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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

OSCAR DE LA TORRE and ELIAS SERNA Plaintiffs, v. CITY OF SANTA MONICA and DOES 1 through 10, inclusive Defendants.	**Case No.: 21STCV08597** **OPPOSITION TO DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT** Date: July 22, 2021 Time: 9:15 a.m. Dept. 15 [Hon. Richard Fruin]

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I. INTRODUCTION

Through its demurrer, Defendant asks this Court to disregard the well-pled facts in the verified complaint in favor of its competing alternative facts, and summarily bless its previous usurpation of the courts. Not only is Defendant's request procedurally improper – a demurrer is not a vehicle to weigh the parties' competing versions of the facts – it is also substantively flawed because it is based on its erroneous and amorphous view of what constitutes a "common-law conflict."

As fully explained in the detailed verified complaint, Mr. de la Torre does not have a "common-law conflict," or any other kind of conflict, that precludes him from doing what the Santa Monica voters elected him to do – represent them in all city council meetings and decisions. The Fair Political Practices Commission ("FPPC"), the agency charged with determining whether elected officials have prohibitive conflicts of interest, confirmed as much. Defendant is not entitled to unilaterally exclude an elected member of the city council, disregarding the FPPC's authority, and the authority of the judicial branch to adjudicate disputes about conflicts of interest.

The voters who elected Mr. de la Torre want Defendant to stop wasting millions of dollars fighting against their voting rights, and so does he. In fact, Mr. de la Torre ran for city council on precisely that platform. No doubt, Mr. de la Torre's view, shared by tens of thousands of Santa Monica voters, is contrary to the position taken by Defendant's former city council, as well as some of Mr. de la Torre's colleagues on the current city council. But that does not mean that his council colleagues can exclude Mr. de la Torre, as an equal member of the city council, from the city council's discussions and decisions. When voters disagree with the actions and positions of elected officials, the voters make their voices heard by replacing those officials with candidates who more closely share their views. That is what representative democracy is all about; that is what happened when Mr. de la Torre was elected; and it may not be stifled by a council majority's unilateral and amorphous notion of what constitutes a "common-law conflict."

II. THE ALLEGATIONS OF THE VERIFIED FIRST AMENDED COMPLAINT

The First Amended Complaint ("FAC") alleges all of the elements of a claim for declaratory relief and a claim under the Ralph M. Brown Act, and more.

A. Plaintiffs' Advocacy and the Voting Rights Case

For several decades, De La Torre has advocated for the implementation of district-based elections, both in Santa Monica and throughout California. (FAC ¶¶ 2, 14-18.) In his view, Defendant's at-large system of electing its city council dilutes Latino votes, and has caused Defendant's city council to be unresponsive, even hostile, to Latino voters and the Pico Neighborhood where they are most concentrated. (FAC ¶¶ 16-17; see also *Thornburg v. Gingles* (1986) 478 U.S. 30, 47 [The U.S. Supreme Court "has long recognized that multi-member districts and at-large voting schemes may operate to minimize or cancel out the voting strength" of minorities."]; see also *id*. at 48, fn. 14 [at-large elections may also cause elected officials to "ignore [minority] interests without fear of political consequences"]), citing *Rogers v. Lodge* (1982) 458 U.S. 613, 623; *White v. Regester* (1973) 412 U.S. 755, 769)

Beginning around 2015, De La Torre and others, including Plaintiff Elias Serna, focused their efforts on changing the at-large election system employed by Defendant City of Santa Monica. They held informational meetings and a rally at City Hall, but Defendant did not respond at all, so some advocates for district-based elections – specifically, Pico Neighborhood Association and Maria Loya – filed a lawsuit in this Court to compel Defendant to comply with the California Voting Rights Act. (FAC ¶¶ 18-19.) They recognized that litigation is often an integral part of civil rights advocacy. (FAC ¶ 19.) That case (the "Voting Rights Case"), captioned *Pico Neighborhood Association, et al. v. City of Santa Monica*, LASC Case No. BC616804, was filed in April 2016 and went to trial in August 2018 before Hon. Yvette M. Palazuelos. (FAC ¶¶ 19-20.) This Court entered judgment in favor of the plaintiffs. (FAC ¶ 20). Defendant appealed, and the intermediate appellate court reversed. (FAC ¶ 21). The California Supreme Court granted review and, on its own motion, depublished the intermediate appellate court's decision. (Id.) The Voting Rights Case is currently pending in the California Supreme Court. (Id.)

The Voting Rights Case seeks only non-monetary relief – an injunction and declaration from the court. (FAC ¶ 42.) Consistent with the requested relief, the Judgment entered by this Court awards the plaintiffs injunctive and declaratory relief, but no monetary relief. (Id.) While the lawyers in the Voting Rights Case are likely entitled to recover their fees and costs, the plaintiffs in that case

cannot share in those fees. (See Cal. Rule of Prof. Conduct 1-320.) The Voting Rights Case plaintiffs are also not obligated to pay any fees or costs; their attorneys accepted the case on a pro bono basis. (FAC ¶¶ 43-44.)

B. The 2020 Election

De La Torre sought election to Defendant's city council in the November 2020 elections. (FAC ¶ 24.) The system of election employed by Defendant, and relatedly the Voting Rights Case, was a significant issue in the campaign. (FAC ¶ 25.) All of the incumbents opposed any change to the at-large election system, while De La Torre and his "Change Slate" all professed their support for district elections and an end to Defendant's wasteful fight against the Voting Rights Case. (Id.) Like many other voters, Serna supported De La Torre because of De La Torre's strong advocacy for district-based elections. (FAC ¶ 25)

De La Torre and two of his Change Slate colleagues defeated the incumbents, and were sworn into office in December 2020. (FAC ¶ 28). Before he took his seat on the Santa Monica City Council, De La Torre resigned from the Pico Neighborhood Association board. (FAC ¶ 29).

C. Defendant's City Council Votes to Exclude De La Torre From Council Meetings and Decisions.

On November 25, 2020, the interim city attorney, who had actively participated in the defense of the Voting Rights Case, sought advice from the FPPC on whether Councilmember de la Torre had a conflict of interest that prevented him from lawfully participating in council deliberations and decisions regarding the Voting Rights Case. (FAC ¶ 30.) Then, on January 26, 2021, without any advanced notice to De La Torre, and without waiting for a response from the FPPC, the interim city attorney placed an item on the City Council's next meeting agenda, for a council vote to declare that De La Torre has a conflict of interest and exclude him from all council meetings concerning the Voting Rights Case. (FAC ¶¶ 32-33). Presented with only the interim city attorney's one-sided report, and though some members of Defendant's city council expressed a desire to obtain legal advice from the FPPC, they ultimately did not wait for guidance from the FPPC or any court. Instead, a bare majority (4 of 7) voted to declare that De La Torre has a conflict of interest and to exclude Plaintiff from all discussions, meetings and decisions concerning the Voting Rights Case. (FAC ¶¶ 34-38)

Later that same evening, Defendant excluded De La Torre from a closed session meeting. (FAC ¶ 38.) No actions were reported out of that closed session meeting.

D. The FPPC Rules That De La Torre Has No Conflict of Interest, But Defendant Refuses to Revisit Its Exclusion of De La Torre.

On February 4, 2021 the FPPC responded to Defendant's inquiry whether De La Torre has a conflict of interest. (FAC ¶ 31, Ex. A). The FPPC definitively concluded that Plaintiff does not have a conflict of interest that would prohibit him from participating in meetings and decisions concerning the Voting Rights Case. (Id.) De La Torre requested that, in light of the FPPC's determination, Defendant reverse its previous action excluding him from meetings and decisions concerning the Voting Rights Case; Defendant refused. (FAC ¶ 40.)

Plaintiffs maintain that De La Torre does not have a conflict[1] that prohibits him from participating in city council meetings and decisions, including those relating to Defendant's election system and the Voting Rights Case. (FAC ¶ 41). As explained in the FAC:

> Plaintiffs' interests in the outcome of the Voting Rights Case are no different than any other Santa Monica voter. Plaintiffs want Defendant's city council elections to be brought into compliance with the CVRA, as requested by the plaintiffs in the Voting Rights Case, because the current at-large elections are racially discriminatory and have resulted in the neglect of the Pico Neighborhood. And, Plaintiffs want Defendant to stop wasting huge sums of money on a divisive case to fight against the CVRA and minority voting rights.

(FAC ¶ 45; also see id. ¶¶ 41-44)

E. Plaintiffs File This Lawsuit Seeking Declaratory and Injunctive Relief.

Plaintiffs' operative complaint includes two causes of action: 1) for declaratory relief (FAC ¶¶ 46-52); and 2) for threatened violation of the Ralph M. Brown Act (FAC ¶¶ 53-57). In their claim for declaratory relief, Plaintiffs detail the issues of dispute between Plaintiffs and Defendant:

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[1] In its Demurrer, Defendant misleadingly, claims the operative complaint makes "no reference to the common-law conflict of interest." (Demurrer, p. 6.) The FAC repeatedly explains that De La Torre has **no** conflict of interest of **any** sort, common-law or otherwise. (See, e.g. FAC ¶¶ 45, 47 ["De La Torre does not have a conflict of interest that prevents him from participating in city council meetings, deliberations, or votes concerning the Voting Rights Case."].)

> Plaintiffs contend that: 1) Defendant does not have authority, under the law, to exclude De La Torre from city council meetings, deliberations or votes without either De La Torre's consent or a judicial determination that De La Torre has a conflict of interest; and 2) De La Torre does not have a conflict of interest that prevents him from participating in city council meetings, deliberations or votes concerning the Voting Rights Case. Defendant contends that it may unilaterally determine, as it has done, that De La Torre (or any other council member(s)) has a conflict of interest and exclude De La Torre (or any other council member(s)) from participating in city council meetings, deliberations or votes, even without a judicial determination that any conflict of interest exists. [Defendant disagrees] (FAC ¶ 47)

And, in their claim for threatened violation of the Brown Act, the FAC explains that the Brown Act generally requires all council meetings be open to the public, with limited specified exceptions. (FAC ¶ 54.) The only one of those exceptions potentially applicable here – "hold[ing] a closed session to confer [regarding] pending litigation" – does not permit a closed session accessible to just a majority of the members of a council rather than all the members. (Id.) By excluding De La Torre from future closed session meetings, Defendant threatens to violate the Brown Act. (FAC ¶¶ 55-57)

III. DEFENDANT'S ALTERNATIVE FACTS ARE NOT PROPERLY CONSIDERED ON DEMURRER.

Defendant's demurrer is premised not on the facts alleged in Plaintiffs' verified complaint, but rather on its alternative facts under the guise of judicial notice. But most of those "facts" are not properly subject to judicial notice, as explained in Plaintiffs' Opposition to Defendant's Request for Judicial Notice. Specifically, Defendant's Demurrer rests on: Defendant's erroneous and unsupported view of the Voting Rights Case (Demurrer, pp. 2, 4); the truth of cherry-picked testimony in the Voting Rights Case (Demurrer, pp. 2-4); the truth of billing records by an attorney in the Voting Rights Case (Demurrer, p. 3); unsupported statements about what city councilmembers reviewed prior to voting to exclude De La Torre from council meetings (Demurrer, p. 5); undocumented communications that Defendant's interim city attorney claims to have had with an unidentified person in the Attorney General's office (Demurrer, p. 9); and *even the truth of statements made by Defendant's attorney in a staff report* (Demurrer, p. 4).

While documents that are filed in this Court or are records of a public agency may themselves be judicially noticeable, the truth of the matters asserted in those documents are not subject to judicial notice. (See *Mangini v. R.J. Reynolds Tobacco* (1994) 7 Cal.4th 1057, 1063-1064; *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal.App.4th 514, 519.) A demurrer admits the truth of all factual material allegations in a complaint, as well as facts that may be implied or inferred from those expressly alleged, regardless of possible difficulties of proof. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal. App. 4th 1397, 1403.) While judicially noticeable facts may also be considered, facts not in the complaint and not subject to judicial notice may not be considered. (*Id.* at 1406)

IV. THE FAC STATES CLAIMS FOR DECLARATORY RELIEF AND VIOLATION OF THE RALPH M. BROWN ACT.

There is essentially only one element to a declaratory relief cause of action – "the existence of an actual, present controversy over a proper subject." (*Californians for Native Salmon and Steelhead Association v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1426, citing 5 Witkin, Cal. Procedure (3d ed. 1985), Pleading, §811.) Declaratory relief is an equitable remedy, and is "unusual in that it may be brought to determine and declare rights before any actual invasion of those rights has occurred." (*Id.*) Similarly, the Brown Act allows "an action … for the purpose of stopping or preventing violations or threatened violations." (Gov't Code § 54960(a))

There can be no doubt that the FAC alleges an actual present controversy. Plaintiffs contend De La Torre has no disqualifying conflict of interest, and that Defendant's city council is not empowered to make that determination, and Defendant disagrees. (FAC ¶¶ 47-50.) And, as discussed above, the FAC also alleges the exclusion of De La Torre threatens to violate the Brown Act. (FAC ¶¶ 54-57)

Nonetheless, Defendant asks this Court to reach the merits of the parties' dispute and dismiss Plaintiffs' case because, according to Defendant, De La Torre has a disqualifying conflict of interest and its city council has authority to adjudicate that issue. Defendant is wrong on both counts.

A. De La Torre Does Not Have a Conflict of Interest That Prevents Him From Participating in City Council Meetings

As the FPPC confirmed, Councilmember De La Torre "does not have a disqualifying conflict of interest in City Council decisions concerning the [Voting Rights] lawsuit against the City." (FAC, Ex. A at pp. 4, 6.)

1. The Law of Conflicts of Interest

Public officials are prohibited from involvement in official decisions in which they have a conflict of interest. This prohibition is found in several places, including the Political Reform Act ("PRA" Gov't Code §§ 81000-91014), Section 1090 et seq. of the Government Code ("Section 1090"), and (arguably) the common law prohibition on conflicts of interest.

The PRA prohibits public officials from making, participating in making, or in any way attempting to use their official positions to influence governmental decisions in which they have economic interests. (Govt. Code, § 87100; 2 Cal. Code of Regs. § 18700(b).) If a public official or employee has a prohibited conflict of interest in a decision, they must disqualify themselves from any involvement in the decision. Like the PRA, Section 1090 prohibits public officials and employees, acting in their official capacities, from making contracts in which they are financially interested. (88 Ops.Cal.Atty.Gen. 32 (2005))

In addition to the PRA and Section 1090, some courts have acknowledged a common law doctrine which "prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171.) "While common law conflicts may sometimes arise in the absence of a financial interest, there still must be some personal advantage or disadvantage at stake" that is different than the interest of other constituents. (88 Ops.Cal.Atty.Gen. 32 (2005) at pp. 8-9, citing *Clark*, *supra*, 48 Cal.App.4th at 1172.) Particularly because an unduly broad view of the "common law doctrine" could prevent public officials from doing what they were elected to do, the courts are reluctant to find a conflict of interest under the common law doctrine where no conflict exists under the PRA or Section 1090. (See *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1233 [declining to find a public servant's bias in a decision to constitute a conflict of interest at

common law where conflict of interest statutes had not been violated – "We continue to be cautious in finding common law conflicts of interest … We reject the application of the doctrine in this case, assuming, arguendo, it exists."]; *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 958 ["Except where the law clearly provides rules for identification and rectification of what might be termed conflicts of interest, that is a legislative not a judicial function."].) At least some aspects of the common law doctrine have been abrogated by the Legislature's enactment of the PRA and Section 1090. (See 88 Ops.Cal.Atty.Gen. 32 (2005), at p. 9)

2. Plaintiff's Advocacy for District Elections, Including in the Voting Rights Case, Does Not Present a Conflict of Interest; De La Torre's Participation in Council Meetings on that Topic Is What Representative Democracy Is All About.

Councilmember De La Torre's decades-long advocacy for Latino civil rights, including the district-based elections sought through the Voting Rights Case, does not give rise to a conflict of interest. The FPPC has already concluded "neither the [PRA] nor Section 1090 prohibits Councilmember de la Torre from participating in governmental decisions relating to the [Voting Rights Case], including a potential settlement agreement, where his spouse is a named plaintiff." (FAC, Ex. A at p. 2). Both the PRA and Section 1090 prohibit an elected official from making decisions for a public agency only where that public official, or certain family members, has a financial interest in the decision. (Gov't Code §§ 1090, 87100). As discussed above, and confirmed by the FPPC, Councilmember de la Torre does not have a financial interest in the Voting Rights Case. (See FAC ¶¶ 41-45, Ex. A at p. 5). That case seeks only injunctive and declaratory relief, and while the plaintiffs' counsel may recover their reasonable attorneys' fees, those fees cannot be shared with the non-attorney plaintiffs. (Id.) The FPPC detailed Councilmember de la Torre's lack of any financial interest in the Voting Rights Case:

> Neither [Councilmember de la Torre] nor his spouse has any financial interest, direct or indirect in the outcome of the [Voting Rights Case], including any future settlement agreement. There is no obligation on the part of him or his spouse to pay any attorneys' fees or costs in connection with the litigation, and no arrangement under which any portion of any recovery from the City of attorneys' fees or costs would flow to him or his spouse.

(FAC, Ex. A at p. 5)

As is almost always the case, the common law doctrine does not compel a different result than the PRA and Section 1090. (See *BreakZone*, *supra*, 81 Cal.App.4th at 1233 ["We continue to be cautious in finding common law conflicts of interest" where there is no conflict of interest under the PRA or Section 1090].) "While common law conflicts may sometimes arise in the absence of a financial interest, there still must be some personal advantage or disadvantage at stake for the public officer." (88 Ops.Cal.Atty.Gen.32 (2005) at p. 8, citing *Clark*, *supra*, 48 Cal.App.4th at 1172.) De La Torre simply does not have any "personal stake – financial or otherwise" in the Voting Rights Case. (88 Ops.Cal.Atty.Gen. 32 (2005) at p. 8, citing *BreakZone*, *supra*, 81 Cal.App.4th at 1232-33). On the contrary, if the plaintiffs prevail in the Voting Rights Case, Defendant's city council elections will be district-based, and the votes of thousands of Latino residents of Santa Monica will no longer be unlawfully diluted; De La Torre will receive nothing more than those thousands of other Latino residents of Santa Monica – an undiluted vote. (See FAC ¶ 45)

Defendant argues that the mere fact that De La Torre's wife is one of the plaintiffs in the Voting Rights Case means that De La Torre *per se* has a conflict of interest. That superficial view ignores the nature of the Voting Rights Case which seeks only changes to Defendant's election system to benefit all Santa Monica voters – no monetary or other individual relief at all. The discussion in *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205 is particularly instructive on this point. In *BreakZone*, a business obtained an amendment to its conditional use permit from the City of Torrance's planning commission over the objections of several residents and the police chief. (*Id*. at 1209-1213.) A Torrance City Councilmember, Dan Walker, filed an appeal of the planning commission's decision. (*Id*. at 1213-1214.) Councilmember Walker adjudicated the appeal, along with his council colleagues, ultimately granting the appeal and denying the business the conditional use permit amendment. (*Id*. at 1214-1219.) The business challenged that decision in court, claiming, among other things, that Councilmember Walker had a conflict of interest because: 1) he himself filed the appeal; and 2) he had received campaign contributions totaling over $8,000 from businesses that stood to gain financially by the denial of the conditional use permit amendment. (*Id*. at 1220.) The *BreakZone* court found those allegations, even if true, did not amount to a legally cognizable conflict of interest, under the common law doctrine or any statutory prohibition, because even though

Councilmember Walker was a party to the appeal he had no personal interest different from other Torrance residents at stake in the appeal. (*Id*. at 1233-1241; also see 88 Ops.Cal.Atty.Gen.32 (2005) at pp. 8-9.) As in *BreakZone* where Councilmember Walker's role as the appellant did not require his recusal, Councilmember De La Torre's wife's role as one of the plaintiffs in the Voting Rights Case likewise does not present a disqualifying conflict of interest here.

Just like Councilmember Walker in *BreakZone*, Councilmember De La Torre has expressed his desire that one side – the plaintiffs – prevail in the Voting Rights Case so district-based elections are implemented for Santa Monica's City Council. De La Torre has consistently expressed his support for district-based elections, in his campaign and for several years prior. (FAC ¶¶ 2, 14-18, 25). But that strong advocacy, and even expressing disagreement with the positions of a previous council, including how they have responded to litigation, is no reason to exclude Councilmember De La Torre from discussions concerning that litigation. As the California Supreme Court explained in *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, disqualifying elected officials from deliberations and decisions on topics about which they have expressed their strong opinions "would be contrary to the basic principles of a free society … [and] the very essence of our democratic society." (*City of Fairfield*, 14 Cal.3d at 781-782, approvingly quoting *Wollen v. Fort Lee* (1958) 27 N.J. 408 and citing cases from several other states.) Where, as here, the electorate disagrees with the positions taken by their elected representatives, including in litigation, and replace those representatives through the democratic process, the will of the electorate should not be thwarted by excluding the new elected representatives from decisions concerning that litigation. In *City of Fairfield*, the California Supreme Court expressly rejected the contrary view expressed in *Saks & Co. v. City of Beverly Hills* (1951) 107 Cal.App.2d 260. (*City of Fairfield*, 14 Cal.3d at 781-782 ["The Court of Appeal decision in *Saks* effectively thwarted representative government by depriving the voters of the power to elect councilmen whose views on this important issue of civic policy corresponded to those of the electorate."].)

For its view that De La Torre has a conflict of interest, Defendant relies exclusively on a non-precedential Attorney General opinion – 92 Ops.Cal.Atty.Gen. 19 (2009) – and its discussion of *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152. But neither that lone Attorney General

opinion, nor the *Clark* case it cites, help Defendant's cause. And, of course, Defendant ignores the precedential cases and Attorney General opinion discussed above.

92 Ops.Cal.Atty.Gen. 19 addressed a redevelopment agency's decision to enter into a loan agreement for commercial property improvement with a corporation wholly owned by the son of one of the agency's members. (Id. at p. 1). Receiving a substantial loan obviously has personal value – of a financial nature, and, as the Attorney General opinion explained: "it is difficult to imagine that the agency member has no private or personal interest in whether her son's business transactions are successful or not." (Id. at p. 7.) In contrast, Councilmember De La Torre has absolutely no private or personal interest in the outcome of the Voting Rights Case, because neither he nor anyone in his family has a financial interest in that case. (FAC ¶¶ 41-44.) Rather, Councilmember De La Torre's interest in the Voting Rights Case is the same as every other Latino voter in Santa Monica – to enjoy an undiluted vote in the city council elections – not the sort of interest that gives rise to a conflict of interest. (Id.)

Nor does *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 support Defendant's position. In *Clark*, the court found a conflict of interest because the official "stood to benefit personally by voting against the [condominium] project" since he had "an interest in preserving his ocean view" from his residence. (*Id*. at 1172.) Had the proposed condominium project not threatened his personal ocean view, but rather the official was generally opposed to developments that exceeded height limitations because those developments would impede the ocean views of residents living inland, the court stated that would not be a conflict of interest. (*Id*. at 1172-73 ["Here, Benz's conflict of interest arose, not because of his general opposition to 35-foot buildings, but because the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence.). While an ocean view at a rented residence might not be a "financial interest," it is still something of tangible value and so the *Clark* court did not hesitate to find a conflict of interest. Here, the Voting Rights Case seeks representation not just for De La Torre, but for the entire Latino-concentrated neighborhood in which he resides with thousands of others. (FAC ¶ 45). Therefore, the Voting Rights Case does not involve a "personal" interest for Councilmember de la Torre; it involves an interest common to a large group of Santa Monicans whom De La Torre was elected to represent.

B. Defendant Is Not Empowered to Exclude a Councilmember from City Council Meetings With No Judicial Determination of a Disqualifying Conflict of Interest.

Even if De La Torre did have a conflict of interest (he doesn't), Defendant's city council is not empowered to make that determination. Under the separation of powers doctrine, absent explicit statutory authorization, neither local elected officials nor city attorneys have the authority to make judicial determinations; those determinations are the province of the judicial branch. (See *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068-69, 1094 ["a local administrative agency has no authority under the California Constitution to exercise judicial power"], citing *Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 36-44.) Where there is no express statutory authority granted to local elected officials to take a particular action, those local elected officials may not take that action. (See *Lockyer*, *supra*, 33 Cal.4th at 1080, 1093-94.)

Not only is there no statutory authority for city councils or city attorneys to determine whether a member of the city council has a conflict of interest, that authority has been expressly conferred on the courts and the FPPC. For example, Government Code section 91003 provides:

> Any person residing in the jurisdiction may sue for injunctive relief to enjoin violations or to compel compliance with the provisions of [the Political Reform Act]. The court may in its discretion require any plaintiff other than the [FPPC] to file a complaint with the [FPPC] prior to seeking injunctive relief. … Upon a preliminary showing in an action brought by a person residing in the jurisdiction that a violation of [the Political Reform Act] or of a disqualification provision of a Conflict of Interest Code has occurred, the court may restrain the execution of any official action in relation to which such a violation occurred, pending final adjudication.

Here, Defendant has not "sue[d] for injunctive relief" (Gov't Code § 91003), nor did Defendant wait for the FPPC to respond to its inquiry before it unilaterally excluded Councilmember de la Torre from its meeting. (FAC ¶¶ 32-39). When the FPPC did complete its analysis, it concluded that De La Torre does not have a conflict of interest. (FAC ¶¶ 30-31, Ex. A). Under those circumstances, Defendant cannot be permitted to usurp the role of the judicial branch and the FPPC, by unilaterally excluding De La Torre from council meetings.

As its interim city attorney did at the January 26, 2021 council meeting, Defendant points only to Section 605 of the Santa Monica City Charter as its authority to exclude Councilmember de la Torre

from city council meetings based on only its own view that De La Torre has a conflict of interest. Section 605, however, does not grant the city council any authority to exclude one of its members from meetings based on its own unadjudicated view that member has a conflict of interest. Section 605 doesn't speak to the issue at all; it merely provides: "All powers of the City shall be vested in the City Council, subject to the provisions of this Charter and to the Constitution of the State of California." "The City" never had the authority to unilaterally exclude a member of the city council from council meetings such that that power could be vested in the city council. Under the California Constitution and the relevant statutes, that power lies with the courts. (See Gov't Code § 91003; *Lockyer*, supra, 33 Cal.4th at 1068-69, 1080, 1093-94.)

Defendant's citation to an old case discussing the powers of a charter city – *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455 – does not help it either, because any charter city authority must yield to the California Constitution, which, as discussed above, vests the interpretation of the law in the judicial branch. (See *Lockyer, supra.*) Even *Simons* recognizes the California Constitution is supreme on the matter. (*Id.* at 468.) Nor is the power of charter cities nearly as unfettered as Defendant would have this Court believe. On issues such as the right to vote and the integrity of the electoral process, city charters must yield. (See *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 799-801.) Here, Santa Monica's voters elected De La Torre; there can hardly be anything more disruptive to the right to vote and the integrity of the electoral process than to prevent a duly-elected official from serving in the position to which he was elected.

If Defendant believed De La Torre had a conflict of interest that prevented him from participating in meetings concerning the Voting Rights Case, it had a ready remedy – seeking an injunction from the courts. Perhaps unconfident in the result if a neutral court considered the matter, Defendant instead usurped the role of the courts. For that reason alone, Defendant's exclusion of Councilmember De La Torre is unlawful. (Cf. *Lockyer*, *supra* [declining to reach the issue of whether denial of marriage licenses to same-sex couples was unconstitutional, because local officials may not usurp the role of the courts to make that determination].) Moreover, allowing a bare majority of a city council to unilaterally decide that another councilmember cannot participate in its meetings and votes, would be incredibly dangerous. What would stop any council majority from exploiting an amorphous

concept like the "common-law conflict" as pretext to silence its opponents in any council minority on any matter before the council?

V. PLAINTIFFS HAVE STANDING TO ASSERT THEIR BROWN ACT CLAIM

Defendant contends that the court in *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 held that a city councilmember may never sue the city for violating the Brown Act. The holding in *Holbrook* is not nearly as broad and unyielding as Defendant suggests. In fact, the *Holbrook* court recognized that councilmembers would have standing to sue under the Brown Act if they were "barred [] from participating in council business … [or] deprive[d] of the ability to participate in the proceedings of the city council" because such "conduct [is] directed at individual council members." (*Id.* at 1255-56, citing *Degrassi v. Cook* (2002) 29 Cal.4th 333, 336-338, 342.)

The court in *Galbiso v. Orosi Pub. Util. Dist.* (2010) 182 Cal.App.4th 652, reversing the trial court's sustaining of a demurrer for a governing board member's lack of standing (while affirming the trial court on other grounds), and distinguishing *Holbrook*, explained:

> Although it is true that Galbiso lacked standing as a member of the general public to sue OPUD for Brown Act violations, since she served on its board of directors, we do not believe that she asserted the third cause of action merely as a member of the general public. Rather, she had a personal stake in the outcome of the relief sought; specifically, whether the tax sale of her parcels would stand. That being the case, the demurrer to the third cause of action based on a lack of standing under the analysis of the above cases should have been overruled. (See *Carsten v. Psychology Examining Com*. [(1980) 27 Cal.3d 793,] 798 [exception to rule exists where member of board had personal interest in outcome of litigation].)

Here, De La Torre certainly has a "personal stake in the outcome of the relief sought." (*Id.*) It is De La Torre, specifically, who Defendant's council majority seeks to exclude from future meetings and votes. Therefore, he has standing. (*Id.*)

In any event, even if De La Torre could not pursue the Brown Act claim, Serna – the other plaintiff in this case – most certainly can. Serna is a registered voter residing in Santa Monica, and is not a member of Defendant's city council. (FAC ¶ 5). Having voted for De La Torre, he is "interested" in having De La Torre represent him in all council meetings and decisions. (See Gov't Code § 54960)

VI. NO CURE NOTICE IS REQUIRED FOR PLAINTIFFS' BROWN ACT CLAIM.

Defendant fundamentally misunderstands Plaintiffs' second cause of action for violation of the Brown Act. Defendant argues that Plaintiffs seek "to overturn Council's quasi-legislative act in determining a common-law conflict of interest exists."[2] (Demurrer, p. 13.) But that is not at all what Plaintiffs seek through their second cause of action, and Plaintiffs do not contend that the council's "determination" on January 26 violated the Brown Act. That "determination" was in error and exceeded the city council's authority, as discussed above, but it did not itself violate the Brown Act. Rather, Plaintiffs contend that the prospect of future closed session meetings of a majority, but not all, of the city council is a "threatened violation[] of [the Brown Act] by members of the legislative body." (Gov't Code § 54960(a); FAC ¶ 55.) And, while the January 26, 2021 closed session meeting was a violation of the Brown Act, there was no action reported out of that closed session meeting so there is nothing to declare "null and void." (Compare Gov't Code § 54960.1)

Section 54960 of the Government Code, under which Plaintiffs proceed here (FAC ¶ 56), authorizes *prospective* relief – "stopping or preventing threatened violations of [the Brown Act] by members of the legislative body" – and thus has no notice and cure provision. In contrast, sections 54960.1 and 54960.2, which Plaintiffs do not invoke, authorize *retrospective* relief – a determination that "an action [already] taken by a legislative body of a local agency … is null and void." (Compare Gov't Code 54960 with Gov't Code 54960.1.) To obtain that retrospective relief, a plaintiff must first provide notice and an opportunity to cure a prior action, but for prospective relief under Section 54960 to prevent threatened violations, there is no prior action to cure and so the notice requirement does not apply. (*Id.*) All of the relief requested in the FAC is prospective, consistent with Section 54960, and so no cure notice was required. (FAC, pp. 15-16 [Prayer for Relief].)

In any event, Plaintiffs did request that Defendant reverse its decision to exclude him from closed session council meetings, but Defendant refused. (FAC ¶ 40)

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[2] A "determin[ation that] a common-law conflict of interest exists" (Demurrer, p. 13) is not a quasi-legislative act at all; it is a judicial act, and Defendant does not have authority to make judicial determinations.

Respectfully submitted:

DATED: July 9, 2021

TRIVINO-PEREZ & ASSOCIATES

By: /s/ Wilifred Trivino Perez
Wilifred Trivino-Perez
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 10940 Wilshire Blvd., 16th Floor, Los Angeles, CA 90024.

On July 9, 2021, I served true copies of the following document(s) described as

OPPOSITION TO DEMURRER

on the interested parties in this action as follows:

George Cardona
Interim Santa Monica City Attorney
1685 Main Street, Room 310
Santa Monica, CA 90401

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with our practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on July 9, 2021 at Los Angeles, California.

/s/ Wilifred Trivino-Perez
Wilifred Trivino-Perez