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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** **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION** Date: May 6, 2022 Time: 9:15 a.m. Dept. 15 [Hon. Richard Fruin]

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I. INTRODUCTION

Councilmember de la Torre does not have a conflict of interest, statutory or otherwise, that prevents him from doing what the Santa Monica voters elected him to do – represent them in all city council meetings and decisions, including those concerning *Pico Neighborhood Association v. City of Santa Monica* (the "Voting Rights Case").

To determine whether an elected official has a conflict of interest in making decisions concerning an underlying litigation or other dispute, courts evaluate the relief sought in that litigation. If the elected official does not have a "personal" interest in that relief, different than that of any substantial group of constituents, there is no disqualifying conflict. (88 Ops.Cal.Atty.Gen. 32 (2005) at pp. 8-9. ["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 a group of constituents generally.].) That is true regardless of the elected official's previous involvement in the litigation, or relationship to the named parties in the litigation. (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1230-1233 [finding no common law conflict, even where Torrance councilmember participated in council's decision on *his own* appeal, because councilmember had no peculiarly personal interest in the relief sought through his appeal].)

Councilmember de la Torre has no "personal" interest in the Voting Rights Case; rather, his interest is philosophical and political, just like every other member of the Santa Monica City Council. The only relief sought in the Voting Rights Case is a change to the method of electing Defendant's city council – a change that would impact all Santa Monica voters, not just Councilmember de la Torre. If the plaintiffs prevail in the Voting Rights Case, Councilmember de la Torre and his wife will receive an undiluted vote in Santa Monica city council elections, just like all Santa Monica voters – nothing more. If the plaintiffs are unsuccessful in the Voting Rights Case, Councilmember de la Torre and his wife will continue to be subjected to a dilutive at-large election system, just like all Santa Monica voters. This Court summed it up best in its September 30, 2021 ruling:

> "The issue at stake here is CVRA litigation now on appeal in which the City is a defendant. **Plaintiff De La Torre does not have a personal stake in that litigation** but voices a point of view that is contrary to the majority of the councilmembers. These differing viewpoints are to be resolved in a fair political process. **The City's actions to**

> **exclude the participation of a councilmember who campaigned in support of the plaintiffs in the CVRA litigation thwarts the political process** and raises an actual controversy for judicial determination."

(September 30, 2021 Ruling, overruling Defendant's Demurrer (emphasis added).)[1]

Refusing to heed this Court's guidance on the law, Defendant still fails to identify, in its motion or anywhere else, any personal stake Councilmember de la Torre has in the Voting Rights Case. Rather, Defendant regurgitates its already rejected arguments from its Demurrer, insisting that Councilmember de la Torre's "enmeshment with the CVRA Action (and relationship with his wife)" (Motion, p. 10) is a substitute for a personal stake, and attempts to conjure up some financial conflict after repeatedly disclaiming any such contention in this case. The simple fact remains – Councilmember de la Torre "does not have a personal stake in" the Voting Rights Case, and therefore has no disqualifying conflict of interest. (September 30, 2021 Ruling)

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 wishful thinking about what constitutes a "common-law conflict."

II. FACTS

Unable to identify, much less provide evidence of, any "personal interest," Defendant instead weaves a sordid story full of inuendo, focusing on Councilmember de la Torre's "wife's continued role as a named plaintiff" in the Voting Rights Case and his "substantial involvement with the CVRA Action" and "entwinement with the lead CVRA Action attorney." (Motion, p. 10.) But, as explained below, neither a relationship with a litigant, nor friendship with an attorney, nor past involvement in the dispute, is a substitute for a "personal interest." (Section III, *infra*; see also 88 Ops.Cal.Atty.Gen. 32 (2005) at pp. 8-9 ["Here, we find no common law conflict because, once again, the city council member has no personal stake – financial or otherwise – in the proposed lease of the city's property."].)

The complicated story Defendant presents in its motion, full of personal accusations with no evidence, is wrong, as detailed in Plaintiffs' response to Defendant's lengthy separate statement, but more

[1] For the Court's convenience, a copy of the Court's September 30, 2021 Ruling is attached as Exhibit A to the Declaration of Wilfredo Trivino-Perez.

importantly it is irrelevant. Even if everything in Defendant's story–full of irrelevant accusations about Mr. Shenkman being involved in this case, and Councilmember de la Torre's voluntary recusal from the sex abuse cases filed against Defendant because at least one of the victims is a family member – were accurate (it's not), none of that would change the fact that Councilmember de la Torre has no "personal interest" in the Voting Rights Case. Indeed, as explained more fully below, because of the nature of CVRA claims, even the Voting Rights Case plaintiffs themselves have no personal interest in the Voting Rights Case different than the public generally. (Sections III.B and III.C, *infra*, citing Elec. Code §§ 14029, 14032.)

Defendant's lengthy story only amplifies what Plaintiffs acknowledged in their operative verified complaint: that Councilmember de la Torre's wife is a plaintiff in the Voting Rights Case (SAC ¶¶ 17, 23); that he was a member of the organizational plaintiff's board (SAC ¶¶ 15, 32); and he has been involved in the effort to adopt district-based elections in Santa Monica, including through the Voting Rights Case (SAC ¶¶ 2, 17-19, 26, 28.) Because Defendant's present motion presents nothing different than its demurrer, there is no reason for this Court to second-guess its decision overruling that demurrer, or its rationale for doing so – "Plaintiff De La Torre does not have a personal stake in that litigation but voices a point of view that is contrary to the majority of the councilmembers. ... The City's actions to exclude the participation of a councilmember who campaigned in support of the plaintiffs in the CVRA litigation thwarts the political process …." (Sept. 30, 2021 Ruling).

The key question – whether Councilmember de la Torre has a personal interest in the Voting Rights Case – can be conclusively answered with facts much simpler than the 154 purportedly undisputed material facts Defendant presents in its separate statement. The *relevant* facts are described below:

A. Plaintiffs' Advocacy and the Voting Rights Case

For several decades, De La Torre has advocated for the elimination of at-large elections, both in Santa Monica and throughout California, because those elections are well-known to disadvantage minority voters and cause elected officials to be unresponsive, even hostile, to those voters. (de la Torre Decl. ¶¶ 2-3; see also *Thornburg v. Gingles* (1986) 478 U.S. 30, 47 [The U.S. Supreme Court "has long recognized that … 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 also cause elected officials to "ignore [minority] interests without fear of political consequences"].) The California Legislature expressed its disdain for at-large

elections, for these very same reasons, by enacting the California Voting Rights Act. ("CVRA", Elec. Code §§ 14025 et seq.)

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. (de la Torre Decl. ¶ 4.) With their efforts ignored by Defendant, the Pico Neighborhood Association and Maria Loya filed a lawsuit in this Court to compel Defendant to comply with the CVRA. (de la Torre Decl. ¶ 5.) That case (the "Voting Rights Case") was filed in April 2016 and went to trial in August 2018. (Shenkman Decl. ¶ 3.) The Los Angeles Superior Court (Hon. Yvette Palazuelos) entered judgment in favor of the plaintiffs. (Shenkman Decl. ¶ 4, Ex. B). An intermediate appellate court reversed. (Shenkman Decl. ¶ 4). The California Supreme Court granted review and 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, implementing district-based elections for Defendant's city council. (Shenkman Decl. ¶ 3, Ex. A.) Consistent with the requested relief, the Judgment entered by the Los Angeles Superior Court awards the plaintiffs injunctive and declaratory relief – the implementation of district-based elections the plaintiffs requested, but no monetary relief. (Shenkman Decl., ¶ 4 Ex. B.) 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); and the Voting Rights Case plaintiffs also need not pay any fees or costs; their attorneys accepted the case *pro bono* and agreed to pay all costs. (Id. at ¶¶ 5-6, Exs. B, C.)

B. The 2020 Election

De La Torre sought election to Defendant's city council in the November 2020 elections, campaigning on a platform that included an end to the illegal at-large election system and the expensive legal fight to maintain that system. (de la Torre Decl. ¶ 7, Ex. A.) De La Torre and two other opponents of the at-large elections defeated the incumbents, and were sworn into office in December 2020. (de la Torre Decl. ¶¶ 7-9, Exs. A, B).

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

On November 25, 2020, Defendant's interim city attorney, who had actively participated in the defense of the Voting Rights Case, sought advice from the FPPC on whether De La Torre had a conflict of

interest that prevented him from participating in council deliberations and decisions regarding the Voting Rights Case. (de la Torre Decl. ¶ 10, Ex. C.) Then, on January 22, 2021, 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 exclude Councilmember de la Torre from all decisions concerning the Voting Rights Case. (de la Torre Decl. ¶ 11, Ex. D). Though some city council members expressed a desire to hear from the FPPC, they ultimately did not wait for guidance from the FPPC or any court. Instead, a bare majority (4 of 7), including one councilmember who testified at trial for the defense in the Voting Rights Case, voted to declare that Councilmember de la Torre has a conflict of interest and to exclude him from all discussions, meetings and decisions concerning the Voting Rights Case. (de la Torre Decl. ¶ 12, Ex. E.)

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, and definitively concluded that De La Torre does ***not*** have a conflict of interest that prohibits him from participating in meetings and decisions concerning the Voting Rights Case. (de la Torre Decl. ¶13, Ex. F.) De la Torre requested that, in light of the FPPC's determination, Defendant reverse its previous action, but Defendant refused, and even refused to allow the matter to be considered by the council. (Id. at ¶ 14, Ex. G.)

III. COUNCILMEMBER DE LA TORRE HAS NO CONFLICT OF INTEREST

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." (de la Torre Decl., Ex. F at pp. 4, 6.) While Defendant argues the FPPC limited its analysis to California's statutory framework governing conflicts of interest, that analysis applies equally to the "common law doctrine" of conflicts of interest as well. Just like De La Torre does not have a financial interest in the Voting Rights Case, as the FPPC explained, because none of the relief sought in that case could result in a financial benefit to De La Torre or his family (de la Torre Decl. Ex. F, pp. 5-6), he also does not have a non-financial "personal" interest because the relief sought in the Voting Rights Case would confer the same benefit on tens of thousands of Santa Monica voters as De La Torre. (*Cf.* Gov't Code § 87103 ["A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, *distinguishable from its effect on the public generally*."] (emphasis added); Cal. Code Regs. tit. 2 § 18703.)

A. The Law of Conflicts of Interest for Elected Officials

California's law concerning conflicts of interest for elected officials is addressed by two statutes – the Political Reform Act ("PRA", Gov't Code §§ 81000-91014) and Section 1090 et seq. of the Government Code ("Section 1090"). To the extent it has not been abrogated by those two statutes, there also remains a common law prohibition on conflicts of interest. (See 88 Ops.Cal.Atty.Gen. 32 (2005), at p. 9 ["Since the Legislature has, in effect, authorized the lease agreement under this 'noninterest' exception, the common law prohibition may not be applied in a manner inconsistent with this statute."].)

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,* 81 Cal.App.4th at 1233 ["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."].)

"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 a group of constituents generally. (88 Ops.Cal.Atty.Gen. 32 (2005) at pp. 8-9.) If an elected official does not have "some personal advantage or disadvantage at stake" that is different than the interest of a group of constituents, there is no conflict of interest, even if the elected official is heavily involved in, or supportive of, one side of litigation. (*Id*. ["Here, we find no common law conflict because, once again, the city council member has no personal stake – financial or otherwise – in the proposed lease of the city's property."]; *BreakZone,* 81 Cal.App.4th at 1208-1209, 1213-1214, 1231-1239 [finding no common law conflict, even where Torrance councilmember participated in council's decision on *his own* appeal, because councilmember had no peculiarly personal interest in the relief sought through his appeal].)

Where the question of a common law conflict arises in connection with an underlying litigation or other dispute where an elected official may have some decision-making role, the existence of a personal interest is determined by evaluating the relief sought in the underlying dispute. (See, e.g., *BreakZone,* 81 Cal.App.4th at 1230-1233 [finding no common law conflict because the approval or denial of the conditional use permit would affect all of the pool hall's neighbors, not just the councilmember].) Where an official has a personal interest, different than the interest of other constituents, in the relief sought, he

may have a conflict of interest; where he does not have such a personal interest in the requested relief, he does not have a conflict of interest. (See *id*., at 1238-1239 distinguishing *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1172-1173 [finding common law conflict because councilmember "stood to benefit personally by voting against the [condominium] project" since that project was one block from his residence and would block "his ocean view," but noting that no conflict prevents the councilmember from participating in council decisions regarding "the height of new construction" generally because that is a "subject[] of community concern" that affects a large group of constituents, not just the councilmember].)

That rule holds regardless of whether the official has expressed a position different than that previously taken by the political subdivision through its governing board or other commission. (Cf. *BreakZone*, 81 Cal.App.4th at 1208-1209 [no conflict of interest where council member expresses a position contrary to determination by the City's planning commission].) A contrary rule would stifle dissenting voices and prevent the electorate from changing the direction of their local government through elections. (See *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 781-782 [disapproving of disqualification of three city council members based on their expression of a view contrary to that of the former city council].)

B. Councilmember De La Torre Does Not Have a *Personal* Interest in the Relief Sought in the Voting Rights Case.

De La Torre simply does not have any "personal stake – financial or otherwise" in the relief sought in the Voting Rights Case. (88 Ops.Cal.Atty.Gen. 32 (2005) at p. 8, citing *BreakZone*, 81 Cal.App.4th at 1232-33).

The FPPC has already concluded:

> [N]either 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. … 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."

(de la Torre Decl., Ex. F at pp. 2, 5).

Nor does De La Torre have any non-financial personal interest in the Voting Rights Case. If the plaintiffs prevail in the Voting Rights Case, Defendant's city council elections will be district-based, and the votes of thousands of Santa Monica residents will no longer be unlawfully diluted; De La Torre will receive nothing more than those thousands of other residents of Santa Monica – an undiluted vote in a fair and lawful election. (de la Torre Decl. ¶¶ 16-18.) The relief granted by the Los Angeles Superior Court in the Voting Rights Case (now pending appeal) confirms this fact. (Shenkman Decl., ¶ 4, Ex. B.) And, while De La Torre may run for re-election and the method of election might impact his prospects, the same is also true for all other councilmembers and potential candidates – i.e. every registered voter residing in Santa Monica.

In its motion, and throughout the course of this case, Defendant has failed to identify any aspect of the relief sought in the Voting Rights Case that would peculiarly benefit De La Torre differently than thousands of other Santa Monica voters. Rather, Defendant has sought to distract this Court from the proper analysis – an evaluation of the relief sought in the Voting Rights Case – by focusing on De La Torre's past involvement in the prosecution of the Voting Rights Case and his relationships with the plaintiffs in that case. De La Torre's past involvement in the Voting Rights Case and his relationships with the plaintiffs in that case, is no substitute for showing a personal interest in the relief sought in the underlying case. Even where a councilmember is himself one of the litigants, he has no conflict in making decisions for the city concerning the litigation if a significant portion of the public has a similar interest in the relief sought through the litigation as the councilmember, i.e. the councilmember's interest is not "personal." (See *BreakZone,* 81 Cal.App.4th at at 1208-1209, 1213-1214, 1230-1233 [finding no common law conflict despite the councilmember himself being a party to the underlying dispute he decided as a member of the city council].)

In many types of cases, the plaintiffs necessarily have a personal interest. In a personal injury or wrongful termination case, for example, if the plaintiff prevails he receives money – unquestionably a benefit personal to the plaintiff. Even in some cases seeking non-monetary relief, such as a property-line dispute or a case seeking to abate a private nuisance, the relief may be personal to the plaintiffs. But cases brought under the CVRA, such as the Voting Rights Case here, are different. The relief available in CVRA cases is limited to remedying an unlawful election system. (See Elec. Code 14029 ["Upon a

finding of a violation of [the CVRA], the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation."].) All voters have an equal interest in that relief, as recognized by the CVRA's standing provision, Elections Code section 14032: "***Any voter*** who is a member of a protected class and who resides in a political subdivision where a violation of [the CVRA] is alleged may file an action …" (emphasis added).

BreakZone, supra, is particularly instructive in demonstrating how a councilmember's involvement in an underlying dispute, and even being a party to the dispute himself, does not establish a personal interest under the common law doctrine of conflicts of interest. 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 1227-1233; also see 88 Ops.Cal.Atty.Gen.32 (2005) at pp. 8-9.) Rather, Councilmember Walker's interest was the same as that of other Torrance residents – the elimination of the noise and crime they attributed to the pool hall. The *BreakZone* court summed it up: "In this case we consider de novo whether a member of the Torrance City Council may appeal the decision of that city's planning commission to grant a conditional use permit, participate in the public hearing and city council deliberations on the appeal, and vote on that appeal. … We will conclude that the council member was not barred from participation." (*Id.* at 1208-1209.) As in *BreakZone* where Councilmember Walker's role as the appellant did not justify his disqualification, 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, because there is no *personal* interest (for De La Torre or his wife) in the relief sought.

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. (de la Torre Decl. ¶¶ 2-4, 7, 9, 15-16). That was one of the reasons he was elected. (de la Torre Decl. ¶ 9.) 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 decisions 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 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 newly 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."].)[2]

[2] As in its Demurrer, Defendant attempts to insulate its erroneous conflict of interest conclusion, by pointing to its authority, as a charter city, over "municipal affairs." (Motion, p. 7.) But the issue of conflicts of elected officials, even local elected officials, is not a "municipal affair"; it is a "statewide concern." (*County of Sacramento v. Fair Political Practices Com*. (1990) 222 Cal.App.3d 687, 691-692.) Where the "Legislature [has] legislated as to a matter of statewide concern," as the Legislature has done with the issue of conflicts of interest with the PRA and Section 1090, the issue "ceases to be a 'municipal affair' pro tanto." (*City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 254-255.) Charter city authority does not extend to statewide concerns "even in regard to matters which would otherwise be deemed to be strictly municipal affairs". (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600.) Therefore, Defendant's charter city authority over "municipal affairs" has no impact here. In any event, where, as here, a city council's decision is based on an incorrect view of

Unable to distinguish the portion of *BreakZone* addressing common law conflicts – the subject of this case – Defendant misleads. Defendant asserts councilman Walker "was not a real party in interest" (Motion, p. 11, fn. 5), but what Defendant omits is that councilman Walker was the party appealing the planning commission's decision. (*BreakZone*, 81 Cal.App.4th at 1213-1214.) The right to appeal the planning commission's decision was not limited to councilmembers, as Defendant suggests; similar to the CVRA, the appeal of the planning commission's decision in *BreakZone* could be appealed by "any interested person adversely affected." (Torrance Mun. Code §11.5.1, compare Elec. Code 14032.) And, while Defendant focuses on *BreakZone*'s discussion of whether campaign contributions can disqualify a councilmember, Defendant fails to address the *BreakZone* court's holding on the question that court presented for itself – "whether a member of the Torrance City Council may appeal [a] decision …, participate in the public hearing and city council deliberations on the appeal and vote on that appeal." (*BreakZone*, 81 Cal.App.4th at 1208-1209.) The *BreakZone* court answered that question in the affirmative – "We will conclude that the council member was not barred from participation" – because with no personal stake in the outcome, there can be no conflict of interest, even where the council member is himself the appellant. (*BreakZone*, 81 Cal.App.4th at 1209, 1230, 1232 ["the conflict of interest doctrine requires that the official have some interest in the outcome" "The facts of Terry v. Bender reveal that the public official there under scrutiny was alleged to have a direct and personal interest in the contract before that city council. There is no similar allegation in the instant case."].)

C. Without a Personal Interest in the Voting Rights Case, There Is No Conflict of Interest.

Unable to identify any personal interest of De La Torre in the relief sought in the Voting Rights Case, Defendant seeks to shift the focus to his relationships with the plaintiffs and attorneys in that case, and his involvement in the case prior to becoming a councilmember. But none of the authorities cited by

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the law - specifically, here, that a common law conflict can arise based on an official's past involvement in litigation or relationship with the parties to litigation, even in the absence of a personal interest in the relief requested in that litigation – it must be reversed by the courts. (*People v. Knoller* (2007) 41 Cal. 4th 139, 156 ["it is the courts' duty to intervene "if the [tribunal] based its decision on impermissible factors or on an incorrect legal standard."]; *Gabriel P. v. Suedi D*. (2006) 141 Cal. App. 4th 850, 862 [reversal required where a tribunal "transgresses the confines of the applicable principles of law"].) The decision by Defendant's council majority is subject to de novo review by this Court; no deference is owed. (*BreakZone,* 81 Cal.App.4th at 1208-1209 [applying de novo review to finding that councilmember did not have a common law conflict].)

Defendant in its January 2021 staff report, its demurrer, or most recently in its summary judgment motion, support its view that a conflict of interest can exist absent a personal interest in the underlying litigation based on an elected official's involvement in the litigation or relationship with the parties to that litigation.

The authority Defendant's interim city attorney initially cited, and Defendant still relies upon now – 92 Ops.Cal.Atty.Gen. 19 (2009) – involves a clear personal interest. That Attorney General opinion addressed the decision by a redevelopment agency to give a loan to the son of one of the agency's members. (*Id.* at p. 1.) That loan was, of course, a personal benefit to the member's son, not a large group of constituents. Here, a victory (or a settlement) in the Voting Rights Case confers no personal benefit to Ms. Loya or the Pico Neighborhood Association, let alone to Councilmember de la Torre. (de la Torre Decl. ¶¶ 3, 13, 16-18, Ex. F.) Rather, win or lose, Councilmember de la Torre, like his wife, will get nothing more or less than other Santa Monica voters – either an undiluted vote in city council elections, or the continued subjugation of a discriminatory election system. (*Id.*; *Cf.* Gov't Code § 87103; Cal. Code Regs. tit. 2 § 18703.)

Likewise, in *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 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."].) Just like the hypothetical "general opposition to 35-foot buildings" the *Clark* court confirmed would not constitute a personal interest because it would protect many constituents' ocean views, the relief sought in the Voting Rights Case – the elimination of at-large elections – would inure to the benefit of thousands of Santa Monica voters, not just De La Torre. (de la Torre Decl. ¶¶ 2-3, 16, 18).

In *Kimura v. Roberts* (1979) 89 Cal.App.3d 871, heavily (and incorrectly) relied on by Defendant, the court addressed whether the Woodland city council could remove an appointed planning commissioner

who was the wife of one of the council members. The council never suggested that the commissioner's marital relationship with a councilmember resulted in a conflict of interest that legally prohibited her from serving; they reasoned it was a "moral conflict of interest rather than a legal conflict of interest." (*Id.* at 873.) The *Kimura* court upheld the removal of the commissioner because "[t]he law is clear that a planning commissioner serving at the pleasure of the appointing power may be terminated for any reason, without cause, notice or a hearing so long as the reason for removal is not an unconstitutional one." (*Id.* at 874.) The court did not evaluate whether the marital relationship between a commissioner and councilmember resulted in any conflict of interest under the law; the court had no need to. Councilmember de la Torre is not an appointed official serving at the pleasure of the city council; he is an elected member of the council himself. Therefore, the standard the Woodland City Council decided to apply for a "moral conflict of interest" does not supplant the legal standard here. (*Id.* at 873.)[3]

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. Therefore, he has no legally cognizable conflict in addressing the Voting Rights Case, and is entitled to a declaration from this Court.

1. Laws Expressly Applicable to Prosecutors, Judicial Officers and Public Officials Acting in a Quasi-Judicial Capacity, Do Not Apply Here.

Unlike the authorities relied upon in Plaintiffs' moving papers, Defendant's authorities do not address the only three sources of law governing conflicts of interest for elected officials acting in their legislative capacity – the PRA, Section 1090 and the common law doctrine of conflicts of interest.

In *People v. Connor* (1983) 34 Cal.3d 141 and *Schumb v. Superior Court* (2021) 64 Cal.App.5th 973, misleadingly relied on by Defendant, the courts addressed the disqualification of the Santa Clara County District Attorney's office, pursuant to Penal Code section 1424, because "a deputy district attorney who was employed in that office was both a witness to, and arguably a victim of, the criminal conduct" being prosecuted (*Connor* 34 Cal.3d at 144), and two prosecutors in that office, including the elected district attorney, were likely to be fact witnesses in the criminal case (*Schumb* 64 Cal.App.5th at 976.)

[3] Councilmember de la Torre's comments in support of a proposed "anti-nepotism" policy governing who may serve on Santa Monica's commissions are inapposite for the same reason; and, in any event, comments by Councilmember de la Torre are not legal authority.

Councilmember de la Torre is not seeking to prosecute any criminal offense, so neither Penal Code section 1424, nor its unique standard peculiarly suited to criminal prosecution, applies here.[4]

Defendant's citation to judicial ethics canons and cases addressing councilmembers sitting in a quasi-judicial capacity, similarly miss the mark. In *Petrovich Devel. Co., LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963, the court did not address whether a council member had a conflict of interest under any statute or the common law doctrine of conflicts of interest. Rather, the issue was "whether there was a fair trial." (*Id.* at 972.) The *Petrovich* court explained: "City council members wear multiple hats. It is commonly understood that they function as local legislators. But sometimes they act in a quasi-adjudicatory capacity similar to judges. [This] is one of the times that a city council acts in a quasi-adjudicatory capacity. *When functioning in such an adjudicatory capacity*, the city council must be 'neutral and unbiased.'" (*Id.* at 973 (emphasis added).) Similarly, the courts in *Mennig v. City Council* (1978) 86 Cal.App.3d 341 and *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470 never mention the PRA, Section 1090 or the common law doctrine of conflicts of interest. Rather, those cases, just like *Petrovich*, involved adjudicatory decisions made at quasi-judicial hearings – specifically, *Mennig* addressed the police chief's disciplinary hearing (86 Cal.App.3d at 348-349) and *Nasha* addressed a planning commission appeal hearing (125 Cal.App.4th at 475-478). Unlike the statutes and common law doctrine concerning conflicts of interest, the "neutral and unbiased" standard described in *Petrovich* is not applicable to legislative decisions of a city council. (See *Save Civita Because Sudberry Won't v. City of San Diego* (2021) 72 Cal.App.5th 957, 983-984 [distinguishing *Petrovich* because that case is limited to quasi-judicial decisions, and is not applicable to legislative decisions: "The principle" that "[a] decisionmaker must be unbiased" discussed in *Petrovich* "do[es] not apply to quasi-legislative action." (citing cases)].) Council decisions about how to respond to litigation – whether to settle, fight or something entirely different – are legislative, not quasi-judicial. (See *Harris v. DeSoto* (Haw. 1996) 911 P.2d 60, 70-74 [surveying the law of several states: "the power to settle or compromise claims lies exclusively in the legislative branch of municipal government."].) The decision about how to respond to the Voting Rights Case is particularly

[4] The same is true for *People ex rel. Lacey v. Robles* (2020) 44 Cal.App.5th 804, which addressed the issue of incompatible public offices in a *quo warranto* proceeding where there need only be "a possibility" of conflicting duties – not a standard applicable here, because Councilmember de la Torre does not seek to hold two public offices simultaneously. (*Id.* at 811.)

legislative, not quasi-judicial, because of the broad policy effect that decision has on both the city's coffers and elections; that decision requires no hearing, so Defendant's "fair hearing" cases are inapposite.

Plaintiffs agree with the principle stated in *Mennig*: "those with a substantial pecuniary interest in legal proceedings should not adjudicate these disputes." (86 Cal.App.3d at 350-351.) Councilmember de la Torre does not seek to be the judge in the Voting Rights Case or otherwise adjudicate that case – that role is already filled by Hon. Yvette Palazuelos, and now the justices of the California Supreme Court. It would be unlawful for *any* of the councilmembers to be the judge in the Voting Rights Case. Rather, Councilmember de la Torre seeks to participate in the continuing decisions on how the City should handle the Voting Rights Case – continue to waste tax dollars fighting that lawsuit when those funds could be better spent on public safety, or seek to resolve the case amicably so the community can begin to heal from the divisive years-long fight prompted by Councilmember de la Torre's predecessors. That is a legislative decision with far-reaching effect on the city's budget and elections, not a quasi-judicial decision, which Santa Monica voters elected Councilmember de la Torre to make.

2. Defendant's Other "Authorities" Are Not Authority At All.

Lacking any legal authority supporting its view that "relationships" and "enmeshment" can suffice for a conflict of interest even in the absence of a personal interest, Defendant instead relies on the declaration of its purported expert, Frank Zerunyan, citing his declaration throughout its opposition as if that declaration were precedential legal authority. Mr. Zerunyan's opinions are no substitute for legal authority; they are not authority at all because expert witnesses are not permitted to usurp the role of the court by opining on the law. (See, e.g., *Summers v. A.L. Gilbert Co*. (1999) 69 Cal. App. 4th 1155, 1179-1181 ["allowing an expert to voice an opinion on an issue of law usurps the authority of the court."].)

Nor is the opinion of the Los Angeles City Attorney an authority in this case. LAC Op. No. 2005:3, which Defendant discusses extensively, expressly found no conflict under state law (in circumstances very similar to those presented in this case), and instead relied entirely on LA City Charter §222, which gives the elected city attorney of Los Angeles the power to disqualify any unelected board member if the city attorney feels it is "in the public interest." The Los Angeles city charter does not apply to Santa Monica, and Santa Monica has no similar provision in its charter; nor would LA City Charter §222

apply even if this case concerned Los Angeles rather than Santa Monica because Councilmember de la Torre is an elected councilmember not an unelected board member.

Statements by Councilmember de la Torre regarding unrelated matters, taken out of context, are also not a substitute for legal authority. Far from supporting Defendant's view that relationships alone, with no personal interest, can result in a common law conflict, Defendant's mention of Councilmember de la Torre's voluntary recusal from addressing sex abuse cases against Defendant, thus forcing Councilmember de la Torre to reveal here that a member of his family was molested by Defendant's employee, demonstrates the depths to which Defendant will go to silence Councilmember de la Torre.

D. Defendant Was Right to Disclaim Any Contention of a Financial Conflict; Councilmember de la Torre Has None.

Perhaps because the FPPC concluded there is no financial conflict here (de la Torre Decl. Ex. F), Defendant has repeatedly conceded that Councilmember de la Torre has no financial conflict. (See, e.g. Defendant's Demurrer to Second Amended Complaint, p. 23 ["Plaintiff de la Torre's conflicts here are not financial."]; Defendant's Reply in Support of Demurrer to First Amended Complaint, p. 8 ["Simply put, whether Plaintiff has a financial conflict of interest is not at issue. The sole basis for the Council's decision to disqualify Plaintiff … was because he has a common law conflict of interest."].) Those statements in Defendant's briefs foreclose Defendant from reversing course and arguing that Councilmember de la Torre has a financial conflict. (See *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152 ["[B]riefs and arguments … are reliable indications of a party's position on the facts as well as the law, and a [] court may make use of statements therein as admissions against the party."].) Defendant nonetheless attempts to now argue that Councilmember de la Torre has a financial conflict. Regardless, Defendant was right to disclaim any contention of a financial conflict; what Defendant now claims in its last-gasp effort, does not amount to a financial conflict.

Defendant claims that Kevin Shenkman provided Councilmember de la Torre with legal advice concerning Defendant's effort to exclude him, and that advice constitutes a gift of more than $520. (Motion, pp. 14-16.) In other words, according to Defendant, by excluding Councilmember de la Torre, which forced him to sue Defendant, and dragging Mr. Shenkman into this case by seeking documents from his firm and taking his deposition, Defendant was able to manufacture a financial conflict where none existed before, and thus justify its otherwise unlawful exclusion of Councilmember de la Torre.

Defendant's perverse theory fails for several reasons. First, Mr. Shenkman's advice is expressly excluded from the definition of "gift." Specifically, the advice provided to Councilmember de la Torre related to how to address the attempt by Defendant to keep Councilmember de la Torre from performing his duties as a councilmember. (Silberberg Decl. Ex. 14, p. 13 [supplemental response to special interrogatory no. 8].) Therefore, pursuant to the "informational material" exception, that advice is "neither [a] gift[] nor income" even if it would "otherwise meet the definition of gift." (Code Regs., tit. 2 §§ 18942(a)(1), 18942.1 [defining "information material" to include any "service that serves primarily to convey information and that is provided to the official for the purpose of assisting the official in the performance of official duties … ."]; see also FPPC Adv. I-94-147 (1994) ["Because the [free] legal services were related to your position as a member of the Half Moon Bay Redevelopment Agency and not to personal matters unrelated to your status as an officeholder, the services would not be reportable on your statement of economic interests."].) Second, Mr. Shenkman's advice was not a gift; it was incidental to Mr. Shenkman's consultation and pre-filing investigation in contemplation of potentially representing Councilmember de la Torre in this case in which Mr. Shenkman could recover an award of attorneys' fees at the conclusion of the case. (Shenkman Decl. ¶¶ 6-8.) Ultimately, Mr. Shenkman and Councilmember de la Torre decided it would be better if Councilmember de la Torre secured other counsel to pursue this case, but that does not change the nature of those initial discussions. (*Id*.) The time spent by Mr. Shenkman over a few days was no more a gift of free legal services than the initial consultations and investigations routinely offered by contingency attorneys in contemplation of potential cases. Finally, even if Mr. Shenkman's advice to Mr. de la Torre could be construed as a "gift" of more than $520, it still would not result in a conflict now because that advice was provided, according to Defendant, in "December 2020 and January 2021" (Motion, p. 15) – more than twelve months ago. (See Gov't Code § 87103 [prohibition of elected official in participating in decision affecting source of gift is limited to where the gift is "provided or promised to, received by, the public official within 12 months prior to the time when the decision is made."]; Code Regs., tit. 2 § 18700(c)(6)(E) [same].)[5]

[5] To support its argument, Defendant purports to quote from FPPC Adv. I-95-287. However, FPPC Adv. I-95-287 concerns the revolving-door provisions of the Department of Forestry, not anything even remotely relevant to this case, and the quotes Defendant includes in its brief are nowhere to be found in FPPC Adv. I-95-287. For the court's convenience, a copy of FPPC Adv. I-95-287 is attached as Exhibit F to the declaration of Mr. Trivino-Perez.

Defendant's other attempt to conjure up a financial conflict fares no better. Defendant claims "[a] settlement in the CVRA Action ***could*** lead to new customers and raise [the] prestige" of Ms. Loya's business, Holistic Strategies. (Motion, p. 17 (emphasis added).) Defendant reasons that success in the Voting Rights Case might raise Ms. Loya's profile, which might attract some unidentified and as yet unknown customers to contract with Holistic Strategies, even though it is the attorneys and experts in the Voting Rights Case, not Ms. Loya or Holistic Strategies, who would be responsible for the success in the Voting Rights Case. That sort of speculation is insufficient to raise the specter of a financial conflict. Rather, for a conflict to exist, the government decision must "have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or the official's immediate family … ." (Code Regs., tit. 2 §18700(a).) If "the occurrence of the financial effect is contingent upon intervening events," or is a mere possibility, it is unlikely there is any conflict. (Code Regs., tit. 2 §18701(b)(1); *In re Thorner* (1975) 1 FPPC Ops. 198 ["although it is conceivable that lifting the moratorium will have a material financial effect …, we do not believe such an effect is reasonably foreseeable."].) It is no wonder then that the FPPC, in concluding that Councilmember de la Torre does not have a conflict of interest in the Voting Rights Case, refused to go down the rabbit holes suggested by Defendant's interim city attorney concerning, for example, what terms could possibly be included in a settlement of the Voting Rights Case. (de la Torre Decl. Exs. C, F.) Holistic Strategies currently has one client – a horseracing industry group – that has no connection to voting rights; Holistic Strategies has never done any work related to voting rights; it is exceptionally unlikely that any outcome of the Voting Rights Case will have any effect on its business. (Trivino-Perez Decl. Ex. D [Loya Depo. 81:2-15]).[6]

IV. PLAINTIFFS HAVE STANDING

To assert their claims, only one plaintiff must have standing with respect to each claim. (*Rumsfeld v. Forum for Academic and Institutional Rights* (2006) 547 U.S. 47, 53 fn. 2 [declining to consider the standing of other plaintiffs because "the presence of one party with standing is sufficient to satisfy Article

[6] This is in stark contrast to 86 Ops.Cal.Atty.Gen. 138 (2003), which addressed the peculiar circumstance of a city retaining *pro bono* "a law firm, of which a city council member is a partner," and was concerned with "circumstances [in which] the city's interests and the firm's interests might diverge," and "give rise to potentially significant cost concerns affecting the economic well being of the firm." (*Id.* at pp. 1, 4.) Only when "coupled with the[se] potential losses," did the Attorney General find potential "prestige, publicity and goodwill" for the firm to result in a financial interest. (*Id.* at p. 4.) Here, of course, any such prestige, publicity or goodwill would inure to the attorneys in the Voting Rights Case who prosecuted the case, not Holistic Strategies.

III's case-or-controversy requirement."].) Defendant challenges Serna's standing, but not de la Torre's standing, to assert the declaratory relief claim (Motion, pp. 17-18); and challenges de la Torre's standing, but not Serna's standing, to assert the Brown Act claim in a footnote (Motion, p. 20). Since at least de la Torre has standing on the declaratory relief claim, and at least Serna has standing on the Brown Act claim, there is no need for this Court to consider the complicated and academic issue of whether other plaintiffs also have standing on these claims.

If this Court were nonetheless inclined to entertain Defenant's sideshow, De La Torre has standing on both causes of action for all of the reasons already stated in this Court's July 23, 2021 ruling, and re-affirmed in this Court's September 30, 2021 ruling. For the sake of brevity, those reasons are not duplicated here. Likewise, Serna, like any other interested citizen of Santa Monica, has standing to compel Defendant to comply with the law – the object of this case. (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 439-441 [To establish standing in a case seeking to compel a public agency to comply with the law, plaintiffs must only have a "sufficient interest in the subject matter of the dispute to press their case with vigor."].) Serna has a sufficient interest to press this case with vigor. (Serna Decl. ¶ 2.) Even the federal case Defendant cites, recognizes that the federal courts, with stricter standing requirements than California's state courts, have granted voter standing in claims asserting that the exclusion of an elected official denies that voter effective representation, as long as the elected official being excluded is also a party. (See, e.g. *Kucinich v. Forbes* (N.D. Ohio 1977) 432 F.Supp. 1101, 1116 fn. 23 ["Dennis Kucinich has standing to raise the issue of his loss of representation" from the suspension of Gary Kucinich from the city council].)

V. THE REMAINDER OF DEFENDANT'S ARGUMENTS ALL DEPEND ON ITS ERRONEOUS VIEW THAT COUNCILMEMBER DE LA TORRE HAS A CONFLICT OF INTEREST IN THE VOTING RIGHTS CASE.

Because Councilmember de la Torre does not have a disqualifying conflict of interest, he is entitled to declaratory relief. It follows from the lack of a conflict of interest, that Defendant cannot lawfully exclude Councilmember de la Torre from doing what he was elected to do. Nor should any unidentified unforeseeable "future actions," which Defendant doesn't even attempt to posit (see Motion, pp. 6-7), stop this Court from resolving this case based on the present facts. (See *Cmtys. for a Better Env't v. State Energy Res. Conservation & Dev. Comm'n* (2017) 19 Cal.App.5th 725, 739 ["the ripeness requirement

should not operate in this case to prevent the trial court from resolving the concrete dispute before it, given that the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question."].)

Similarly, because Councilmember de la Torre does not have a disqualifying conflict of interest, excluding him from closed session meetings is a violation of the Brown Act, and he is entitled to an injunction prohibiting Defendant from continuing to hold closed session meetings while excluding him, as Defendant has threatened.[7] That does not mean, as Defendant caricatures, all councilmembers must attend every closed session, just that such closed sessions be accessible to all of them – a conclusion perfectly consistent with the Brown Act's purpose of promoting openness and limiting closed meetings.

VI. CONCLUSION

Mr. de la Torre was elected to change the course of how the previous council decided to handle the Voting Rights Case. That is a legislative policy decision on which Councilmember de la Torre, an elected city council member with no "personal interest" in the relief sought in the Voting Rights Case, is entitled to have his voice heard. As this Court previously explained, excluding him from that decision thwarts the political process. Defendant's motion should be denied.

DATED: April 13, 2022

Respectfully submitted:
TRIVINO-PEREZ & ASSOCIATES

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

[7] The Brown Act does not permit a closed session accessible to just a majority of the members of a legislative body rather than all the members. (See Gov't Code § 54953 [with only specified exceptions, "all persons shall be permitted to attend" meetings of all or a majority of any city council]; Gov't Code § 54956.9 ["a legislative body of a local agency," but not just a majority of a legislative body, may "hold[] a closed session to confer [regarding] pending litigation."]) The litigation exception of the Brown Act, which permits a "closed session to confer regarding pending litigation" applies to meetings of "a legislative body of a local agency," not to meetings accessible to just a majority of the legislative body of a local agency. (Gov't Code § 54956.9.) Where the Legislature wanted to refer in the Brown Act to "a majority … of the members of a legislative body" rather than the entire legislative body, the Legislature did exactly that explicitly. (See, e.g., Government Code §§ 54952.2, 54952.6 and 54957.5.) The litigation exception cannot, as Defendant would prefer, be interpreted broadly to suit its policy goals to allow only its favored city council members to attend closed sessions; if Defendant disagrees, it should take it up with the Legislature. (See, *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917 ["Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly."]; 71 Ops.Cal.Atty.Gen. 96 (1988) ["Litigation exceptions to the Ralph M. Brown Act's open meeting requirements must be strictly construed … If there is to be any change [to allow closed sessions], it is one for the Legislature to make."]; see also Cal. Const. Art. 1, section 3(b)(2) [added by Proposition 59 in 2004, requiring Brown Act exceptions to open meeting requirement to be construed narrowly].)