monica | SUPERIOR COURT CASE NUMBER:<br>BC616804 |
| APPELLANT/ PETITIONER: City of Santa Monica<br>RESPONDENT/ REAL PARTY IN INTEREST: Respondent: Superior Court, Cty. of Los Angeles<br>Real Parties: Pico Neighborhood Association; Maria Loya | |
| **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**<br>(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE | |

**Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.**

1. This form is being submitted on behalf of the following party (*name* ): City of Santa Monica

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

| | **Full name of interested entity or person** | **Nature of interest *(Explain):*** |
|---|---|---|
| (1) | | |
| (2) | | |
| (3) | | |
| (4) | | |
| (5) | | |

[ ] Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: July 2, 2018

William Thomson
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)



Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Cal. Rules of Court, rules 8.208, 8.488
*www.courts.ca.gov*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

**Cases**

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES



**Statutes**

## TABLE OF AUTHORITIES



**Other Authorities**

TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA:

## I. INTRODUCTION

In this California Voting Rights Act ("CVRA") case, the trial court denied Petitioner City of Santa Monica's motion for summary judgment solely on the ground that the City's service by email and USPS Priority Mail 77 days before the date set for hearing rendered it technically untimely by three days. There was no dispute that plaintiffs received *actual* notice of the motion more than the 75 days before the hearing required by section 437c of the Code of Civil Procedure. And plaintiffs responded fully on the motion's merits—with a comprehensive brief, three expert declarations, and other supporting documents totaling 856 pages. Neither plaintiffs nor the trial court identified any harm to the plaintiffs resulting from the timing of service. In fact, the trial court expressly recognized that its ruling exalted "form over substance," but believed it had "no discretion" to act otherwise, because it could not "shorten the notice requirement for a summary judgment motion."

But no one asked the court to "shorten the notice requirement." Rather, the trial court was required to apply established California law governing objections by non-moving parties to the timing of service, which requires the non-moving party to show prejudice, or else forfeit the objection. In thus depriving the City of its right to a hearing on the merits, without even an inkling of prejudice, the trial court committed clear legal error.

Controlling cases from this (and other) Appellate Districts hold that where a party's service method renders a summary judgment motion technically untimely, the non-moving party must do more than exclaim "gotcha" in its opposition and collect a litigation windfall. Rather, it must affirmatively show prejudice: "It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion." (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697 [affirming grant of summary judgment].) In *Carlton*, this District held that the non-moving party had "waived any claim of inadequate service or notice," despite objecting in his opposition and again at the hearing, because he "*did* file an opposition to the motion, appeared and

argued at the hearing, never requested a continuance of the hearing and *never claimed prejudice* by reason of insufficient notice of service." (*Ibid.*, second italics added.) That is precisely what happened here.

By statute and fundamental public policy, there is a strong preference for resolving cases on the merits, rather than technicalities. California's courts "must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties." (Code Civ. Proc., § 475; see also *Bahl v. Bank of Am.* (2001) 89 Cal.App.4th 389, 398 [California policy is to "decid[e] cases on their merits rather than on procedural deficiencies"].)

Plaintiffs did not—and could not—show prejudice because, as another Court of Appeal put it last fall, plaintiffs "opposed the summary judgment motion with voluminous papers" and "did not argue that they could have put on an even bigger or better showing" if the City had personally served the motion two days *after* emailing it. (*National Grange of the Order of Patrons of Husbandry v. California Guild* (2017) 17 Cal.App.5th 1130, 1146–1148 [affirming grant of summary judgment]; see also *Reedy v.*

*Bussell* (2007) 148 Cal.App.4th 1272, 1289 [similarly rejecting inadequate-notice argument because of lack of prejudice].)

**Trial in this action is scheduled to begin on July 30, 2018**, and this Court should intercede now to correct the trial court's legal error and restore to the City its right to have its case-dispositive motion heard on the merits. Writ relief is urgently needed to spare the parties and judiciary alike the burdens of an expensive and potentially inflammatory multi-week trial when the record shows that plaintiffs cannot meet their evidentiary burden.

A decision on the merits here is vital not just because the trial court disregarded the controlling law and severely prejudiced the City, but because the subject matter of this CVRA case renders it of statewide importance. Despite its obvious significance, the CVRA has all but evaded appellate review. Since its enactment in 2002, the statute has been interpreted only three times by appellate courts, and none of those three decisions resolves the weighty statutory interpretation and constitutional questions the City's motion presents. Resolving those questions would obviate trial or, at the very least, provide essential pretrial guidance to the parties.

Accordingly, this Court should grant the City's petition and issue a peremptory writ in the first instance, or an alternative writ, and order the trial court to vacate its order and decide the City's motion for summary judgment on the merits. If this Court does not issue a decision before the scheduled trial date, it should also stay proceedings in the trial court pending a decision on this petition.

## II. ISSUE PRESENTED

Did plaintiffs forfeit any timeliness-of-service objection by opposing the summary judgment motion on the merits, appearing at the hearing, and failing to claim or show any prejudice? (*Carlton v. Quint* (2000) 77 Cal.App.4th 691, 696–698; *Nat'l Grange of the Order of Patrons of Husbandry v. Cal. Guild* (2017) 17 Cal.App.5th 1130, 1146–1148.)

## III. SUMMARY OF PETITION AND ARGUMENT

Plaintiffs received the City's summary judgment motion by email on the 77th day before the hearing date, and by USPS Priority Mail on the 76th day before the hearing, but they did not also receive personal service on the 75th day before the hearing. (Vol. 6, Ex. N, pp. 1500–1504; Vol. 7, Ex. T, pp. 1675, 1680–1681.) Alt-

hough plaintiffs argued that the motion was untimely, they opposed it on the merits, appeared at the hearing, and failed to claim, let alone show, prejudice. (Vol. 2, Ex. E, pp. 537–538.)

On materially identical facts, courts have vindicated substance over empty formality and deemed a timeliness objection forfeited as a matter of law. (E.g., *Nat'l Grange*, *supra*, 17 Cal.App.5th at p. 1148; *Carlton*, *supra*, 77 Cal.App.4th at p. 697.) That is, as the cases show, the sensible and legally required approach.

The trial court, however, disregarded these binding authorities and concluded it had "no discretion" to hear the City's summary judgment motion, due to its inability to shorten the statutory notice period—something the court was never asked to do. (Vol. 7, Ex. W, pp. 1726–1730.) Rather, the question here is whether plaintiffs forfeited any timeliness-of-service objection by failing to show prejudice. Under longstanding and controlling law, they did. The City's motion therefore should be resolved on the merits.

## IV. REQUEST FOR STAY

The trial in this case is set to begin on July 30, 2018. The City requests that the Court either decide this petition before the

trial date or, if it needs additional time to consider the petition and related briefing, to stay proceedings in the trial court until it reaches a decision.

Plaintiffs would suffer no prejudice from a short stay. They will likely disagree, and argue that, should they prevail at trial, the court might order changes to Santa Monica's electoral system before the November elections. But that is already an impossible timeline—and unfair to candidates and voters alike. The trial court has three trials scheduled to begin on the same day as this case, and three trials scheduled the week before and four trials the week after. (See http://www.lacourt.org/CivilCalendar/ui/mainpanel.aspx?CaseType=general, last visited July 2, 2018.) And even if trial in this case were to begin on schedule, it would take between two and four weeks, making changes to the November election unworkable. If, hypothetically speaking, at some point after the conclusion of the lengthy trial the trial court were to order the adoption of plaintiffs' preferred remedy, districted elections, there would be still further delay.

The Santa Monica election would already be well underway. The nomination period for candidates begins before the trial date,

on July 16, 2018, and closes on August 10, 2018.[1] The process of working with a demographer, drawing district lines, vetting the proposed districts in the community, and then litigating the proposal in court, would begin at best weeks after the filing deadline and take longer than the remaining two months before election day. (See Elec. Code, § 10010 [calling for an extensive public-comment process at hearings to be held both before and after the drawing of district lines].) Similar delays would attend the implementation of any alternative election scheme, which would require new ballots and electoral equipment.

Even if this extensive process could somehow be completed in advance of the November election, there would be inadequate time for candidates to declare and *run* for their assigned seats. And if plaintiffs were to prevail and the City to appeal, an appeal being virtually certain based on the facts and law as they stand today, any mandatory injunction entered by the trial court would be automatically stayed. (*URS Corp. v. Atkinson / Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 884.)

---

[1] http://www.smvote.org/uploadedFiles/SMVote/2016(1)/Election%20Calendar_website.pdf.

Put simply, no matter what happens in the trial court, there is no practical scenario in which the City will be holding elections in November under a different electoral scheme.

In contrast with the complete lack of prejudice to plaintiffs from a short stay, the prejudice that the City will suffer in defending itself at an unnecessary trial is *certain* unless this Court intervenes. The City's motion should terminate this case altogether at the trial level, and it should be heard *before* trial begins. A short stay is therefore warranted to provide this Court sufficient time to consider this petition.

## V. PETITION FOR PEREMPTORY WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF

### A. Beneficial Interest of Petitioner and Capacities of Respondent and Real Parties in Interest

1. Petitioner the City of Santa Monica is the defendant in an action pending in the Respondent Superior Court captioned *Pico Neighborhood Association v. City of Santa Monica*, Superior Court Case No. BC616804.

2. Respondent, the Superior Court of the State of California for the County of Los Angeles, the Honorable Yvette M. Palazuelos presiding, is now, and at all times mentioned has been,

a duly constituted court exercising judicial functions in connection with the underlying action.

3. The Real Parties in Interest in the underlying action are plaintiffs Pico Neighborhood Association and Maria Loya.

**B. Factual and Procedural Background**

4. The City of Santa Monica, like most cities throughout California, holds at-large elections every two years for seats on its seven-member City Council. The City's current method of election dates to 1946.

5. Latino candidates have been successful under this system. For example, Tony Vazquez was elected to the Council in 1990, 2012, and 2016, and Gleam Davis won elections in 2010, 2012, and 2016. (See Vol. 1, Ex. B, p. 57.) Many other Latino-preferred candidates have also been elected over the years. (*Ibid.*)

6. The operative complaint was filed on February 23, 2017. (Vol. 1, Ex. A, p. 22.) Plaintiffs allege that the City amended its charter in 1946 to discriminate against "non-Anglo" voters, in violation of the Equal Protection Clause, and that the City's electoral system now prevents Latino voters from electing candidates of their choice, in violation of the CVRA.

7. The City moved for summary judgment on March 29,

2018, which was 77 calendar days before the scheduled hearing date of June 14, 2018. (Vol. 1, Ex. B, p. 45.) That same day, March 29, 2018, the City served its motion and supporting papers on plaintiffs electronically, immediately after filing, and through USPS Priority Mail. (Vol. 6, Ex. N, pp. 1500–1504; Vol. 7, Ex. T, pp. 1675, 1680–1681.) The Postal Service delivered the paper documents to plaintiffs' counsel the day after they were mailed, on March 30, 2018 (76 days before the hearing). (Vol. 7, Ex. T, pp. 1680–1681.)

8. Plaintiffs opposed the motion on May 31, 2018. (Vol. 2, Ex. E, p. 532.) The opposition brief was 20 pages, and was accompanied by three lengthy expert declarations (the longest of which was 98 pages, even excluding appendices and attachments), two other declarations, and 118 exhibits—some 856 pages in all. (Vols. 2–6, Exs. E–L, pp. 531–1475.) The expert declarations contained many pages of improper additional legal argumentation. (See Vol. 6, Ex. O, pp. 1514–1548.)

9. Plaintiffs devoted 14 lines of their opposition to the argument that because of the method of service they did not receive the statutorily required notice. (Vol. 2, Ex. E, pp. 537–538.) Plaintiffs did not contend that they were in any way prejudiced by

not receiving personal service 75 days before the hearing. Nor did they cite the controlling cases (such as *Carlton*, *supra*), requiring them to show such prejudice.

10. In its reply, the City argued that service had been timely. (Vol. 6, Ex. M, p. 1490.)

11. At the hearing on June 14, 2018, the court passed out a two-page tentative order denying the City's motion on grounds of untimely service. (Vol. 7, Ex. Q, pp. 1636–1637.) The court reasoned that "[t]he minimum notice requirements are mandatory and cannot be shortened by the court," citing *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 764–765, fn. 5.

12. During the argument, the City cited controlling case law holding that where, as here, the non-moving party opposes the motion on the merits and does not establish prejudice, that party forfeits any timeliness-of-service objection by operation of law. (Vol. 7, Ex. R, pp. 1643–1648.)

13. The court ordered the City to address this controlling case law by means of a motion brought under section 473 of the Code of Civil Procedure. At the subsequent argument a few days later, the court acknowledged it was elevating "form over sub-

stance," yet indicated that it would deny the City's motion as untimely, declaring itself "constrained" by section 437c. (Vol. 7, Ex. X, p. 1735.) The court concluded that "[t]he minimum notice requirements are mandatory and cannot be shortened by the Court." (Vol. 7, Ex. W, pp. 1726, 1729.) The court did not directly address the City's contention that *Carlton*, *National Grange*, and other binding authorities required plaintiffs to show prejudice, and that failure to show prejudice forfeited the objection. The clerk served notice of the court's rulings by mail on June 19, 2018. (*Id.*, p. 1720.)

14. Trial in this action is scheduled for July 30, 2018.

**C. Basis for Writ Relief**

15. The trial court's decision contravenes binding precedent. Where, as here, the non-moving party opposes a motion on the merits and fails to show any prejudice as a result of a technical defect in service, the non-moving party forfeits any inadequate-notice objection by operation of law. (E.g., *Carlton*, *supra*, 77 Cal.App.4th at pp. 696–698; *Nat'l Grange*, *supra*, 17 Cal.App.5th at pp. 1146–1148.) The City is not aware of a single decision reaching any conclusion other than forfeiture or waiver under these circumstances. But the trial court declined to apply

this longstanding and controlling rule.

16. The trial court's clear error has severely prejudiced the City, as it has lost the right to have its case-dispositive motion heard on the merits and must expend public funds on an unnecessary trial. This result elevates form over substance and violates the principle that courts must disregard mere technical defects that have caused no prejudice, in furtherance of the State's policy of deciding cases on the merits. (Code Civ. Proc., § 475.)

### D. The Absence of a Plain, Speedy, and Adequate Remedy at Law and the Appropriateness of Writ Relief

17. The City lacks a plain, speedy, and adequate remedy at law because the trial court's order denying its motion is not appealable and "may only be reviewed by way of a petition for extraordinary writ." (*Sierra Craft, Inc. v. Magnum Enters., Inc.* (1998) 64 Cal.App.4th 1252, 1256.)

18. First, "the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case." (*Omaha Indem. Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273–1274.) The decision directly conflicts with binding case law, including *Carlton* and *National Grange*. As a result of the court's decision, the City has been severely prejudiced because it has lost

the right to have its case-dispositive motion heard on the merits. (Cf. *Fatica v. Superior Court* (2002) 99 Cal.App.4th 350, 351 ["the order deprived petitioners of a fair and reasonable opportunity to present a substantial portion of their case, and petitioners would be severely prejudiced if we did not intervene"].)

19. Second, the City "lacks an adequate means, such as a direct appeal, by which to attain relief." (*Omaha*, 209 Cal.App.3d at p. 1274.) "One purpose of summary judgment is to provide a speedy legal resolution of uncontested facts; a denial of summary judgment when it should as a matter of law have been granted should open the door to an equally speedy review of the matter." (*Leyva v. Superior Court* (1985) 164 Cal.App.3d 462, 468.)

20. Third, the City will, absent writ relief, "suffer harm or prejudice in a manner that cannot be corrected on appeal." (*Ibid.*) The purpose of the City's motion was to end costly litigation that lacks merit and to spare the trial court, the parties, and the residents of Santa Monica from enduring an unnecessary trial. (See, e.g., *Exchequer Acceptance Corp. v. Alexander* (1969) 271 Cal.App.2d 1, 11 ["The purpose of the summary judgment statute . . . is to promote and protect the administration of justice, and

to expedite litigation by the elimination of needless trials."].) Uncorrected, the trial court's error will frustrate that purpose. "[T]he burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy" under these circumstances. (*Smith v. Superior Court* (1996) 41 Cal.App.4th 1014, 1022; see also *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370; *City of Glendale v. Superior Court* (1993) 18 Cal.App.4th 1768, 1776–1777.)

21. Fourth, this petition presents an "issue of widespread interest." (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816.) The petition concerns the application of the statute governing service of summary judgment motions, which is one of the most frequently cited provisions in the Code and must be interpreted uniformly. As reflected in the trial court's decision, notwithstanding the controlling case law, there is apparently still confusion among the lower courts as to when a non-moving party forfeits a timeliness-of-service objection through failure to show prejudice.

22. The petition also indirectly (through the City's summary judgment motion that has not been resolved on the merits) presents significant issues of statutory interpretation that are

ones of first impression and that bear directly on dozens of pending or threatened CVRA suits against cities, school districts, and other public entities across the State. (See, e.g., *Regents of Univ. of Cal. v. Superior Court* (2013) 220 Cal.App.4th 549, 558 ["the issue of statutory construction raised by the superior court's ruling and presented by the . . . petition has not previously been addressed by an appellate court and . . . appears to be of widespread interest"].)

23. The City's motion presents open questions concerning the proper interpretation of the CVRA, a 16-year-old statute that has given rise to a cottage industry devoted to intimidating cities and other public entities with threats of lawsuits—and extracting substantial fees from them—with almost no court supervision.[2] Critics have decried that practice, arguing that it is "altering the landscape of Southern California's local elections,"[3] while "fail[ing]

---

[2] The misuse of the CVRA, an important statute whose proper purpose has been subverted by opportunistic counsel, recalls the abuse of the Americans with Disabilities Act, which the Legislature is actively attempting to curb. (See Assem. Bill 150, 2017–2018 [requiring notice to a business at least six months before filing an ADA complaint].)

[3] http://www.sandiegouniontribune.com/communities/north-county/sd-no-voting-districts-20171012-story.html.

to deliver a surge of Latino political representation inside California's city halls."[4]

24. Plaintiffs take an extreme view of the statute, contending that its eight sections and one-thousand-plus words reduce to a single element—racially polarized voting. (Elec. Code, §§ 14025–14032; Vol. 2, Ex. E, pp. 540–543.) The City, by contrast, contends that the statute requires more—namely, proof that an at-large electoral system has caused dilution of Latinos' voting power. (See Elec. Code, § 14027.) In its motion, the City demonstrated the impossibility of any such showing given Santa Monica's indisputable demographic and electoral facts.

25. Latinos in Santa Monica account for less than one in seven eligible voters, and they have achieved more than proportional representation, as a Latino (and Latino-preferred) candidate, Tony Vazquez, has been on and off the seven-member Council over the last 25 years. (Vol. 1, Ex. B, pp. 57, 61.) Another Latina, Gleam Davis, has also been on the Council since 2009. (*Id.*, p. 57.) There is no other electoral system under which the City's

---

[4] http://www.latimes.com/politica/la-pol-ca-voting-rights-minorities-california-20170409-story.html.

Latino voters would have a better opportunity to elect candidates of their choice. (*Id.*, pp. 61, 67–71.)

26. For example, as plaintiffs concede, Latino voters are both too few in number and too dispersed throughout the City to allow for the creation of a contiguous, majority-Latino district. (Vol. 1, Ex. B, pp. 58, 61.) These and other demographic and electoral facts demonstrate the flaws of plaintiffs' conception of the CVRA. If courts are authorized to impose predominantly race-based remedies notwithstanding the undisputed lack of vote dilution—i.e., absent any injury or harm—then the CVRA, at least as applied to this case, would be unconstitutional. (*Id.*, pp. 65–71.)[5]

27. Despite the importance of the CVRA—and the frequency with which it has been cited in both demand letters and filed lawsuits—the statute has generated only three published appellate decisions over almost two decades. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781; *Rey v. Madera Unified Sch.*

---

[5] The former mayor of Poway is challenging the constitutionality of the statute in federal court. On June 14, 2018, the Ninth Circuit reversed a decision that the former mayor lacked standing and remanded the case to the District Court for the Southern District of California for a decision on the merits. (*Higginson v. Becerra* (9th Cir., No. 18-55455; S.D.Cal., No. 3:17-cv-02032-WQH-JLB).)

*Dist.* (2012) 203 Cal.App.4th 1223; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660.) None of those decisions resolves the important legal questions presented by the City's summary judgment motion. A decision by the trial court or this Court is necessary to confirm, among other things, that vote dilution (i.e., an injury caused by an electoral system) is an element of the statute, in part because there is substantial risk of unconstitutional applications of the statute if it is not.

28. Fifth and finally, writ review is appropriate to prevent the avoidable and significant waste of judicial and taxpayer resources in litigating this meritless case through trial. (See *American Honda v. Superior Court* (2011) 199 Cal.App.4th 1367, 1370–1371 [granting petition because all "parties and the court" would be harmed if the court "delayed review until final judgment" after trial]; *City of Glendale, supra*, 18 Cal.App.4th at p. 1776 [granting writ relief "to prevent an expensive trial and ultimate reversal"]; *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1043 [same].) Without writ review, a central purpose of summary judgment would be frustrated—namely, "to dispose of cases and defenses which are unmeritorious in substance and fact which, by considering the pleadings only, might remain in court to the harm

or harassment of parties and to the disadvantage and expense of the public, and in particular of other litigants." (*Wells Fargo Bank v. Kincaid* (1968) 260 Cal.App.2d 120, 123.)

### E. Timeliness of Writ Petition

29. This statutory writ petition is being filed within 20 days after service of a written notice of entry of the trial court's order denying summary judgment. The petition is therefore timely. (Code Civ. Proc., § 437c, subd. (m)(1); *Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 173.)

## VI. PRAYER FOR RELIEF

The City prays that this Court:

1. Issue a peremptory writ of mandate or other extraordinary relief directing Respondent Superior Court to vacate its order denying the City's summary judgment motion and to decide that motion on its merits;

2. In the alternative, issue an alternative writ of mandate or other extraordinary relief directing Respondent Superior Court to vacate its order denying the City's summary judgment motion, hear argument, and issue a decision on the motion's merits, or compelling Respondent Superior Court to show cause before this Court, at a time and place specified by this Court's order, why

the Respondent Superior Court should not be ordered to do so;

3. On the return of any alternative writ and hearing thereof, or on an order to show cause and hearing, issue a peremptory writ of mandate or other extraordinary relief directing Respondent Superior Court to set aside its order denying the City's summary judgment motion, hear argument, and issue a decision on the motion's merits;

4. Immediately vacate or stay the July 30, 2018, trial date, until at least such time as this Court has considered and ruled on this writ petition;

5. Award Petitioner its costs of suit herein; and

6. Grant such other or further relief as may be just and proper.

DATED: July 2, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____

Theodore J. Boutrous, Jr.
*Attorneys for Petitioner-Defendant City of Santa Monica*

## VII. VERIFICATION

I, William E. Thomson, declare as follows:

I am one of the attorneys for Petitioner in this matter, and I am authorized to execute this verification on its behalf. I have read the foregoing petition and know its contents. The facts alleged in the petition are within my own knowledge, and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioner, verify this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on July 2, 2018, in Los Angeles, California.

By: 

William E. Thomson

## VIII. MEMORANDUM OF POINTS AND AUTHORITIES

### A. Standard of review

"In evaluating the propriety of a denial of a summary judgment motion or a motion for summary adjudication, our review is de novo, and we independently review the record before the trial court." (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1077.) "[T]he appellate court need not defer to the trial court's decision. We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale." (*Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450, internal quotation marks omitted.)

### B. The trial court erred in declining to reach the merits of the City's motion

"The principal purpose of the requirement to file and serve a notice of motion a specified number of days before the hearing . . . is to provide the opposing party adequate time to prepare an opposition. That purpose is served if the party appears at the hearing, opposes the motion on the merits, and was not prejudiced in preparing an opposition by the untimely notice." (*Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 343.)

Here, the purpose of section 437c's 75-day notice period was

satisfied, and there was no prejudice. Plaintiffs received the City's summary judgment motion and all supporting papers immediately after they were filed, 77 days before the hearing (Vol. 6, Ex. N, pp. 1500–1504); they voluminously opposed the motion on the merits (Vols. 2–6, Exs. E–L, pp. 531–1475); they appeared at the hearing; and they never claimed, much less showed, any prejudice resulting from the City's service (Vol. 2, Ex. E, pp. 537–538).[6]

Under materially identical circumstances, courts (including this District) have held that no timeliness objection should stand in the way of a decision on the merits of a summary judgment motion *even where that objection is raised in the opposition*. (*Nat'l Grange*, *supra*, 17 Cal.App.5th at pp. 1146–1148; *Carlton*, 77 Cal.App.4th at pp. 696–698.) Those decisions are dispositive here.

---

[6] "To preserve a claim of defective notice of a motion or other hearing, the objection must be raised at the earliest opportunity and accompanied by some indication of prejudice." (*In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 13.) In their summary judgment opposition, plaintiffs did not even claim, much less demonstrate, any prejudice. Nor could they. (See, e.g., Adv. Comm.'s 2016 Notes on Fed. R. Civ. Proc., rule 6 [explaining rules had been amended such that electronic service was equivalent to personal service, because email is "virtually instantaneous"].)

In *Carlton*, as here, the non-moving party objected to "inadequate service and notice in his opposition to the motion and at the summary judgment hearing," but a Division of this District overruled that objection. (77 Cal.App.4th at p. 697.) The non-moving party "*did* file an opposition to the motion, appeared and argued at the hearing, never requested a continuance of the hearing and never claimed prejudice by reason of insufficient notice or service. Under these circumstances, we conclude Carlton waived any claim of inadequate service or notice . . . ." (*Ibid.*)[7]

*National Grange* reached the same conclusion. There, the court assumed without deciding that the motion for summary judgment was untimely because one of its supporting papers—an amended complaint—was served after the rest of the motion. (17 Cal.App.5th at pp. 1145–1146.) The decision turned on the failure of the moving parties to demonstrate any prejudice resulting from

---

[7] Plaintiffs contended below that *Carlton* reached this conclusion only in dicta. Not so. It is one of two alternative holdings. (See, e.g., *Gaskill v. Richmaid Ice Cream Co.* (1952) 111 Cal.App.2d 745, 746 ["an alternative ground of decision in an appellate opinion is not dictum"].) In any event, the relevant language from *Carlton* has also been repeatedly cited by other courts. (E.g., *Nat'l Grange*, *supra*, 17 Cal.App.5th at p. 1147; *Obrecht*, *supra*, 245 Cal.App.4th at p. 13; *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1066–1067.)

this fact. Those parties opposed summary judgment with "voluminous papers"—one with 514 pages and another with 400. (*Id.* at p. 1146.) And nowhere in their oppositions did those parties argue "that they could have put on an even bigger or better showing" had there been no timeliness issue. (*Id.* at pp. 1146–1147; see also *Carlton*, *supra*, 77 Cal.App.4th at p. 698 [to preserve objection, the "opposition should [have] contain[ed] a complete discussion of counsel's position as to why a more complete opposition was not able to be filed"].)[8]

The facts in *National Grange*, *Carlton*, and this case are materially identical: inadequate notice caused by the service error of the moving party, full opposition on the merits, and no showing of prejudice. The result should likewise be identical: forfeiture of the timeliness objection and a decision on the merits of the motion. The City is aware of *no* published authority supporting the trial court's conclusion given these facts.

---

[8] As an alternative to showing prejudice, plaintiffs might instead have objected on timeliness grounds and stood on that objection, declining to oppose the motion on the merits at all. That was the ultimately successful strategy of the non-moving party in *Robinson*. (168 Cal.App.4th at p. 1267.) Plaintiffs obviously elected not to pursue that strategy, which made it their obligation to show prejudice to preserve their objection.

*National Grange* and *Carlton* are well supported in longstanding California law. California courts have for decades refused to enforce merely technical violations of notice rules where the facts plainly reveal that the non-moving party did receive adequate notice. In general, and not just in the summary judgment context, it has long been "well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion." (*Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930; see also, e.g., *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 918; *Reedy, supra*, 148 Cal.App.4th at p. 1288; *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7–8; *Kowalski v. Cohen* (1967) 252 Cal.App.2d 977, 979; *McConaghy v. McConaghy* (1966) 239 Cal.App.2d 601, 604; *Lacey v. Bertone* (1949) 33 Cal.2d 649, 652.)

The reason for this rule is simple: The non-moving party's robust opposition and appearance at a hearing confirm that the notice, although technically defective, "served its purpose." (*De Luca v. Bd. of Supervisors of L.A. Cty.* (1955) 134 Cal.App.2d 606, 609; see also *Adams v. Roses* (1986) 183 Cal.App.3d 498, 507; *Farrar v. McCormick* (1972) 25 Cal.App.3d 701, 705.) Here, there can

be no question that the City's multiple methods of service achieved their purpose. They prompted a vigorous and extensive response from plaintiffs, who cannot reasonably claim they were prejudiced.

The trial court chose not to follow *Carlton*, *National Grange*, or the decades of cases preceding them. It instead described itself as "constrained" by section 437c, and ruled that it had no power to shorten the statute's 75-day notice period. (Vol. 7, Ex. W, pp. 1726–1727, 1729.) But in requiring the non-moving party to show prejudice from the form of service the trial court was not being asked to shorten the notice period. And there is no dispute that plaintiffs had *actual* notice *beyond* the 75-day minimum set forth in section 437c. This case is thus fundamentally different from the cases on which the trial court relied. Those cases, *Urshan* and *Boyle*, involved not the technical service issues of the moving party, but instead a local rule or court order purporting to modify the requirements of section 437c. In *Urshan*, for example, the court invited the defendant to file an unnoticed motion for summary judgment at the final status conference, giving the non-moving plaintiff all of two days to prepare an opposition. (120 Cal.App.4th at pp. 762–763.) And in *Boyle*, there was a local rule

authorizing expedited summary judgment proceedings in asbestos cases. (137 Cal.App.4th 645, 647.) In both cases, a court order purported to displace section 437c.

Those cases turn exclusively on courts' lack of authority to issue rules or orders that conflict with statutes. (See *Boyle*, *supra*, 137 Cal.App.4th at pp. 647, 651–655 [invalidating court order because trial courts have "no authority to issue . . . local rules which conflict with any statute"]; *Urshan*, *supra*, 120 Cal.App.4th at pp. 766–768; see also *McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 118.) And the cases expressly distinguish notice periods shortened by courts from technical service issues created by moving parties. (See *Boyle*, *supra*, 137 Cal.App.4th at pp. 650–651 [distinguishing *Carlton* on the ground that "the issue here is not whether the moving party provided adequate notice under the governing standard," but "whether the [court's rule] is itself invalid"]; *Urshan*, *supra*, 120 Cal.App.4th at p. 768 [similarly distinguishing *Carlton* because "the present case does not involve an alleged defect with the movant's service of notice" and "instead involves an unauthorized order by the trial court"]; see also *Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1264–1267 [explaining difference between cases involving court orders contradicting a

statute and cases involving technical service error].) In sum, there are two lines of cases about inadequate notice, and the trial court followed the wrong one.

The trial court should have resolved the City's motion on the merits. The court was not "constrained" to rely on a procedural defect that indisputably caused no prejudice to the non-moving party. Courts routinely reverse rulings that, like the trial court's here, "exalt form over substance." (*Fireman's Fund Ins. Co. v. Sparks Constr., Inc.* (2004) 114 Cal.App.4th 1135, 1148; see also Code Civ. Proc., § 475.)

The trial court faulted the City for failing to cite *Carlton* and other controlling case law in its reply brief, and it found that the City had failed to set forth a basis for relief under section 473 of the Code of Civil Procedure. But it was *plaintiffs'* burden as the objecting party to establish a valid timeliness objection, which includes a showing of prejudice. In any event, the controlling case law was cited to the court at the original hearing (Vol. 7, Ex. R, pp. 1643–1648), was subsequently briefed by the parties (Vol. 7, Exs. S, U, pp. 1668–1671, 1685–1692), and was addressed by the trial court (Vol. 7, Ex. W, pp. 1726–1730). Moreover, as the City argued in its supplemental brief, section 473 had no applicability

here, because the controlling case law was brought to the court's attention before it issued any final ruling, and the trial court had both the ability and obligation to consider that law and ensure that it did not, as it ultimately did, issue a final ruling that was legally erroneous. (Vol. 7, Ex. S, pp. 1669–1670.) This Court should rectify the trial court's error so that the City's motion can be heard on the merits.

### C. A decision on the merits is necessary, either to obviate a trial or to provide guidance on the CVRA

For the reasons set out in the City's motion for summary judgment, there need not be any trial in this action. The CVRA targets the dilution of a protected class's voting power caused by at-large electoral systems. (Elec. Code, § 14027.) And Latino votes are not being diluted in Santa Monica. No alternative electoral system would result in a greater number of Latino or Latino-preferred representatives on the City Council, and, in fact, Latino voters have already achieved proportional representation by Latino-preferred candidates. A trial on plaintiffs' CVRA claim is therefore unnecessary.

Nor is there a triable issue of material fact on plaintiffs'

Equal Protection claim, and for much the same reason. To demonstrate the element of disparate impact, plaintiffs must show that the City's at-large electoral system has *caused* a purported lack of Latino representation. (See *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.* (2015) 135 S.Ct. 2507, 2523.) But indisputable facts show that no other method of election would enhance Latino voting power. There is thus no cause for a trial at all.

Even if there were, a decision on the merits of the City's motion would provide the parties valuable guidance about the CVRA, a statute that, although enacted almost twenty years ago, has scarcely been interpreted by California's appellate courts. (See pp. 11, 26–27, *supra*.) None of the three published decisions on the CVRA addresses the questions presented by the City's motion, including whether vote dilution and causation are elements of the statute. (See *Sanchez*, *supra*, 145 Cal.App.4th at p. 690 [declining to decide "[w]hat elements must be proved to establish liability under the CVRA?"].) A decision on the merits of the City's motion is essential at the very least to avoid the prospect of a trial in which the parties have no clear guidance even as to what the CVRA means and requires. Such guidance, whether from this

Court or the trial court, as to what plaintiffs must prove to prevail on their CVRA claim would narrow the issues at trial and conserve judicial and party resources.

## IX. CONCLUSION

For the foregoing reasons, this Court should grant the City's petition and order the trial court to vacate its order and decide the City's motion for summary judgment on the merits. If this Court does not decide the petition before July 30, 2018, it should also stay proceedings in the trial court pending a decision on this petition.

DATED: July 2, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

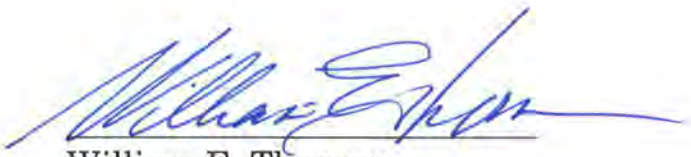
By: _____
Theodore J. Boutrous, Jr.

*Attorneys for Petitioner-Defendant City of Santa Monica*

## CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court 8.204(c)(1) and 8.486(a)(6), the undersigned hereby certifies that this petition contains 6,427 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, the verification, and the signature blocks.

DATED: July 2, 2018



William E. Thomson

## PROOF OF SERVICE

I, Cynthia Britt, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State. On July 2, 2018, I served the following document(s):

**PETITION FOR PEREMPTORY WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS (SEPARATELY BOUND)**

on the parties stated below, by the following means of service:

**SEE ATTACHED SERVICE LIST**

☑ **BY HAND DELIVERY:** I personally delivered a true copy to the person below

Ellery Gordon, PARRIS LAW FIRM

☑ **BY PERSONAL SERVICE**: I placed a true copy in a sealed envelope addressed to the other persons named at the addresses shown below and gave the same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

☑ I am employed in the office of Daniel R. Adler, a member of the bar of this court, and the foregoing documents were printed on recycled paper.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 2, 2018.

Cynthia Britt

## SERVICE LIST

**Respondent**

Hon. Yvette M. Palazuelos
Judge Presiding
Los Angeles County Superior Court
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012
Tel: 213-633-0528

*Via Personal Service*
*(Petition only)*

**Plaintiff's Counsel**

Kevin Shenkman (223315)
Mary Hughes (222662)
John Jones (225411)
SHENKMAN & HUGHES PC
28905 Wight Road
Malibu, California 90265
Tel: 310-457-0970

*Via Personal Service*
*(Petition & supporting exhibits)*

Milton Grimes (59437)
LAW OFFICES OF MILTON C. GRIMES
3774 West 54th Street
Los Angeles, California 90043
Tel: 323-295-3023

*Via Personal Service*
*(Petition & supporting exhibits)*

*Via Hand Delivery*
*(Petition & supporting exhibits)*

Ellery Gordon (316655)
PARRIS LAW FIRM
43364 10th Street West
Lancaster, California 93534
Tel: 661-949-2595

*Via Personal Service*
*(Petition & supporting exhibits)*

Robert Rubin (85084)
LAW OFFICE OF ROBERT RUBIN
131 Steuart Street, Suite 300
San Francisco, California 94105
Tel: 415-625-8454