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Gov. Code, § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION; and MARIA LOYA,

Plaintiffs,

v.

CITY OF SANTA MONICA,

Defendant.

CASE NO. BC616804

DECLARATION OF KAHN A. SCOLNICK IN SUPPORT OF DEFENDANT CITY OF SANTA MONICA'S OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION TO ADVANCE HEARING DATE ON MOTION TO RE-ISSUE JUDGMENT

Date: June 27, 2024
Time: 8:30 a.m.
Dept: 16
Judge: Hon. Steve Cochran

Complaint Filed: April 12, 2016

DECLARATION OF KAHN A. SCOLNICK

I, Kahn A. Scolnick, declare as follows:

I am a partner with the law firm Gibson Dunn & Crutcher, LLP, counsel for the City of Santa Monica in this case. I am authorized to practice law in the State of California and submit this declaration in support of the City's opposition to plaintiffs' ex parte application to advance the hearing date on their motion to "re-issue judgment." The following matters are based upon my personal knowledge, and if called to testify to such facts, I could and would do so competently.

1. Attached as Exhibit A is a true and correct copy of the statement of decision dated February 13, 2019.

2. Attached as Exhibit B is a true and correct copy of the Court of Appeal's decision in this case, which was issued on July 9, 2020.

3. Attached as Exhibit C is a true and correct copy of the Court of Appeal's order calling for supplemental briefing, dated October 6, 2023.

4. Attached as Exhibit D is a true and correct copy of the Court of Appeal's order remanding this case to this Court, dated February 9, 2024.

5. Attached as Exhibit E is a true and correct copy of the remittitur, which was issued on April 15, 2024.

6. Attached as Exhibit F is a true and correct copy of the City's petition for a writ of supersedeas, dated March 8, 2019.

7. Attached as Exhibit G is a true and correct copy of the Court of Appeal's order granting the City's petition for a writ of supersedeas, dated March 27, 2019.

8. Attached as Exhibit G is a true and correct copy of an email I sent on the evening of June 25, 2024, to counsel for plaintiffs responding to the question whether the City would oppose this ex parte application.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct. I received no response to that email.

Executed this 26th day of June, 2024.

Kahn A. Scolnick

PROOF OF SERVICE

I, Daniel R. Adler, declare:

I am employed in the County of Los Angeles, State of California. My business address is 333 South Grand Avenue, Los Angeles, California 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

On June 26, 2024, I served

DECLARATION OF KAHN A. SCOLNICK IN SUPPORRT OF DEFENDANT CITY OF SANTA MONICA'S OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION TO ADVANCE HEARING DATE ON MOTION TO RE-ISSUE JUDGMENT

on the interested parties in this action by causing the service delivery of the above document as follows:

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☑ **BY MAIL**: I caused a true copy to be placed in sealed envelopes addressed as indicated above, on the above-mentioned date. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☑ **BY ELECTRONIC SERVICE**: I also caused the documents to be emailed to the persons at the electronic service addresses listed above.

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

Executed on June 26, 2024.

Daniel Adler

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION, et al. Plaintiffs, vs. CITY OF SANTA MONICA, Defendant.	Case No.: BC616804 STATEMENT OF DECISION

Pursuant to CCP §632, the Court issues the following Statement of Decision in support of its Judgment after court trial:

INTRODUCTION

1. Plaintiffs' Pico Neighborhood Association ("PNA"), Maria Loya ("Loya"), filed a First Amended Complaint alleging two causes of action: 1) Violation of the California Voting Rights

Act of 2001 ("CVRA"); and 2) Violation of the Equal Protection Clause of the California Constitution ("Equal Protection Clause").

2. Defendants answered the Complaint denying each of the foregoing allegations and raising certain affirmative defenses.

3. The action was tried before the Court on August 1, 2018 through September 13, 2018. After considering written closing briefs, the Court issued its Tentative Decision on November 8, 2018, finding in favor of Plaintiffs on both causes of action.

4. On November 15, 2018, Defendant requested a statement of decision.

5. The parties submitted further briefing regarding proposed remedies, and on December 7, 2018 a hearing was held on the issue of remedies. On December 12, 2018 the Court issued its Amended Tentative Decision again finding in favor of Plaintiffs on both causes of action. Defendant again requested a statement of decision.

THE CALIFORNIA VOTING RIGHTS ACT

6. "At-large" voting is an election method that permits voters of an entire jurisdiction to elect candidates to the seats of its governing board and which permits a plurality of voters to capture all of the available seats. Sanchez v. City of Modesto (2006) 145 Cal.App.4th 660. 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. Thornburg v. Gingles (1986) 478 U.S. 30, 46-47; see also id. at 48, n. 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. In at-large elections, "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." Gingles, supra, at 47.

7. Section 2 of the federal Voting Rights Act ("FVRA"), 52 U.S.C. § 10101, et seq., targets, among other things, discriminatory at-large election schemes. Gingles, supra, 478 U.S. at 37. By enacting the CVRA, the California "Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act of 1965." Jauregui v. City of Palmdale (2014) 226 Cal.App.4th 781, 808. The CVRA "was enacted to implement the equal protection and voting guarantees of article I, section 7, subdivision (a) and article II, section 2" of the California Constitution. Id. at 793, citing § 14031[1].

8. "Section 14027 [of the CVRA] sets forth the circumstances where an at-large electoral system may not be imposed ...: 'An at-large method of election may not be imposed or applied in a

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[1] Statutory citations are to the California Elections Code, unless otherwise indicated.

manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.'" Id., citing Sanchez, supra, 145 Cal.App.4th at 669. Section 14028 of the CVRA provides more clarity on how a violation of the CVRA is established: "A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision."

9. "Section 14026, subdivision (e) defines racially polarized voting thusly: 'Racially polarized voting means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act ([52 U.S.C. Sec. 10301 et seq.]), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." Jauregui, supra, 226 Cal.App.4th at 793.

10. "Proof of racially polarized voting patterns are established by examining voting results of elections where at least one candidate is a member of a protected class; elections

involving ballot measures; or other 'electoral choices that affect the rights and privileges' of protected class members." Jauregui, supra, 226 Cal.App.4th at 793 citing § 14028 subd. (b). Racially polarized voting can be shown through quantitative statistical evidence, using the methods approved in federal Voting Rights Act cases. Id. at 794, quoting § 14026, subd. (e). ("The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act [52 U.S.C. Sec. 10301 et seq.] to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.") Additionally, "[t]here are a variety of [other] factors a court may consider in determining whether an at-large electoral system impairs a protected class's ability to elect candidates or otherwise dilute their voting power," including "the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action" (§ 14028, subd. (b)) and the qualitative factors listed in Section 14028 subd.

(e) which "are probative, but not necessary factors to establish a violation of [the CVRA]".[2] Ibid. at 794.

11. Equally important to an understanding of the CVRA is what the CVRA directs the Court to consider in acknowledging what need not be shown to establish a violation of the CVRA. While the CVRA is similar to the FVRA in several respects, it is also different in several key respects, as the Legislature sought to remedy what it considered "restrictive interpretations given to the federal act." Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, at 2. For example: a) Unlike the FVRA, to establish a violation of the CVRA, plaintiffs need not show that a "majority-minority" district can be drawn. § 14028, subd. (c); Sanchez, supra, 145 Cal.App.4th at 669; b) Likewise, the factors enumerated in section 14028 subd. (e), which are modeled on, but also differ from, the FVRA's "Senate factors," are "not necessary [] to establish a violation." § 14028, subd. (e); and c) "[P]roof of an intent to discriminate is [also] not an element of a

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[2] Section 14028 subd. (e) provides: "Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section."

violation of [the CVRA]." Jauregui, supra, 226 Cal.App.4th at 794, citing § 14028, subd. (d).

12. The appellate courts that have addressed the CVRA have noted that showing racially polarized voting establishes the at-large election system dilutes minority votes and therefore violates the CVRA. Rey v. Madera Unified School Dist. (2012) 203 Cal.App.4th 1223, 1229 ("To prove a CVRA violation, the plaintiffs must show that the voting was racially polarized. However, they do not need to either show that members of a protected class live in a geographically compact area or demonstrate a discriminatory intent on the part of voters or officials."); Jauregui, supra, 226 Cal.App.4th at 798 ("The trial court's unquestioned findings [concerning racially polarized voting] demonstrate that defendant's at-large system dilutes the votes of Latino and African American voters."); see also Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, at 2 (The CVRA "addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity.")

13. The key element under the CVRA—"racially polarized voting"—consists of two interrelated elements: (1) "the minority group . . . is politically cohesive[;]" and (2) "the White majority votes sufficiently as a bloc to enable it—in the absence of

special circumstances—usually to defeat the minority's preferred candidate." Gomez v. City of Watsonville (9th Cir. 1988) 863 F.2d 1407, 1413, quoting Gingles, supra, 478 U.S. at 50-51. It is the combination of plurality-winner at-large elections and racially polarized voting that yields the harm the CVRA is intended to combat. Jauregui, supra, 226 Cal.App.4th at 789 (describing how vote dilution is proven in FVRA cases and how vote dilution is differently proven in CVRA cases). To an even greater extent than the FVRA, the CVRA expressly directs the courts, in analyzing "elections for members of the governing body of the [defendant]" to focus on those "elections in which at least one candidate is a member of a protected class." § 14028, subds. (a), (b).

14. Once liability is established under the CVRA, the Court has a broad range of remedies from which to choose in order to provide greater electoral opportunity, including both district and non-district solutions. § 14029; Sanchez, supra, 145 Cal.App.4th at 670; Jauregui, supra, 226 Cal.App.4th at 808 ("The Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act. It is incongruous to intend this expansion of vote dilution liability but then constrict the available remedies in the electoral context to less than those in the Voting Rights Act. The Legislature did not intend such an odd result.")

15. In light of the broad range of remedies available to the Court, a plaintiff need not demonstrate the desirability of any particular remedy to establish a violation of the CVRA. § 14028, subd. (a); Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 ("Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown.")

Defendant's "At Large" Elections[3] Are Consistently Plagued By Racially Polarized Voting

16. The CVRA defines "racially polarized voting" as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. § 1973 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." § 14026, subd. (e).

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[3] The CVRA defines "[a]t-large method of election" as including any method" in which the voters of the entire jurisdiction elect the members to the governing body." § 14026 subd. (a). Though the parties did not stipulate to this element, Defendant has never disputed that it employs an at-large method of electing its city council. The CVRA explicitly grants standing to "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." (§ 14032). Though the parties did not stipulate to this element, Defendant has never disputed that Plaintiffs Maria Loya and Pico Neighborhood Association have standing.

17. The federal jurisprudence regarding "racially polarized voting" over the past thirty-two years finds its roots in Justice Brennan's decision in Gingles, and in particular, the second and third "Gingles factors." Justice Brennan explained that racially polarized voting is tested by two criteria: (1) the minority group is politically cohesive; and (2) the majority group votes sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidates. Gingles, supra, 478 U.S. at 30, 51.

18. A minority group is politically cohesive where it supports its preferred choices to a significantly greater degree than the majority group supports those same choices; in elections for office (as opposed to ballot measures), the CVRA focuses on elections in which at least one candidate is a member of the protected class of interest (§ 14028(b)), because those elections usually offer the most probative test of whether voting patterns are racially polarized. Gomez, supra, 863 F. 2d at 1416 ("The district court expressly found that predominantly Hispanic sections of Watsonville have, in actual elections, demonstrated near unanimous support for Hispanic candidates. This establishes the requisite political cohesion of the minority group.") The extent of majority "bloc voting" sufficient to show racially polarized voting is that which

allows the White majority to "usually defeat the minority group's preferred candidate." Ibid.

19. As Justice Brennan explained, it is through establishment of this element that impairment is shown—i.e. that the "at-large method of election [is] imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." § 14027; Gingles, supra, 478 U.S. at 51 ("In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.")

20. Gingles also set forth appropriate methods of identifying racially polarized voting; since individual ballots are not identified by race, race must be imputed through ecological demographic and political data. The long-approved method of ecological regression ("ER") yields statistical power to determine if there is racially polarized voting if there are not a sufficient number of racially homogenous precincts (90% or more of the precinct is of one particular ethnicity). Benavidez v. City of Irving (N.D. Tex. 2009) 638 F.Supp.2d 709, 723 ("HPA [homogenous precinct analysis] and ER [ecological regression] were both approved in Gingles and have been utilized by numerous courts in Voting Rights Act cases.") The CVRA expressly adopts methods like ER that have been used in federal Voting Rights Act

cases to demonstrate racially polarized voting. § 14026, subd. (e) ("The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.")

21. At trial, Plaintiffs and Defendant offered the statistical analyses of their respective experts - Dr. J. Morgan Kousser and Dr. Jeffrey Lewis, respectively. Though the details and methods of their respective analyses differed in minor ways, the analyses by Plaintiffs' and Defendant's experts reveal the same thing – Santa Monica elections that are legally relevant under the CVRA are racially polarized.[4] Analyzing elections over the past twenty-four years, a consistent pattern of racially-polarized voting emerges. In most elections where the choice is available, Latino voters strongly prefer a Latino candidate running for Defendant's city council, but, despite that support, the preferred Latino candidate loses. As a result, though

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[4] Dr. Kousser opined that his analysis demonstrates racially polarized voting. Though he had done so in other cases, Dr. Lewis reached no conclusions about racially polarized voting in this case, and declined to opine about whether his analysis demonstrated racially polarized voting. Another of Plaintiffs' experts, Justin Levitt, evaluated the results of Dr. Lewis' statistical analyses, and concluded, like Dr. Kousser, that all of the relevant elections evaluated by Dr. Lewis exhibit racially polarized voting, including in some instances racial polarization that is so "stark" that it is similar to the polarization "in the late '60s in the Deep South."

Latino candidates are generally preferred by the Latino electorate in Santa Monica, only one Latino has been elected to the Santa Monica City Council in the 72 years of the current election system - 1 out of 71 to serve on the city council.

22. Dr. Kousser, a Caltech professor who has testified in many voting rights cases spanning more than 40 years, analyzed the elections specified by the CVRA: "elections for members of the governing body of the political subdivision . . . in which at least one candidate is a member of a protected class." § 14028 subds. (a), (b). The CVRA's focus on elections involving minority candidates is consistent with the view of a majority of federal circuit courts that racially-contested elections are most probative of an electorate's tendencies with respect to racially polarized voting.[5]

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[5] U.S. v. Blaine Cty., Mont. (9th Cir. 2004) 363 F.3d 897, 911 (rejecting defendant's argument that trial court must give weight to elections involving no minority candidates); Ruiz v. City of Santa Maria (9th Cir. 1998) 160 F.3d 543, 553 ("minority v. non-minority election is more probative of racially polarized voting than a non-minority v. non-minority election" because "[t]he Act means more than securing minority voters' opportunity to elect whites."); Westwego Citizens for Better Gov't v. City of Westwego (5th Cir.1991) 946 F.2d 1109, 1119, n. 15 ("[T]he evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates."); League of United Latin Am. Citizens, Council No. 4434 v. Clements (5th Cir. en banc 1993) 999 F.2d 831, 864 ("This court has consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates . . . ."); Citizens for a Better Gretna v. City of Gretna, La. (5th Cir.1987) 834 F.2d 496, 502 ("That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference [for a black candidate]."); Jenkins v. Red Clay Consol. School Dist. Bd. of Educ. (3d Cir. 1993) 4 F.3d 1103, 1128-1129 ("The defendants also argue that the plaintiffs may not selectively choose which elections to analyze, but rather must analyze all the elections, including those involving only white candidates. It is only on the basis of such a comprehensive

23. In those elections, Dr. Kousser focused on the level of support for minority candidates from minority voters and majority voters respectively, just as the Court in Gingles, and many lower courts since then, have done. Gingles, supra, 478 U.S. at 58-61 ("We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard."); Id. at 81 (Appendix A - providing Dr. Grofman's ecological regression estimates for support for Black candidates from, respectively, White and Black voters); see also, e.g., Garza v. Cnty. of Los Angeles (C.D. Cal. 1990) 756 F. Supp. 1298, 1335-37, aff'd, 918 F.2d 763 (9th Cir. 1990) (summarizing the bases on which the court found racially polarized voting: "The results of the ecological regression analyses demonstrated that for all elections analyzed, Hispanic voters generally preferred Hispanic candidates over non-Hispanic candidates. … Of the elections analyzed by plaintiffs' experts non-Hispanic voters provided majority support for the Hispanic candidates in only three elections, all partisan general election contests in which party

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analysis, the defendants submit, that the court is able to evaluate whether or not there is a pattern of white bloc voting that usually defeats the minority voters' candidate of choice. We disagree.")

affiliation often influences the behavior of voters"); Benavidez v. Irving Indep. Sch. Dist. (N.D. Tex. 2014) 2014 WL 4055366, *11-12 (finding racially polarized voting based on Dr. Engstrom's analysis which the court described as follows: "Dr. Engstrom then conducted a statistical analysis … to estimate the percentage of Hispanic and non-Hispanic voters who voted for the Hispanic candidate in each election. … Based on this analysis, Dr. Engstrom opined that voting in Irving ISD trustee elections is racially polarized.")

24. In its closing brief, Defendant argued that the Supreme Court in Gingles held that the race of a candidate is "irrelevant," but what Defendant fails to recognize is that the portion of Gingles it relies upon did not command a majority of the Court, and Defendant's reading of Gingles has been rejected by federal circuit courts in favor of a more practical race-sensitive analysis. Ruiz v. City of Santa Maria, supra, 160 F.3d at 550-53 (collecting other cases rejecting Defendant's view and noting that "non-minority elections do not provide minority voters with the choice of a minority candidate and thus do not fully demonstrate the degree of racially polarized voting in the community.") To the extent there is any doubt about whether the race of a candidate impacts the analysis in FVRA cases, there can be no doubt under the CVRA; the statutory language mandates a focus on elections involving minority

candidates. §14028 subd.(b) ("The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class … One circumstance that may be considered … is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class … have been elected to the governing body of the political subdivision that is the subject of an action …"). In this analysis, it is not that minority support for minority candidates is presumed; to the contrary, it must be demonstrated. But both the CVRA and federal case law recognize that the most probative test for minority voter support and cohesion usually involves an election with the option of a minority candidate.

25. Dr. Kousser provided the details of his analysis, and concluded those elections demonstrate legally significant racially polarized voting.[6] Specifically, Dr. Kousser evaluated the 7 elections for Santa Monica City Council between 1994 and 2016 that involved at least one Spanish-surnamed candidate[7] and

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[6] Dr. Kousser presented his analyses using unweighted ER, weighted ER and ecological inference ("EI"). Dr. Kousser explained that, of these three statistical methods, weighted ER is preferable in this case. Dr. Kousser's conclusions were the same for each of these three methods, so, for the sake of brevity, only his weighted ER analysis is duplicated here.

[7] One of Defendant's city council members, Gleam Davis, testified that she considers herself Latina because her biological father was of Hispanic descent (she was adopted at an early age by non-Hispanic white parents).

provided both the point estimates of group support for each candidate as well as the corresponding statistical errors (in parentheses in the charts below):

Weighted Ecological Regression[8]

Year	Latino Candidate(s)	% Latino Support	% Non-Hispanic White Support	Polarized	Won?
1994	Vazquez	145.5 (28.0)	34.9 (1.9)	Yes	No
1996	Alvarez	22.2 (12.9)	15.8 (1.1)	No	No
2002	Aranda	82.6 (12.6)	16.5 (1.3)	Yes	No
2004	Loya	106.0 (12.3)	21.2 (2.0)	Yes	No
2008	Piera-Avila	33.3 (5.2)	5.7 (0.8)	Yes	No

Though that may be true, the Santa Monica electorate does not recognize her as Latina, as demonstrated by the telephone survey of registered voters conducted by Jonathan Brown; even her fellow council members did not realize she considered herself to be Latina until after the present case was filed. Consistent with the purpose of considering the race of a candidate in assessing racially polarized voting, it is the electorate's perception that matters, not the unknown self-identification of a candidate. Paragraph 24 herein.

[8] Because each voter could cast votes for up to three or four candidates in a particular election, Prof. Kousser estimated the portion of voters, from each ethnic group, who cast at least one vote for each candidate.

2012	Vazquez Gomez Duron	92.7 (9.0) 30.4 (3.3) 5.0 (2.6)	19.1 (2.0) 2.9 (0.7) 4.4 (0.6)	Yes Yes No	Yes No No
2016	de la Torre Vazquez	88.0 (6.0) 78.3 (9.0)	12.9 (1.5) 36.6 (2.3)	Yes Yes	No Yes

26. Non-Hispanic Whites voted statistically significantly differently from Latinos in 6 of the 7 elections. The ecological regression analyses of these elections also reveals that when Latino candidates run for the Santa Monica City Council, Latino voters cohesively support those Latino candidates - in all but one of those six elections, a Latino candidate received the most Latino votes, often by a large margin. And in all but one of those six elections, the Latino candidate most favored by Latino voters lost, making the racially polarized voting legally significant. Gingles, supra, 478 U.S. at 56 ("in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting.") Even in that one instance (2012 - Tony

Vazquez), the Latino candidate who won came in fourth in a four-seat race in that unusual election, in which none of the incumbents who had won four years earlier sought re-election. Id. at 57, fn. 26 ("Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest. This list of special circumstances is illustrative, not exclusive.")

27. In summary, Dr. Kousser's analysis revealed:

- In 1994, Latino voters heavily favored the lone Latino candidate – Tony Vazquez - but he lost.
- In 2002, the lone Latina candidate and resident of the Pico Neighborhood – Josefina Aranda – was heavily favored by Latino voters, but she lost.
- In 2004, the lone Latina candidate and resident of the Pico Neighborhood – Maria Loya – was heavily favored by Latino voters, but she lost.

- In 2008, the lone Latina candidate and resident of the Pico Neighborhood – Linda Piera-Avila – received significant support from Latino voters.[9]

- In 2012, two incumbents – Richard Bloom and Bobby Shriver - decided not to run for re-election, and the two other incumbents who had prevailed in 2008 - Ken Genser and Herb Katz - died during their 2008-12 terms. The leading Latino candidate – Tony Vazquez – was heavily favored by Latino voters but did not receive nearly as much support from non-Hispanic White voters. He was able to eke out a victory, coming in fourth place in this four-seat race.

- Finally, in 2016, a race for four city council positions, Oscar de la Torre – a Latino resident of the Pico Neighborhood – was heavily favored by Latinos, but lost. In 2016, Mr. de la Torre received more support from Latinos than did Mr. Vazquez. This is the prototypical illustration of legally significant racially polarized voting - Latino voters favor Latino candidates, but non-Latino voters vote against those candidates, and therefore the favored candidates of the Latino community

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[9] At trial, Dr. Kousser explained that even though Ms. Piera-Avila did not receive support from a majority of Latinos, the contrast between the levels of support she received from Latinos and non-Hispanic whites, respectively, nonetheless demonstrate racially polarized voting, just as the Gingles court found very similar levels of support for Mr. Norman in the 1978 and 1980 North Carolina House races to likewise be consistent with a finding of racially polarized voting. Gingles, supra, 478 U.S. at 81, Appx. A.

lose. Gingles, supra, 478 U.S. at 58-61 ("We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.")

28. Defendant argues that the Court should disregard Mr. de la Torre's 2016 candidacy because, according to Defendant, Mr. de la Torre intentionally lost that election. But Defendant presented no evidence that Mr. de la Torre did not try to win that election, and Mr. de la Torre unequivocally denied that he deliberately attempted to lose that election. And, the ER analysis by Dr. Lewis further undermines Defendant's assertion - Mr. de la Torre received essentially the same level of support from Latino voters in the 2016 council election as he did in his 2014 election for school board, an odd result if Mr. de la Torre had tried to win one election and lose the other.

29. All of this led Dr. Kousser to conclude: "[b]etween 1994 and 2016 [] Santa Monica city council elections exhibit legally significant racially polarized voting" and "the at-large election system in Santa Monica result[s] in Latinos having less opportunity than non-Latinos to elect representatives of their choice" to the city council. This Court agrees.

30. Defendant's expert, Dr. Lewis, did not disagree. In fact, he confirmed all of the indicia of racially polarized voting in all of the Santa Monica City Council elections he analyzed involving at least one Latino candidate, as well as in other elections. Specifically, Dr. Lewis confirmed that his ER and EI results demonstrate: (1) that the Latino candidates for city council generally received the most votes from Latino voters; (2) that those Latino candidates received far less support from non-Hispanic Whites; and (3) the difference in levels of support between Latino and non-Hispanic White voters were statistically significant applying even a 95% confidence level (with the lone exception of Steve Duron):

Year	Latino Candidate(s)	% Latino Support	% Non-Hispanic White Support
2002	Aranda	69 (10)	16 (1)
2004	Loya	106 (14)	21 (2)
2008	Piera-Avila	32 (4)	6 (1)
2012	Vazquez Gomez Duron	90 (6) 29 (2) 5 (2)	20 (1) 3 (1) 4 (0)
2016	de la Torre Vazquez	87 (4) 65 (7)	14 (1) 34 (2)

31. Dr. Lewis also analyzed elections for other local offices (e.g. school board and college board) and ballot measures such as Propositions 187 (1994), 209 (1996) and 227 (1998). The instant case concerns legal challenges to the election structure for the Santa Monica City Council; where there exist legally relevant election results concerning the Santa Monica City Council, those elections will necessarily be most probative. Consistent with FVRA cases that have addressed the relevance and weight of "exogenous" elections, this Court gives exogenous elections less weight than the endogenous elections discussed above. Bone Shirt v. Hazeltine (8th Cir. 2006) 461 F.3d 1011 (acknowledging that exogenous elections are of much less probative value than endogenous elections, some federal courts have relied upon exogenous elections involving minority candidates to further support evidence of racially polarized voting in endogenous elections); Jenkins, supra, 4 F.3d at 1128-1129 (same); Rodriguez v. Harris Cnty, Texas (2013) 964 F.Supp.2d 686 (same); Citizens for a Better Gretna, supra, 834 F.2d at 502-503 ("Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections, the district court properly considered them as additional evidence of bloc voting – particularly in light of the sparsity of available data."); Clay v. Board of Educ. of City of St. Louis (8th Cir. 1996) 90 F.3d 1357, 1362 (exogenous elections

"should be used only to supplement the analysis of" endogenous elections); Westwego Citizens for Better Gov't, supra, 946 F.2d at 1109 (analysis of exogenous elections appropriate because no minority candidates had ever run for the governing board of the defendant).

32. The focus on endogenous elections is particularly appropriate in this case because, as several witnesses confirmed, the political reality of Defendant's city council elections is very different than that of elections for other governing boards with more circumscribed powers, such as school board and rent board. Dr. Lewis' ER and EI analyses show that non-Hispanic White voters in Santa Monica will support Latino candidates for offices other than city council. For example, according to Dr. Lewis, Mr. de la Torre received votes from 88% of Latino voters and 33% of non-Hispanic White voters in his school board race in 2014, and when he ran for city council just two years later he received essentially the same level of support from Latino voters (87%) but much less support from non-Hispanic Whites (14%) than he had received in the school board race.

33. Regardless of the weight given to exogenous elections, they may not be used to undermine a finding of racially polarized voting in endogenous elections. Bone Shirt, supra, 461 F.3d at 1020-1021 ("Endogenous and interracial elections are the best

indicators of whether the white majority usually defeats the minority candidate… Although they are not as probative as endogenous elections, exogenous elections hold some probative value."); Rural West Tenn. African American Affairs Council v. Sundquist (W.D. Tenn. 1998) 29 F.Supp.2d 448, 457 ("Certainly, the voting patterns in exogenous elections cannot defeat evidence, statistical or otherwise, about endogenous elections."), quoting Cofield v. City of LaGrange, Ga. (N.D.Ga.1997) 969 F.Supp. 749, 773. To hold otherwise would only serve to perpetuate the sort of glass ceiling that the CVRA and FVRA are intended to eliminate.

34. Nonetheless, exogenous elections in Santa Monica further support the conclusion that the levels of support for Latino candidates from Latino and non-Hispanic White voters, respectively, is always statistically significantly different, with non-Hispanic White voters consistently voting against the Latino candidates who are overwhelmingly supported by Latino voters.

Election	Latino Candidate(s)	% Latino Support	% Non-Hispanic White Support
2002 - school board	de la Torre	107 (13)	34 (2)
2004 - school	Jara	113 (13)	37 (2)

board	Leon-Vazquez Escarce	98 (9) 74 (8)	44 (2) 44 (1)
2004 - college board	Quinones-Perez	55 (5)	21 (1)
2006 - school board	de la Torre	95 (12)	40 (1)
2008 - school board	Leon-Vazquez Escarce	101 (8) 68 (6)	40 (1) 36 (1)
2008 - college board	Quinones-Perez	58 (6)	35 (1)
2010 - school board	de la Torre	94 (8)	33 (1)
2012 - school board	Leon-Vazquez Escarce	92 (7) 62 (6)	32 (1) 29 (1)
2014 - school board	de la Torre	88 (7)	33 (1)
2014 - college board	Loya	84 (3)	27 (1)
2014 - rent board	Duron	46 (8)	23 (1)
2016 - college board	Quinones-Perez	85 (5)	36 (1)

35. While he provided his estimates based on ER and EI, Dr. Lewis also questioned the propriety of using those methods. Dr.

Lewis showed that the "neighborhood model" yields different estimates, but the neighborhood model does not fit real-world patterns of voting behavior for particular candidates and the use of the neighborhood model to undermine ER has been rejected by other courts. Garza, supra, 756 F.Supp. at 1334. Dr. Lewis claimed that the lack of data from predominantly Hispanic precincts in Santa Monica renders the ER and EI estimates unreliable, but that argument too has been rejected by the courts. Fabela v. City of Farmers Branch, Tex. (N.D. Tex. Aug. 2, 2012) 2012 WL 3135545, *10-11, n. 25, n. 33 (relying on EI despite the absence of "precincts with a high concentration of Hispanic voters"); Benavidez, supra, 638 F.Supp.2d at 724-25 (approving use of ER and EI where the precincts analyzed all had "less than 35%" Spanish-surnamed registered voters); Perez v. Pasadena Indep. Sch. Dist. (S.D. Tex. 1997) 958 F.Supp. 1196, 1205, 1220-21, 1229, aff'd (5th Cir. 1999) 165 F.3d 368 (relying on ER to show racially polarized voting where the polling place with the highest Latino population was 35% Latino). To disregard ER and EI estimates because of a lack of predominantly minority precincts would also be contrary to the intent of the Legislature in expressly disavowing a requirement that the minority group is concentrated. § 14028 subd. (c) ("[t]he fact that members of a protected class are not geographically compact

or concentrated may not preclude a finding of racially polarized voting.")

36. Moreover, the comparably low percentage of Latinos among the actual voters in Santa Monica precincts is due in part to the reduced rates of voter registration and turnout among eligible Latino voters. Where limitations in the data derive from reduced political participation by members of the protected class, it would be inappropriate to discard the ER results on that basis, because to do so "would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." Perez, supra, 958 F.Supp. at 1221 quoting Clark v. Calhoun Cty. (5th Cir. 1996) 88 F.3d 1393, 1398.

37. Dr. Lewis argued that using Spanish-surname matching to estimate the Latino proportion of voting precincts causes a "skew," but he also acknowledged that Spanish surname matching is the best method for estimating the Latino proportion of each precinct, and the conclusion of racially polarized voting in this case would not change even if the estimates were adjusted to account for any skew. Finally, Dr. Lewis showed that ER and EI do not produce accurate estimates of Democratic Party registration among Latinos in Santa Monica, but that does not undermine the validity or propriety of ER and EI to estimate

voting behavior in this case. Luna v. Cnty. of Kern (E.D. Cal. 2018) 291 F.Supp.3d 1088, 1123-25 (rejecting the same argument).

38. Most importantly, the CVRA directs the Court to credit the statistical methods accepted by federal courts in FVRA cases, including ER and EI, and Dr. Lewis did not suggest or employ any method that could more accurately estimate group voting behavior in Santa Monica. § 14026 subd. (e) ("The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 [52 U.S.C. Sec. 10301 et seq.] to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.")

39. In its closing brief, Defendant argues that there is no racially polarized voting because at least half of what Defendant calls "Latino-preferred" candidacies have been successful in Santa Monica. But that mechanical approach suggested by Defendant - treating a Latino candidate who receives the most votes from Latino voters (and loses, based on the opposition of the non-Hispanic White electorate) the same as a White candidate who receives the second, third or fourth-most votes from Latino voters (and wins, based on the support of the non-Hispanic White electorate) - has been expressly rejected by the courts. Ruiz, supra, 160 F.3d at 554 (rejecting the district court's "mechanical approach" that viewed the victory

of a White candidate who was the second-choice of Latinos in a multi-seat race as undermining a finding of racially polarized voting where Latinos' first choice was a Latino candidate who lost: "The defeat of Hispanic-preferred Hispanic candidates, however, is more probative of racially polarized voting and is entitled to more evidentiary weight. The district court should also consider the order of preference non-Hispanics and Hispanics assigned Hispanic-preferred Hispanic candidates as well as the order of overall finish of these candidates."); see also id. at 553 ("But the Act's guarantee of equal opportunity is not met when . . . [c]andidates favored by [minorities] can win, but only if the candidates are white." (citations and internal quotations omitted)]; Smith v. Clinton (E.D. Ark. 1988) 687 F.Supp. 1310, 1318, aff'd, 488 U.S. 988 (1988) (it is not enough to avoid liability under the FVRA that "candidates favored by blacks can win, but only if the candidates are white."); Clarke v. City of Cincinnati (6th Cir. 1994) 40 F.3d 807, 812 (voting rights laws' "guarantee of equal opportunity is not met when [] candidates favored by [minority voters] can win, but only if the candidates are white.")

40. An approach that accounts for the political realities of the jurisdiction is required, particularly in light of purpose of the CVRA. Jauregui, supra, 226 Cal.App.4th at 807 ("Thus, the Legislature intended to expand the protections against vote

dilution provided by the federal Voting Rights Act of 1965."); Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, at 2 (the Legislature sought to remedy what it considered "restrictive interpretations given to the federal act."); Cf. Gingles, supra, 478 U.S. at 62-63 ("appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended § 2, and would prevent courts from performing the 'functional' analysis of the political process, and the 'searching practical evaluation of the past and present reality'"). To disregard or discount both the order of preference of minority voters and the demonstrated salience of the races of the candidates, as Defendant suggests, would actually exculpate discriminatory at-large election systems where there is a paucity of minority candidates willing to run in the at-large system - itself a symptom of the discriminatory election system. Westwego Citizens for Better Government, supra, 872 F. 2d at 1208-1209, n. 9 ("it is precisely this concern that underpins the refusal of this court and of the Supreme Court to preclude vote dilution claims where few or no black candidates have sought offices in the challenged electoral system. To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove.")

41. No doubt, a minority group can prefer a non-minority candidate and, in a multi-seat plurality at-large election, can prefer more than one candidate, perhaps to varying degrees, but that does not mean that this Court should blind itself to the races of the candidates, the order of preference of minority voters, and the political realities of Defendant's elections. When Latino candidates have run for Santa Monica's city council, they have been overwhelmingly supported by Latino voters, receiving more votes from Latino voters than any other candidates. And absent unusual circumstances, because the remainder of the electorate votes against the candidates receiving overwhelming support from Latino voters, those candidates generally still lose. That demonstrates legally relevant racially polarized voting under the CVRA. Gingles, supra, 478 U.S. at 58-61 ("We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.")

The Qualitative Factors Further Support a Finding of Racially Polarized Voting and a Violation of the CVRA

42. Section 14028(e) allows plaintiffs to supplement their statistical evidence with other evidence that is "probative, but

not necessary [] to establish a violation" of the CVRA. That section provides in relevant part that: "[a] history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns." See also, Assembly Committee Analysis of SB 976 (Apr. 2, 2002). These "probative, but not necessary" factors further support a finding of racially polarized voting in Santa Monica and a violation of the CVRA.

History Of Discrimination.

43. In Garza, supra, 756 F.Supp. at 1339-1340, the court detailed how "[t]he Hispanic community in Los Angeles County has borne the effects of a history of discrimination." The court described the many sources of discrimination endured by Latinos in Los Angeles County: "restrictive real estate covenants [that] have created limited housing opportunities for the Mexican-origin population"; the "repatriation" program in which "many legal resident aliens and American citizens of Mexican

descent were forced or coerced out of the country"; segregation in public schools; exclusion of Latinos from "the use of public facilities" such as public swimming facilities; and "English language literacy [being] a prerequisite for voting" until 1970. Id. at 1340-41. Since Santa Monica is within Los Angeles County, Plaintiffs do not need to re-prove this history of discrimination in this case. Clinton, supra, 687 F.Supp. at 1317 ("We do not believe that this history of discrimination, which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act.")

44. Nonetheless, at trial Plaintiffs presented evidence that this same sort of discrimination was perpetuated specifically against Latinos in Santa Monica - e.g. restrictive real estate covenants, and approximately 70% of Santa Monica voters voting in favor of Proposition 14 in 1964 to repeal the Rumford Fair Housing Act and therefore again allow racial discrimination in housing; segregation in the use of public swimming facilities; repatriation and voting restrictions applicable to all of California, including Santa Monica.

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The Use Of Electoral Devices Or Other Voting Practices Or Procedures That May Enhance The Dilutive Effects Of At-Large Elections

45. Defendant stresses that its elections are free of many devices that dilute (or have diluted) minority votes in other jurisdictions, such as numbered posts and majority vote requirements. Nevertheless, the staggering of Defendant's city council elections enhances the dilutive effect of its at-large election system. City of Lockhart v. U.S. (1983) 460 U.S. 125, 135 ("The use of staggered terms also may have a discriminatory effect under some circumstances, since it . . . might reduce the opportunity for single-shot voting or tend to highlight individual races.")

The Extent To Which Members Of A Protected Class Bear The Effects Of Past Discrimination In Areas Such As Education, Employment, And Health, Which Hinder Their Ability To Participate Effectively In The Political Process.

46. "Courts have [generally] recognized that political participation by minorities tends to be depressed where minority groups suffer effects of prior discrimination such as inferior education, poor employment opportunities and low incomes." Garza, supra, 756 F.Supp. at 1347, citing Gingles, supra, 478 U.S. at 69. Where a minority group has less education and wealth than the majority group, that disparity "necessarily

inhibits full participation in the political process" by the minority. Clinton, supra, 687 F.Supp. at 1317.

47. As revealed by the most recent Census, Whites enjoy significantly higher income levels than their Hispanic and African American neighbors in Santa Monica – a difference far greater than the national disparity. This is particularly problematic for Latinos in Santa Monica's at-large elections because of how expensive those elections have become - more than one million dollars was spent in pursuit of the city council seats available in 2012, for example. There is also a severe achievement gap between White students and their African American and Hispanic peers in Santa Monica's schools that may further contribute to lingering turnout disparities.

The Use Of Overt Or Subtle Racial Appeals In Political Campaigns.

48. In 1994, after opponents of Tony Vazquez advertised that he had voted to allow "Illegal Aliens to Vote" and characterized him as the leader of a Latino gang, causing Mr. Vazquez to lose that election, he let his feelings be known to the Los Angeles Times: "Vazquez blamed his loss on 'the racism that still exists in our city. ... The racism that came out in this campaign was just unbelievable.'"

49. More recent racial appeals, though less overt, have been used to defeat other Latino candidates for Santa Monica's city

council. For example, when Maria Loya ran in 2004, she was frequently asked whether she could represent all Santa Monica residents or just "her people" - a question that non-Hispanic White candidates were not asked. These sorts of racial appeals are particularly caustic to minority success, because they not only make it more difficult for minority candidates to win, but they also discourage minority candidates from even running.

Lack Of Responsiveness To The Latino Community.

50. Although not listed in section 14028(e), the unresponsiveness of Defendant to the needs of the Latino community is a factor probative of impaired voting rights. Gingles, supra, 478 U.S. at 37, 45; §14028 subd.(e) (indicating that list of factors is not exhaustive - "Other factors such as the history of discrimination …") (emphasis added)). That unresponsiveness is a natural, perhaps inevitable, consequence of the at-large election system that tends to cause elected officials to "ignore [minority] interests without fear of political consequences." Gingles, supra, 478 U.S. at 48, n. 14.

51. The elements of the city that most residents would want to put at a distance - the freeway, the trash facility, the city's maintenance yard, a park that continues to emit poisonous methane gas, hazardous waste collection and storage, and, most recently, the train maintenance yard - have all been placed in the Latino-concentrated Pico Neighborhood. Some of these

undesirable elements - e.g., the 10-freeway and train maintenance yard - were placed in the Pico Neighborhood at the direction, or with the agreement, of Defendant or members of its city council.

52. Defendant's various commissions (planning commission, arts commission, parks and recreation commission, etc.), the members of which are appointed by Defendant's city council, are nearly devoid of Latino members, in sharp contrast to the significant proportion (16%) of Santa Monica residents who are Latino. That near absence of Latinos on those commissions is important not only in city planning but also for political advancement: in the past 25 years there have been 2 appointments to the Santa Monica City Council, and both of the appointees had served on the planning commission.

The At-Large Election System Dilutes the Latino Vote in Santa Monica City Council Elections.

53. Defendant argues that, in addition to racially polarized voting, "dilution" is a separate element of a violation of the CVRA. Even if "dilution" were an element of a CVRA claim, separate and apart from a showing of racially polarized voting, the evidence still demonstrates dilution by the standard proposed by Defendant in its closing brief - "that some alternative method of election would enhance Latino voting power." At trial, Plaintiffs presented several available

remedies (district-based elections, cumulative voting, limited voting and ranked choice voting), each of which would enhance Latino voting power over the current at-large system.

54. While it is impossible to predict with certainty the results of future elections, the Court considered the national, state and local experiences with district elections, particularly those involving districts in which the minority group is not a majority of the eligible voters, other available remedial systems replacing at-large elections, and the precinct-level election results in past elections for Santa Monica's city council. Based on that evidence, the Court finds that the district map developed by Mr. Ely, and adopted by this Court as an appropriate remedy, will likely be effective, improving Latinos' ability to elect their preferred candidate or influence the outcome of such an election.

The CVRA Is Not Unconstitutional

55. Defendant argues that the CVRA is unconstitutional, pursuant to a line of cases beginning with Shaw, supra, 509 U.S. 630. As the court in Sanchez held, the CVRA is not unconstitutional; Shaw is simply not applicable. Sanchez, supra, 145 Cal.App.4th at 680-682.

56. Defendant's argument that the CVRA is unconstitutional begins with the already-rejected notion that the CVRA is subject to strict scrutiny because it employs a racial classification.

The court in Sanchez rejected that very argument. Sanchez, supra, 145 Cal.App.4th at 680-682. Rather, although "the CVRA involves race and voting, ... it does not allocate benefits or burdens on the basis of race"; it is race-neutral in that it neither singles out members of any one race nor advantages or disadvantages members of any one race. Id. at 680. Accordingly, the CVRA is not subject to strict scrutiny; it is subject to the more permissive rational basis test, which the Sanchez court held it easily passes. Ibid.

57. Defendant seems to suggest that even though the CVRA was not subject to strict scrutiny in Sanchez, it must be subject to strict scrutiny in Santa Monica under Shaw, because any remedy in Santa Monica will inevitably be based predominantly on race. But, as discussed below, the remedy selected by this Court was not based predominantly on race - the district map was drawn based on the non-racial criteria enumerated in Elections Code section 21620. Moreover, Shaw and its progeny do not require strict scrutiny every time that race is pertinent in electoral proceedings. Instead, the Shaw line of cases, which focus on the expressive harm to voters conveyed by particular district lines, require strict scrutiny when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district[.]" Ala. Legislative Black Caucus v. Ala. (2015) 135

S. Ct. 1257, 1267, quoting Miller v. Johnson (1995) 515 U.S. 900, 916. This standard does not govern liability under the CVRA, and does not govern the imposition of a remedy in the abstract (e.g., whether district lines should be drawn or an alternative voting system imposed), but rather it governs the imposition of particular lines in particular places affecting particular voters.

58. The CVRA is silent on how district lines must be drawn, or even if districts are necessarily the appropriate remedy. Sanchez, supra, 145 Cal.App.4th at 687 ("Upon a finding of liability, [the CVRA] calls only for appropriate remedies, not for any particular, let alone any improper, use of race.") The Court is unaware of any applicable case, finding a Shaw violation based on the adoption of district elections, as opposed to where lines are drawn (and as explained below, the appropriate remedial lines in this case were not drawn predominantly based on race). That is precisely why the Sanchez court rejected the City of Modesto's similar reliance on Shaw in that case. Id. at 682-683.

59. The State of California has a legitimate–indeed compelling–interest in preventing race discrimination in voting and in particular curing demonstrated vote dilution. This interest is consistent with and reflects the purposes of the California Constitution as well as the Fourteenth and Fifteenth Amendments

to the United States Constitution. § 14027 (identifying the abridgment of voting rights as the end to be prohibited); § 14031 (indicating that the CVRA was "enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution"); Cal. Const., Art. I, § 7 (guaranteeing, among other rights, the right to equal protection of the laws); id. Art. II, § 2 (guaranteeing the right to vote); Sanchez at 680 (identifying "[c]uring vote dilution" as a purpose of the CVRA.) The CVRA, which provides a private right of action to seek remedies for vote dilution, is rationally related to the State's interest in curing vote dilution, protecting the right to vote, protecting the right to equal protection of the laws, and protecting the integrity of the electoral process. Jauregui, supra, 226 Cal.App.4th at 799-801; Sanchez, supra, 145 Cal.App.4th at 680.

60. As discussed above, Defendant's election system has resulted in vote dilution - the very injury that the CVRA is intended to prevent and remedy - and, though not required by the CVRA, the evidence explored below even indicates that the dilution remedied in this case was the product of intentional discrimination. And, as discussed below, there are several remedial options to effectively remedy that vote dilution in this case. Accordingly, the CVRA is constitutional and easily

satisfies the rational basis test, on its face and in its specific application to Defendant.

61. Even if strict scrutiny were found to apply to the CVRA, the CVRA is narrowly tailored to achieve a compelling state interest and therefore also satisfies that test. First, California has compelling interests in protecting all of its citizens' rights to vote and to participate equally in the political process, protecting the integrity of the electoral process, and in ensuring that its laws and those of its subdivisions do not result in vote dilution in violation of its robust commitment to equal protection of the laws. Cal. Const., Art. I, § 7, Art. II, § 2; Elec. Code §§ 14027, 14031; Jauregui, supra, 226 Cal.App.4th at 799-801; Sanchez, supra, 145 Cal.App.4th at 680.

62. Second, the CVRA is narrowly tailored to achieve its compelling interests in preventing the abridgment of the right to vote. The CVRA requires a person to demonstrate the existence of racially polarized voting to prove a violation. § 14028 subd. (a). Where racially polarized voting does not exist, the CVRA will not require a remedy. As with the FVRA, both the findings of liability and the establishment of a remedy under the CVRA do not rely on assumptions about race, but rather on factual patterns specific to particular communities in particular geographic regions, based on electoral evidence.

Compare, Shaw, supra, 509 U.S. at 647-648 (unconstitutional racial gerrymandering is based on the assumption that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls") with id. at 653 (distinguishing the Voting Rights Act, in which "racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case" based on evidence of group voting behavior.) And though federal cases have not considered the CVRA specifically in this regard, the Supreme Court has repeatedly implied that remedies narrowly drawn to combat racially polarized voting and discriminatory vote dilution will survive strict scrutiny.[10] As a result, the CVRA sweeps no wider than necessary to equitably secure for Californians their rights to vote and to participate in the political process. Jauregui, supra, 226 Cal.App.4th at 802.

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[10] League of United Latin Am. Citizens v. Perry (2006) 548 U.S. 399, 475, n.12 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part); id. at 518-519 (Scalia, J., joined by Thomas, J., Alito, J., and Roberts, C.J., concurring in the judgment in part and dissenting in part); Bush v. Vera (1996) 517 U.S. 952, 990, 994 (O'Connor, J., concurring); Shaw, supra, 509 U.S. at 653-54. Indeed, just last year, in Bethune-Hill v. Va. State Bd. of Elections (2017) 137 S. Ct. 788, the Supreme Court upheld a Virginia state Senate district against challenge on the theory that it was predominantly driven by race, but in a manner designed to meet strict scrutiny through compliance with the Voting Rights Act. Id. at 802. Neither party contested that compliance with the Voting Rights Act would satisfy strict scrutiny, but the Court does not usually permit the litigants to concede the justification for its most exacting level of scrutiny.

And if the CVRA generally satisfies strict scrutiny, it satisfies strict scrutiny in application here, where as described below, the dilution remedied was proven to be the product of intentional discrimination.

THE EQUAL PROTECTION CLAUSE OF THE CALIFORNIA CONSTITUTION

63. Article I, section 7 of the California Constitution mirrors the Equal Protection Clause of the U.S. Constitution (Fourteenth Amendment).[11] Where governmental actions or omissions are motivated by a racially discriminatory purpose they violate the Equal Protection Clause, and when voting rights are implicated, "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all . . . .' N.C. State Conference NAACP v. McCrory (4th Cir. 2016) 831 F.3d 204, 239 (surveying Supreme Court cases); see also generally Garza v. County of Los Angeles (9th Cir. 1990) 918 F.2d 763, cert. denied (1991) 111 S.Ct. 681. Neither the passage of time, nor the modification of the original enactment, can save a provision enacted with discriminatory intent. Id.; Hunter v. Underwood (1985) 471 U.S. 222 (invalidating a provision of the 1901 Alabama Constitution because it was motivated by a desire to disenfranchise African Americans, even though its "more blatantly discriminatory" portions had since been removed.)

[11] Other than provisions relating exclusively to school integration, Article I section 7 provides "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

64. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. … [including] the historical background of the decision." Village of Arlington Heights v. Metro. Housing Dev. Corp. (1977) 429 U.S. 252, 266-68. Sometimes, racially discriminatory intent can be demonstrated by the clear statements of one or more decision makers. But, recognizing that these "smoking gun" admissions of racially discriminatory intent are exceedingly rare, in Arlington Heights, the U.S. Supreme Court described a number of potential, non-exhaustive, sources of evidence that might shed light on the question of discriminatory intent in the absence of a smoking gun admission:

> The impact of the official action -- whether it bears more heavily on one race than another, may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence. The historical background of the decision

is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decision maker's purposes. … Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances, the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.

Id. at 266-268 (citations omitted). "[P]laintiffs are not required to show that [discriminatory] intent was the sole

purpose of the [challenged government decision]," or even the "primary purpose," just that it was "a purpose." Brown v. Board of Com'rs of Chattanooga, Tenn. (E.D. Tenn. 1989) 722 F. Supp. 380, 389, citing Arlington Heights at 265 and Bolden v. City of Mobile (S.D. Ala. 1982) 543 F. Supp. 1050, 1072.

Defendant's At-Large Election System Violates The Equal Protection Clause Of The California Constitution.

65. Defendant's at-large election system was adopted and/or maintained with a discriminatory intent on at least two occasions - in 1946 and in 1992, *either* of which necessitates this Court invalidating the at-large election system. Hunter v. Underwood (1985) 471 U.S. 222 (invalidating a provision of the 1901 Alabama Constitution because it was motivated by a desire to disenfranchise African Americans, even though its "more blatantly discriminatory" portions had since been removed); Brown, supra 722 F. Supp. at 389 (striking at-large election system based on discriminatory intent in 1911 even absent discriminatory intent in maintaining that system in decisions of 1957, the late 1960s and early 1970s). In the early 1990s, the Charter Review Commission, impaneled by Defendant's city council, concluded that "a shift from the at-large plurality system currently in use" was necessary "to distribute empowerment more broadly in Santa Monica, particularly to ethnic groups ..." Even back in 1946, it was understood that at-large

elections would "starve out minority groups," leaving "the Jewish, colored [and] Mexican [no place to] go for aid in his special problems" "with seven councilmen elected AT-LARGE … mostly originat[ing] from [the wealthy White neighborhood] North of Montana [and] without regard [for] minorities." Yet, in each instance Defendant chose at-large elections.

1946

66. Defendant's current at-large election system has a long history that has its roots in 1946. In 1946, Defendant adopted its current council-manager form of government, and chose an at-large elected city council and school board. The at-large election feature remains in Defendant's city charter. Santa Monica Charter § 600 ("The City Council shall consist of seven members elected from the City at large …"), § 900. As Dr. Kousser's testimony at trial and his report to the Santa Monica Charter Review Committee in 1992 explained, proponents and opponents of the at-large system alike, bluntly recognized that the at-large system would impair minority representation. And, another ballot measure involving a pure racial issue was on the ballot at the same time in 1946 - Proposition 11, which sought to ban racial discrimination in employment. Dr. Kousser's statistical analysis shows a strong correlation between voting in favor of the at-large charter provision and against the contemporaneous Proposition 11, further demonstrating the

understanding that at-large elections would prevent minority representation.

67. When the Arlington Heights factors are each considered, those non-exhaustive factors militate in favor of finding discriminatory intent in the 1946 adoption of the current at large election system. The discriminatory impact of the at-large election system was felt immediately after its adoption in 1946. Though several ran, no candidates of color were elected to the Santa Monica City Council in the 1940s, 50s or 60s. Bolden v. City of Mobile (S.D. Ala. 1982) 542 F.Supp. 1070, 1076 (relying on the lack of success of Black candidates over several decades to show disparate impact, even without a showing that Black voters voted for each of the particular Black candidates going back to 1874.) Moreover, the impact on the minority-concentrated Pico Neighborhood over the past 72 years, discussed above, also demonstrates the discriminatory impact of the at-large election system in this case. Gingles 478 U.S. at 48, n. 14 (describing how at-large election systems tend to cause elected officials to "ignore [minority] interests without fear of political consequences.")

68. The historical background of the decision in 1946 also weighs in favor of a finding of discriminatory intent. At-large elections were known to disadvantage minorities, and that was understood in Santa Monica in 1946. The non-White population in

Santa Monica was growing at a faster rate than the White population - enough that the chief newspaper in Santa Monica, the Evening Outlook, was alarmed by the rate of increase in the non-white population. The fifteen Freeholders, who proposed only at-large elections to the Santa Monica electorate in 1946, were all White, and all but one lived on the wealthier, Whiter side of Wilshire Boulevard. At-large elections were, therefore, in their self-interest, and at least three of the Freeholders successfully ran for seats on the city council in the years that followed.

69. The Santa Monica commissioners had adopted a resolution calling for all Japanese Americans to be deported to Japan rather than being allowed to return to their homes after being interned, Los Angeles County had been marred by the zoot suit riots, and racial tensions were prevalent enough in Santa Monica that a Committee on Interracial Progress was necessary. However, Defendants correctly point out (in their Objections to Plaintiff's proposed statement of decision) that some members of the Committee on Interracial Progress supported the 1946 Santa Monica charter amendment and that none signed onto advertisements opposing it. Indeed, minority leaders, including one the city's most prominent African Americans, Rev. W.P. Carter, endorsed the charter.

70. The Court has weighed the historical evidence, including the endorsement of the charter amendment by some minority leaders, and the Court finds that the evidence of discriminatory intent outweighs the contrary evidence. The Court draws the inferences that the creation of the Committee on Interracial Progress was an acknowledgment of racial tension, that those members were aware that the election of minority candidates was an issue with the charter amendment, and that the members of the Committee on Interracial Progress were hopeful that the charter amendment (which increased the governing body from three to seven, among other things) would increase the number of minorities elected to the governing body. The charter amendment was approved and, despite the hopefulness, did not result in the election of minorities for decades.

71. At the same time as the 1946 Santa Monica charter amendment was approved, a significant majority of Santa Monica voters voted against Proposition 11, which would have outlawed racial discrimination in employment, and Dr. Kousser's EI analysis shows a very strong correlation between voting for the charter amendment and against Proposition 11.

72. The sequence of events leading up to the adoption of the at-large system in 1946 likewise supports a finding of discriminatory intent. As Dr. Kousser detailed, in 1946, the Freeholders waffled between giving voters a choice of having

some district elections or just at-large elections, and ultimately chose to only present an at-large election option despite the recognition that district elections would be better for minority representation.

73. The substantive and procedural departures from the norm also support a finding of discriminatory intent. In 1946, the Freeholders' reversed course on offering to the voters a hybrid system (some district, and some at-large, elected council seats) in the wake of discussion of minority representation, and, after a series of votes the local newspaper called "unexpected," offered the voters only the option of at-large elections.

74. The legislative and administrative history in 1946 is difficult to discern. There appears to have been no report of the Freeholders' discussions, but the statements by proponents and opponents of the charter amendment demonstrate that all understood that at-large elections would diminish minorities' influence on elections.

1992

75. After winning a FVRA case ending at-large elections in Watsonville in 1989, Joaquin Avila (later principally involved in drafting the CVRA) and other attorneys began to file and threaten to file lawsuits challenging at-large elections throughout California on the grounds that they discriminated against Latinos. The Santa Monica Citizens United to Reform

Elections (CURE) specifically noted the Watsonville case in urging the Santa Monica City Council to place the issue of substituting district for at-large elections on the ballot, allowing Santa Monica voters to decide the question. With the issue of at-large elections diluting minority vote receiving increased attention in Santa Monica and throughout California, Defendant appointed a 15-member Charter Review Commission to study the matter and make recommendations to the City Council.

76. As part of their investigation, the Charter Review Commission sought the analysis of Plaintiff's expert, Dr. Kousser, who had just completed his work in Garza regarding discriminatory intent in the way Los Angeles County's supervisorial districts had been drawn. Dr. Kousser was asked whether Santa Monica's at-large election system was adopted or maintained for a discriminatory purpose, and Dr. Kousser concluded that it was, for all of the reasons discussed above. Based on their extensive study and investigations, the near-unanimous Charter Review Commission recommended that Defendant's at-large election system be eliminated. The principal reason for that recommendation was that the at-large system prevents minorities and the minority-concentrated Pico Neighborhood from having a seat at the table.

77. That recommendation went to the City Council in July 1992, and was the subject of a public city council meeting. Excerpts

from the video of that hours-long meeting were played at trial, and provide direct evidence of the intent of the then-members of Defendant's City Council. One speaker after another - members of the Charter Review Commission, the public, an attorney from the Mexican American Legal Defense and Education Fund, and even a former councilmember - urged Defendant's City Council to change its at-large election system. Many of the speakers specifically stressed that the at-large system discriminated against Latino voters and/or that courts might rule that they did in an appropriate case. Though the City Council understood well that the at-large system prevented racial minorities from achieving representation - that point was made by the Charter Review Commission's report and several speakers and was never challenged - the members refused by a 4-3 vote to allow the voters to change the system that had elected them.

78. Councilmember Dennis Zane explained his professed reasoning: in a district system, Santa Monica would no longer be able to place a disproportionate share of affordable housing into the minority-concentrated Pico Neighborhood, where, according to the unrefuted remarks at the July 1992 council meeting, the majority of the city's affordable housing was already located, because the Pico Neighborhood district's representative would oppose it. Mr. Zane's comments were candid and revealing. He specifically phrased the issue as one of

Latino representation versus affordable housing: "So you gain the representation but you lose the housing."[12] While this professed rationale could be characterized as not demonstrating that Mr. Zane or his colleagues "harbored any ethnic or racial animus toward the . . . Hispanic community," it nonetheless reflects intentional discrimination—Mr. Zane understood that his action would harm Latinos' voting power, and he took that action to maintain the power of his political group to continue dumping affordable housing in the Latino-concentrated neighborhood despite their opposition. Garza, supra, 918 F.2d at 778 (J. Kozinski, concurring) (finding that incumbents preserving their power by drawing district lines that avoided a higher proportion of Latinos in one district was *intentionally discriminatory despite the lack of any racial animus*), cert. denied (1991) 111 S.Ct. 681.

79. In addition to Mr. Zane's contemporaneous explanation of his own decisive vote, the Court also considers the circumstantial evidence of intent revealed by the Arlington Heights factors. While those non-exhaustive factors do not each

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[12] Mr. Zane's insistence on a tradeoff between Latino representation and policy goals that he believed would be more likely to be accomplished by an at-large council echoed comments of the *Santa Monica Evening Outlook*, the chief sponsor of and spokesman for the charter change to an at-large city council in 1946. "[G]roups such as organized labor and the colored people," the newspaper announced, should realize that "The interest of minorities is always best protected by a system which favors the election of liberal-minded persons who are not compelled to play peanut politics. Such liberal-minded persons, of high caliber, will run for office and be elected if elections are held at large."

reveal discrimination to the same extent, on balance, they also militate in favor of finding discriminatory intent in this case. The discriminatory impact of the at-large election system was felt immediately after its maintenance in 1992. The first and only Latino elected to the Santa Monica City Council lost his re-election bid in 1994 in an election marred by racial appeals - a notable anomaly in Santa Monica where election records establish that incumbents lose very rarely. Bolden v. City of Mobile (S.D. Ala. 1982) 542 F.Supp. 1050, 1076 (relying on the lack of success of Black candidates over several decades to show disparate impact, even without a showing that Black voters voted for each of the particular Black candidates going back to 1874.) Moreover, the impact on the minority-concentrated Pico Neighborhood over the past 72 years, discussed above, also demonstrates the discriminatory impact of the at-large election system in this case, and has continued well past 1992. Gingles, supra, 478 U.S. at 48, n. 14 (describing how at-large election systems tend to cause elected officials to "ignore [minority] interests without fear of political consequences.")

80. The historical background of the decision in 1992 also militate in favor of finding a discriminatory intent. At-large elections are well known to disadvantage minorities, and that was well understood in Santa Monica in 1992. In 1992, the non-White population was sufficiently compact (in the Pico

Neighborhood) that Dr. Leo Estrada concluded that a council district could be drawn with a combined majority of Latino and African American residents. While the Santa Monica City Council of the late 1980s and early 1990s was sometimes supportive of policies and programs that benefited racial minorities, as pointed out by Defendant's expert, Dr. Lichtman, the members also supported a curfew that Santa Monica's lone Latino council member described as "institutional racism," as pointed out by Dr. Kousser, and they understood that district elections would undermine the slate politics that had facilitated the election of many of them.

81. The sequence of events leading up to the maintenance of the at-large system in 1992, likewise supports a finding of discriminatory intent. In 1992, the Charter Review Commission, and the CURE group before that, intertwined the issue of district elections with racial justice, and the connection was clear from the video of the July 1992 city council meeting, immediately prior to Defendant's city council voting to prevent Santa Monica voters from adopting district elections.

82. The substantive and procedural departures from the norm also support a finding of discriminatory intent. In 1992, the Charter Review Commission recommended scrapping the at-large election system, principally because of its deleterious effect on minority representation. While Defendant's City Council

adopted nearly all of the Charter Review Commission's recommendations, it refused to adopt any change to the at-large elections or even submit the issue to the voters.

83. Finally, as discussed above, the legislative and administrative history in 1992, specifically the Charter Review Commission report and the video of the July 1992 city council meeting, demonstrates a deliberate decision to maintain the existing at-large election structure because of, and not merely despite, the at-large system's impact on Santa Monica's minority population.

REMEDIES

84. Having found that Defendant's election system violates the CVRA and the Equal Protection Clause, the Court must implement a remedy to cure those violations. The CVRA specifies that the implementation of appropriate remedies is mandatory.

85. "Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." Elec. Code § 14029. The federal courts in FVRA cases have similarly and unequivocally held that once a violation is found, a remedy must be adopted. Williams v. Texarkana, Ark. (8th Cir. 1994) 32 F.3d 1265, 1268 (Once a violation of the FVRA is found, "[i]f [the] appropriate legislative body does not propose a remedy, the district court

must fashion a remedial plan"); Bone Shirt, supra, 387 F.Supp.2d at 1038 (same); Reynolds v. Sims (1964) 377 U.S. 533, 585 ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.") Likewise, in regards to an Equal Protection violation implicating voting rights, "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all . . . .' Thus, the proper remedy for a legal provision enacted with discriminatory intent is invalidation." McCrory, supra, 831 F.3d at 239 (surveying Supreme Court cases.)

86. Once liability is established under the CVRA, the Court has a broad range of remedies from which to choose. § 14029 ("Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation."); Sanchez, supra, 145 Cal.App.4th at 670. The range of remedies from which the Court may choose is at least as broad as those remedies that have been adopted in FVRA cases. Jauregui, supra, 226 Cal.App.4th at 807 ("Thus, the Legislature intended to expand the protections against vote dilution provided by the federal Voting Rights Act of 1965. It

would be inconsistent with the evident legislative intent to expand protections against vote dilution to narrowly limit the scope of . . . relief as defendant asserts. Logically, the appropriate remedies language in section 14029 extends to . . . orders of the type approved under the federal Voting Rights Act of 1965.") Thus, the range of remedies available to the Court includes not only the imposition of district-based elections per § 14029, but also, for example, less common at-large remedies imposed in FVRA cases such as cumulative voting, limited voting and unstaggered elections. U.S. v. Village of Port Chester (S.D.N.Y. 2010) 704 F.Supp.2d 411 (ordering cumulative voting and unstaggering elections); U.S. v. City of Euclid (N.D. Ohio 2008) 580 F.Supp.2d 584 (ordering limited voting). The Court may also order a special election. Neal v. Harris (4th Cir. 1987) 837 F.2d 632, 634 (affirming trial court's order requiring a special election, during the terms of the members elected under the at-large system, rather than awaiting the date of the next regularly scheduled election, when their terms would have expired.); Ketchum v. City Council of Chicago (N.D Ill. 1985) 630 F.Supp. 551, 564-566 (ordering special elections to replace aldermen elected under a system that violated the FVRA); Bell v. Southwell (5th. Cir. 1967) 376 F.2d 659, 665 (voiding an unlawful election, prohibiting the winner of that unlawful election from taking office, and ordering that a special

election be held promptly); Coalition for Education in District One v. Board of Elections (S.D.N.Y. 1974) 370 F.Supp. 42, 58, aff'd (2nd Cir. 1974) 495 F.2d 1090; Tucker v. Burford (N.D. Miss. 1985) 603 F.Supp. 276, 279; Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany (2d Cir. 2004) 357 F.3d 260, 262-263 (applauding the district court for ordering a special election.) Indeed, courts have even used their remedial authority to remove all members of a city council where necessary. Bell v. Southwell (5th Cir. 1967) 367 F.2d 659, 665; Williams v. City of Texarkana (W.D. Ark. 1993) 861 F.Supp. 771, aff'd (8th Cir. 1994) 32 F.3d 1265; Hellebust v. Brownback (10th Cir. 1994) 42 F.3d 1331).

87. The broad remedial authority granted to the Court by Section 14029 of the CVRA extends to remedies that are inconsistent with a city charter, Jauregui at 794-804, and even remedies that would otherwise be inconsistent with state laws enacted prior to the CVRA. Id. at 804-808 (affirming the trial court's injunction, pursuant to section 14029 of the CVRA, prohibiting the City of Palmdale from certifying its at-large election results despite that injunction being inconsistent with Code of Civil Procedure section 526(b)(4) and Civil Code section 3423(d)). Likewise, because the California Constitution is supreme over state statutes, any remedy for Defendant's violation of the Equal Protection Clause is unimpeded by

administrative state statutes. Am. Acad. of Pediatrics v. Lungren (1997) 16 Cal.4th 307 (invalidating a state statute because it impinged upon rights guaranteed by the California Constitution). Voting rights are the most fundamental in our democratic system; when those rights have been violated, the Court has the obligation to ensure that the remedy is up to the task.

88. Any remedial plan should fully remedy the violation. Dillard v. Crenshaw Cnty., Ala. (11th Cir. 1987) 831 F.2d 246, 250 ("The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice. … This Court cannot authorize an element of an election proposal that will not with certitude completely remedy the [] violation."); Harvell v. Blytheville Sch. Dist. No. 5 (8th Cir. 1997) 126 F.3d 1038, 1040 (affirming trial court's rejection of defendant's plan because it would not "completely remedy the violation"; LULAC Council No. 4836 v. Midland Indep. Sch. Dist. (W.D. Tex. 1986) 648 F.Supp. 596, 609; United States v. Osceola Cnty., Fla. (M.D. Fla. 2006) 474 F.Supp.2d 1254, 1256. The United States Supreme Court has explained that the court's duty is to both remedy past harm and prevent future violations of minority voting rights: "[T]he

court has not merely the power, but the duty, to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States (1965) 380 U.S. 145, 154; Buchanan v. City of Jackson, Tenn., (W.D. Tenn. 1988) 683 F. Supp. 1537, 1541 (same, rejecting defendant's hybrid at-large remedial plan.)

89. The remedy for a violation of the Equal Protection Clause should likewise be prompt and complete. Courts have consistently held that intentional racial discrimination is so caustic to our system of government that once intentional discrimination is shown, "the 'racial discrimination must be eliminated root and branch'" by "a remedy that will fully correct past wrongs." N. Carolina NAACP v. McCrory (4th Cir. 2016) 831 F.3d 204, 239, quoting Green v. Cty. Sch. Bd. (1968) 391 U.S. 430, 437-439, Smith v. Town of Clarkton (4th Cir. 1982) 682 F.2d 1055, 1068.)

90. It is also imperative that once a violation of voting rights is found, remedies be implemented promptly, lest minority residents continue to be deprived of their fair representation. Williams v. City of Dallas (N.D. Tex. 1990) 734 F.Supp. 1317 ("*In no way will this Court tell African-Americans and Hispanics that they must wait any longer for their voting rights in the City of Dallas.*") (emphasis in original).

91. Though other remedies, such as cumulative voting, limited voting and ranked choice voting, are possible options in a CVRA action and would improve Latino voting power in Santa Monica, the Court finds that, given the local context in this case - including socioeconomic and electoral patterns, the voting experience of the local population, and the election administration practicalities present here - a district-based remedy is preferable. The choice of a district-based remedy is also consistent with the overwhelming majority of CVRA and FVRA cases.

92. At trial, only one district plan was presented to the Court - Trial Exhibit 261. That plan was developed by David Ely, following the criteria mandated by Section 21620 of the Elections Code, applicable to charter cities. The populations of the proposed districts are all within 10% of one another; areas with similar demographics (e.g. socio-economic status) are grouped together where possible and the historic neighborhoods of Santa Monica are intact to the extent possible; natural boundaries such as main roads and existing precinct boundaries are used to divide the districts where possible; and neither race nor the residences of incumbents was a predominant factor in drawing any of the districts.

93. Trial testimony revealed that jurisdictions that have switched from at-large elections to district elections as a

result of CVRA cases have experienced a pronounced increase in minority electoral power, including Latino representation. Even in districts where the minority group is one-third or less of a district's electorate, minority candidates previously unsuccessful in at-large elections have won district elections. Florence Adams, *Latinos and Local Representation: Changing Realities, Emerging Theories* (2000), at 49-61.

94. The particular demographics and electoral experiences of Santa Monica suggest that the seven-district plan would similarly result in the increased ability of the minority population to elect candidates of their choice or influence the outcomes of elections. Mr. Ely's analysis of various elections shows that the Latino candidates preferred by Latino voters perform much better in the Pico Neighborhood district of Mr. Ely's plan than they do in other parts of the city - while they lose citywide, they often receive the most votes in the Pico Neighborhood district. The Latino proportion of eligible voters is much greater in the Pico Neighborhood district than the city as a whole. In contrast to 13.64% of the citizen-voting-age-population in the city as a whole, Latinos comprise 30% of the citizen-voting-age-population in the Pico Neighborhood district. That portion of the population and citizen-voting-age-population falls squarely within the range the U.S. Supreme Court deems to be an influence district. Georgia v. Aschcroft (2003) 539 U.S.

461, 470-471, 482 (evaluating the impact of "influence districts," defined as districts with a minority electorate "of between 25% and 50%.") Testimony established that Latinos in the Pico Neighborhood are politically organized in a manner that would more likely translate to equitable electoral strength. Testimony also established that districts tend to reduce the campaign effects of wealth disparities between the majority and minority communities, which are pronounced in Santa Monica.

95. Though given the opportunity to do so, Defendant did not propose a remedy. The six-week trial of this case was not bifurcated between liability and remedies. Though Plaintiffs presented potential remedies at trial, Defendant did not propose any remedy at all in the event that the Court found in favor of Plaintiffs. On November 8, 2018, the Court gave Defendant another opportunity, ordering the parties to file briefs and attend a hearing on December 7, 2018 "regarding the appropriate/preferred remedy for violation of the [CVRA]."[13]

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[13] The schedule set by this Court on November 8, 2018 is in line with what other courts have afforded defendants to propose a remedy following a determination that voting rights have been violated. Williams v. City of Texarkana (W.D. Ark. 1992) 861 F.Supp. 756, 767 (requiring the defendant to submit its proposed remedy 16 days after finding Texarkana's at-large elections violated the FVRA), aff'd (8th Cir. 1994) 32 F.3d 1265; Larios v. Cox (N.D. Ga. 2004) 300 F.Supp.2d 1320, 1356-1357 (requiring the Georgia legislature to propose a satisfactory apportionment plan and seek Section 5 preclearance from the U.S. Attorney General within 19 days); Jauregui v. City of Palmdale, No. BC483039, 2013 WL 7018376 (Aug. 27, 2013) (scheduling remedies hearing for 24 days after the court mailed its decision finding a violation of the CVRA).

Still, Defendant did not propose a remedy, other than to say that it prefers the implementation of district-based elections over the less-common at-large remedies discussed at trial. Where a defendant fails to propose a remedy to a voting rights violation on the schedule directed by the court, the court must provide a remedy without the defendant's input. Williams v. City of Texarkana (8th Cir. 1994) 32 F.3d 1265, 1268 ("If [the] appropriate legislative body does not propose a remedy, the district court must fashion a remedial plan."); Bone Shirt v. Hazeltine (D.S.D. 2005) 387 F.Supp.2d 1035, 1038 (same).

96. Defendant argues that section 10010 of the Elections Code constrains the Court's ability to adopt a district plan without holding a series of public hearings. On the contrary, section 10010 speaks to what a *political subdivision* must do (e.g. a series of public hearings) in order to adopt district elections or propose a legislative plan remedy in a CVRA case, not what a *court* must do in completing its responsibility under section 14029 of the Elections Code to implement appropriate remedies tailored to remedy the violation. Defendant could have completed the process specified in section 10010 at any time in the course of this case, which has been pending for nearly 3 years. Even if Defendant had started the process of drawing districts only upon receiving this Court's November 8 Order (on November 13), it could have held the initial public meetings

required by section 10010(a)(1) by November 19, and the additional public meetings the week of November 26, completing the process in advance of its November 30 remedies brief. To the Court's knowledge, even at the time of the present statement of decision, Defendant has failed to begin any remedial process of its own.

97. In order to eliminate the taint of the illegal at-large election system in this case, in a prompt and orderly manner, a special election for all seven council seats is appropriate. Other courts have similarly held that a special election is appropriate, where an election system is found to violate the FVRA. Neal, supra, 837 F.2d at 632-634 ("[o]nce it was determined that plaintiffs were entitled to relief under section 2, … the timing of that relief was a matter within the discretion of the court."); Ketchum, supra, 630 F.Supp. at 564-566; Bell v. Southwell (5th. Cir. 1967) 376 F.2d 659, 665 (voiding an unlawful election, prohibiting the winner of that unlawful election from taking office, and ordering that a special election be held promptly); Coalition for Ed. in Dist. One v. Board of Elections of City of N.Y. (S.D.N.Y. 1974) 370 F.Supp. 42, 58, aff'd (2nd Cir. 1974) 495 F.2d 1090; Tucker v. Burford (N.D. Miss. 1985) 603 F.Supp. 276, 279; Arbor Hill Concerned Citizens v. Cnty. of Albany (2d Cir. 2004) 357 F.3d 260, 262-63 (applauding the district court for ordering a

special election); Montes v. City of Yakima (E.D. Wash. 2015) 2015 WL 11120964, at p. 11, (explaining that a special election is often necessary to completely eliminate the stain of illegal elections). As the Second District Court of Appeal held in Jauregui, "the appropriate remedies language in section 14029 extends to [remedial] orders of the type approved under the federal Voting Rights Act of 1965," Jauregui, supra, 226 Cal.App.4th at 807, so the logic of the courts for ordering special elections in all of these cases is equally applicable in this case.

98. From the beginning of the nomination period to election day, takes a little less than four months. https://www.smvote.org/uploadedFiles/SMVote/2016(1)/Election%20Calendar_website.pdf. Based on the path this Court has laid out, a final judgment in this case should be entered by no later than March 1, 2019. Therefore, a special election - a district-based election pursuant to the seven-district map, Tr. Ex. 261, for all seven city council positions should be held on July 2, 2019. The votes can be tabulated within 30 days of the election, and the winners can be seated on the Santa Monica City Council at its first meeting in August 2019, so nobody who has not been elected through a lawful election consistent with this decision may serve on the Santa Monica City Council past August 15, 2019. Only in that way can the stain of the unlawful discriminatory

at-large election system be promptly erased.

CONCLUSION

99. Defendant's at-large election system violates both the CVRA and the Equal Protection Clause of the California Constitution.

100. Accordingly, the Court orders that, from the date of judgment, Defendant is prohibited from imposing its at-large election system, and must implement district-based elections for its city council in accordance with the seven-district map presented at trial. Tr. Ex. 261.

CLERK TO GIVE WRITTEN NOTICE.

IT IS SO ORDERED.

DATED: February 13, 2019

YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT

02/14/19

EXHIBIT B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PICO NEIGHBORHOOD ASSOCIATION et al., Plaintiffs and Respondents, v. CITY OF SANTA MONICA, Defendant and Appellant.	B295935 (Los Angeles County Super. Ct. No. BC616804)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Reversed.

Lane Dilg, City Attorney, George Cardona, Special Counsel; Gibson, Dunn & Crutcher, Theodore J. Boutrous Jr., Marcellus A. McRae, Kahn A. Scolnick, Tiaunia N. Henry and Daniel R. Adler for Defendant and Appellant.

Cole Huber and Derek P. Cole for League of California Cities and California Special Districts Association as Amici Curiae on behalf of Defendant and Appellant.

Strumwasser & Woocher, Bryce A. Gee and Caroline C. Chiappetti for The Santa Monica Transparency Project as Amicus Curiae on behalf of Defendant and Appellant.

Shenkman & Hughes, Kevin I. Shenkman, Mary R. Hughes, Andrea A. Alarcon; Law Office of Robert Rubin, Robert Rubin; Goldstein, Borgen, Dardarian & Ho, Morris J. Baller, Laura L. Ho, Anne P. Bellows, Ginger L. Grimes; Parris Law Firm, R. Rex Parris, Ellery S. Gordon; Law Offices of Milton C. Grimes and Milton Grimes; Schonbrun Seplow Harris & Hoffman, Paul Hoffman and John Washington for Plaintiffs and Respondents.

Panish Shea & Boyle and Brian Panish for Richard Polanco, Sergio Farias, Juan Carrillo, Richard Loa and Austin Bishop as Amici Curiae on behalf of Plaintiffs and Respondents.

Hogan Lovells US, Ira M. Feinberg, Zach Martinez, Patrick C. Hynds and Joseph M. Charlet for FairVote as Amicus Curiae on behalf of Plaintiffs and Respondents.

A neighborhood organization and a resident sued the City of Santa Monica, which uses at-large voting to elect its City Council. The plaintiffs claimed this system discriminated against Latinos, which is the term all parties use. After a bench trial, the trial court agreed and ordered the City to switch to district-based voting. We reverse and enter judgment for the City because the City violated neither the California Voting Rights Act nor the Constitution.

I

We describe the setting.

A

At the time of trial, about 90,000 people lived in the City of Santa Monica, which is the defendant and appellant in this case and which we call the City. Latinos then comprised about 16

percent of the City's total population and 13.64 percent of the City's citizen-voting-age population.

The plaintiffs and respondents are Pico Neighborhood Association and Maria Loya.

Pico Neighborhood Association is an organization dedicated to improving conditions and advancing the interests of the Santa Monica neighborhood near Pico Boulevard. Residents formed the association in 1979 to help neighbors participate fully in the democratic process and to ensure a safe and secure community. Members advocate for neighborhood interests before the Santa Monica City Council.

Maria Loya is a Pico neighborhood resident and a Pico Neighborhood Association board member. Loya ran for the Santa Monica City Council in 2004 and lost. Loya's husband, Oscar de la Torre, is a leader of the Pico Neighborhood Association. Oscar de la Torre won Santa Monica-Malibu Unified School District Board races in 2002, 2006, 2010, 2014, and apparently in 2018 as well. He ran for the Santa Monica City Council in 2016 and lost.

We refer to the respondents collectively as Pico unless otherwise specified.

B

This case concerns two alternative election methods: at-large versus district voting. At-large voting is city-wide. District voting is also called ward voting: "district" and "ward" are synonyms. District voting would divide the City into the number of districts (or wards) corresponding to the number of council members.

The City now uses at-large voting to elect its seven-member City Council. The City holds elections every two years. National presidential elections are every four years. In those years, four

council seats are up for election: each voter can cast four votes. In between national presidential contests are elections for Governor. For elections held those years, voters each get three votes for the three council seats at stake. Depending on whether there are three or four seats open, the top three or four candidates receiving the most votes win. Santa Monica also uses at-large voting for its School, Rent Control, and College Board elections, but this suit targets only City Council elections.

District voting differs from at-large voting. In district voting, each voter casts one vote and votes to select only one candidate to represent that district.

C

Over the years the City has debated and used both at-large and district voting. We review this history, which has six stages. We pay particular attention to 1946 and 1992: the years in controversy, which are stages three and five. But first we begin at the beginning, in 1906.

1

A 1906 charter divided the City into seven districts, called wards. Voters in each ward voted for one council member to represent the ward.

2

In 1914, the City switched from wards to at-large elections. Voters in this new system elected three commissioners at large. Each commissioner occupied a different and specialized post: public safety, public works, and finance. The City held separate elections for each post. Voters could cast only one vote for one candidate in each election.

In 1946, the City changed its at-large voting into the system it uses today. The events of 1946 are crucial in this lawsuit and bear careful attention.

How can we tell what happened in 1946? What are the sources of evidence? Apart from the proposed charter and documents with voting results, the trial court considered only one direct source of evidence about events in 1946. This direct source was 1946 Santa Monica newspaper excerpts. In other words, no trial witnesses testified about what they saw or heard in 1946.

The 1946 newspaper excerpts reveal the following.

In a nutshell, the City in 1946 embarked upon charter reform. A deliberative body called the Board of Freeholders debated and crafted a proposed new charter. Supporters and opponents campaigned about it, and then voters overwhelmingly approved it.

We present the events of 1946 in more detail.

Voters elected a 15-member Board of Freeholders charged with proposing a new city charter. The Freeholders issued their charter proposal on August 15, 1946. They proposed the City continue at-large elections but expand the number of council members from three to seven. They proposed eliminating the three specialized posts in favor of seven equal city council members, each with a general and comprehensive portfolio. Voters would elect three or four council members, depending on the year, and correspondingly would cast up to three or four votes.

The new charter proposal would also create the staff office of city manager. For this reason, news articles in 1946

sometimes called the Freeholders' proposal a "council-manager" form of government.

The record gives us limited demographic information about the City in 1946. A table lists the total 1946 population as 67,473, with "White or Anglo" as 64,415. The other categories are "Black," "Asian," and "Latino," but there is no breakdown within these columns until later years. Today, there is no majority racial or ethnic group in California; statewide, every group is a minority. (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 666 (*Sanchez*).) The recent situation has been different in Santa Monica; in 2010, the white or anglo population was about 70 percent of the City's total. The situation was also different in Santa Monica in 1946, when the white or anglo population constituted about 95.5 percent. We refer to 1946 Santa Monicans in the 4.5 percent group as minorities.

All minority leaders in our record supported the proposed change in 1946. None opposed it. This fact is of dominating significance in this lawsuit about race discrimination, and so we elaborate.

Jean Leslie Cornett was Secretary to the Board of Freeholders and signed an advertisement supporting the charter. Cornett met with members of the National Association for the Advancement of Colored People (NAACP) and explained that the Freeholders' charter proposal would increase the opportunity for minority group representation by two and a half because it expanded the City Council from three to seven members.

Freeholder Vivian Wilken was a member of the NAACP and an organizer in the Santa Monica Interracial Progress Committee, which worked toward "[r]espect for human dignity through common appreciation of the worth of each individual

regardless of racial origin." Wilken also signed on to an advertisement supporting the charter.

Seven members of the Committee for Interracial Progress endorsed the charter amendment in newspaper advertisements. Among them was Reverend W.P. Carter, the preeminent African-American civil rights leader in Santa Monica in the 1940s, 1950s, and 1960s. Reverend Carter was a past president of the NAACP in Santa Monica.

Blanche Carter, Reverend Carter's wife and the first African-American Santa Monica school board member, signed an advertisement supporting the charter. So did other African-American, Latino, and Jewish community leaders.

No member of the Committee for Interracial Progress opposed the charter. No minority leaders, groups, or residents opposed the charter.

By a vote of 15,132 to 6,512, voters approved the charter on November 5, 1946.

4

In 1975, voters rejected Proposition 3, which, among other items, proposed the City switch back to district voting.

5

The year 1992 was another focus of attention in this case. We review 1992 events in detail.

As with 1946, the direct evidence about 1992 came strictly from historical records. There were only two direct sources of evidence: a written commission report and a videotaped City Council meeting where the report was discussed.

One fact witness was present at the 1992 meeting. This witness was former City Councilmember Antonio Vazquez. Vazquez was on the City Council in 1992 and was one of the

seven council members who voted on the decision the trial court condemned. Vazquez testified at trial by deposition. But as far as the record shows, Pico never asked Vazquez whether the City's decisionmaking in 1992 was for the purpose of discriminating against Latinos.

So the lone eyewitness did not weigh in on the crucial equal protection issue because Pico refrained from asking him about it.

As a result, only two items of evidence directly show what happened in 1992. These two direct sources are the report and the videotape. First we give an overview of what they reveal. Then we delve into detail.

The overview is the City did not change its electoral system in 1992. A special study commission concluded the status quo should change but could not achieve consensus on what the change should be, and so recommended inaction and further research. The City Council debated the matter at length and could not agree on anything except more study. In short, 1992 was a year of dissatisfaction, study, debate, and no change.

Now we plunge into more detail. We begin with the work of the Charter Review Commission, and then describe the City Council meeting where the Council discussed this Commission's report.

a

We describe the special study commission and its work.

The City Council appointed the 15-member Charter Review Commission to analyze a set of questions about the city charter, including alternatives to the at-large system the City adopted in 1946.

The Commission issued its report in June 1992. The report is more than 90 pages and it covered more than a dozen topics,

including term limits, selection of the city attorney, competitive bidding, official bonds, council meeting protocols, and so forth.

The first and largest topic in the report was the pertinent one here: the at-large election method for the City Council. The Commission comprehensively explored five voting options: at-large voting, district voting, mixed voting systems, and two types of proportional representation: single transferable votes and cumulative voting.

The Commission emphasized its dominating goal of racial justice. "The central issue, in the Commission's view, is not one of having Council members who are ethnic, but of empowering ethnic communities to choose Council members, and on this criterion, the at-large system is felt to be inadequate." The Commission sought to "distribute empowerment more broadly in Santa Monica, particularly to ethnic groups . . . ." The Commission also wrote district voting was not "clearly the most empowering option to insure minority influence in Santa Monica's political life." It decried "the consequence of disempowering ethnic minorities." The Commission underlined the virtue of bringing "Latinos much closer to placing their choice on City Council."

The Commission recounted its efforts to obtain enlightened perspectives on the issues. It met with Richard Fajardo, a former attorney with the Mexican American Legal Defense and Educational Fund (MALDEF), as well as with members of the NAACP and Citizens United to Reform Elections (CURE), which was Santa Monica's election reform advocacy group. Three Commissioners were members of CURE.

The Commission consulted scholarship about electoral systems. "A substantial part of this material [focused] on ethnic

representation questions." A historian who later served as Pico's expert wrote a report to the Commission stating his view that the City adopted its at-large system with racially discriminatory intent in 1946.

The Commission was dissatisfied with the at-large status quo but could not agree on what to do about it. After reviewing the options, the Commission advised the City Council to delay action and to gather more information.

A bare Commission majority favored some type of proportional voting but recognized these systems were unusual, complex, and largely untested. Apparently the City would have to write software from scratch. As alternatives to proportional voting, the Commission recommended that—if the City Council decided *not* to propose a proportional method to the voters—both a district system and a hybrid district/at-large system should be "seriously considered."

Five of the 15 Commissioners favored district voting as their first choice.

Most Commissioners reported "that we were making our decision with less information than we would have liked to have had before us . . . ." The Commission "strongly" suggested further study, "utilizing experts in this area as needed."

b

The City Council met to consider the Commission's report on July 7, 1992. This public meeting began at 7:40 p.m. and ended at 2:00 a.m. Our record contains a video of the entire meeting.

The Council consisted of Mayor Ken Genser, Mayor Pro Tempore Judy Abdo, and members Robert T. Holbrook, Herbert Katz, Kelly Olsen, Antonio Vazquez, and Dennis Zane.

Commission chair Nancy Greenstein presented the report. Other Charter Review Commissioners and members of the public commented about different election systems and then responded to the City Council's questions, which were many and searching.

Greenstein noted the election method question was the most difficult for the Commission. She said the majority of Commissioners recommended the City move away from the at-large system, but Commissioners were unsure about district voting as a replacement system. While a majority recommended the proportional method, this method admittedly was complex and had drawbacks. The Commissioners did not have enough time to study it. Only five of the 15 Commissioners favored district voting. Ultimately, the Commission was "not giving [the Council] a definitive yes on any system," but was recommending either staff or a small committee continue to study the proportional method and to provide more information about the proper technique for counting votes.

Commissioner Chris Harding was in the Commission's minority and supported districting. Harding urged the City Council to "do a thorough investigation and gather further information and certainly open this up for more public discussion." He did not "expect [Council] to make a decision tonight about this" and encouraged the Council to consider the lack of diversity among past mayors and council members.

George Hickey, another Commissioner, urged the Council to call on members of the public in its deliberations, especially those who served on the Commission.

Some speakers favored districts. They argued the City had never elected a council member from the Pico neighborhood, which had the highest African-American and Latino population

concentration. They wanted neighborhood-specific representatives.

Other speakers opposed a district system out of a desire to have all City Council members represent all residents.

Council members actively questioned speakers and discussed the issues.

For instance, Councilmember Holbrook asked Commission chair Greenstein if the Commission explored whether a hybrid district/at-large system would provide any additional advantage for underrepresented people to win elections.

Greenstein responded the Commissioners were not particularly interested in the hybrid system. Some thought the hybrid system would corrupt the district system and others preferred the proportional system. Some also thought the hybrid system still would dilute minority representation by making an intentionally-formed minority district larger. Councilmember Zane responded the hybrid system would only do so if the City did not expand the number of districts.

Councilmember Katz was concerned a district system would lead to "total provincialism" and believed each council member should represent the city as a whole.

Katz asked several speakers how they felt about a hybrid system's ability to balance the needs of individual neighborhoods with those of the City while intentionally forming districts to empower minorities. Katz emphasized the City would have to pick the districts, because having an all-white district would not help minorities. Katz gave an example of having neighborhoods like Pico become districts while keeping other seats at-large, and asked whether such a system would increase minority

representation and still keep the Council focused on overall City politics.

Richard Fajardo answered Katz. Fajardo was a former MALDEF attorney who had worked on voting rights cases and had advised the Commission. Fajardo told Katz it would depend on whether the at-large representatives could still dilute the power of the district representatives. Fajardo said the hybrid system had been used as a compromise in a number of voting rights cases.

Councilmember Holbrook expressed concerns about how districting would work if minority communities were spread out in their geographically small city, making it difficult to carve out districts.

Councilmember Vazquez favored districts, but noted the report raised a troubling prospect: a district system could pit minorities against each other.

Councilmember Zane spoke as an advocate of affordable housing. Zane asked Fajardo about the effect of district voting on the prospects for affordable housing projects. Zane worried every representative in a district voting system would take a Not-In-My-Backyard (NIMBY) view of low-cost housing projects, meaning every representative would oppose these projects and thus doom them. We quote Zane's lengthy question verbatim for reasons that later will be apparent. We italicize the one sentence that emerged as an issue.

"This is a question about districts that goes less to the sort of legal representational issues, more to some kind of policy concerns that I want to hear if you have had any experience or reflection on. The concern I have about districts sort of somewhat mirroring the parochial kinds of concerns that Mr. Katz alluded

to has to do with, issues like affordable housing and issues that are not simply the representational issues of the poor, for example, and historically discriminated-against minorities but are the sort of substantive needs. One of the experiences of people I have been acquainted with, who have made a transition from at-large systems to district systems, is that it becomes very difficult to get affordable housing projects passed. And the reason is, each council member has, for one thing, become something of a case manager of services rather than a policy maker. Two, each council member feels more vulnerable to any neighborhood protest, and affordable housing frequently, if not always, brings some level of neighborhood protest. In some of the communities I am aware of, they simply don't get affordable housing projects approved any more. Because every council member is afraid of them. *And so, you gain the representation but you lose the housing*. Now, do you have experience with that?"

Fajardo agreed "that has been an issue and it has been a problem" because "even within the Latino community" a debate between homeowners and renters would have to continue. But Fajardo's concern was the inability of minority communities to elect their preferred candidates to boards and commissions.

Zane replied "I just want us to make sure we, you know, don't try to solve our representational issues at the expense of our, the needs of the poor or things like affordable housing. We need a system we can choose both."

Zane returned to his affordable-housing theme about 45 minutes later, in response to Doug Willis's public comments. Willis, who was African-American and one of the 15 members of the Charter Revision Commission, said he belonged to CURE and

represented the Santa Monica-Venice chapter of the NAACP. Willis said he lived in the Pico neighborhood and supported district voting.

Zane responded to Willis. Zane acknowledged district voting has some advantages, but asked Willis if he, in turn, would acknowledge some of the disadvantages of district voting. Zane repeated his concern about whether district voting would end affordable housing projects by making district representatives frightened of the neighborhood protests that usually accompanied such proposals.

Willis replied the Pico area had the most affordable housing in the City.

Zane said "I'm not trying to identify a particular district."

Rather, Zane contrasted Santa Monica's willingness to approve affordable housing projects with communities that "proclaim similar progressive philosophies about housing" but cannot get affordable housing approved. Zane said the way these other places explained it was that the district council members are "freaked out" by every neighborhood uprising on any issue—not just affordable housing, but also "social service centers" and the like. "A small district makes those protesters look very powerful." Zane asked Willis, "how do we combat that" if we adopt district voting?

Willis understood Zane's point but said "I don't tend to agree" and said no more, thus ending their exchange.

After hours of further discussion, the council members voted four to three not to put a district election system on the 1992 ballot. They did agree, unanimously, to gather more information about the hybrid system and the single-member district system.

The record evidence was that, thereafter, the City's staff did provide the City Council with further information about hybrid voting, at-large voting, and district voting.

In this way, Santa Monica did not change from at-large voting in 1992.

6

In 2002, voters rejected ballot measure HH, which included a proposal to switch back to district elections.

7

Because of its history since 1946, Santa Monica now has an at-large City Council composed of seven council members. At the time of trial, two of these council members self-identified as Latinos: Antonio Vazquez (later replaced by Ana Maria Jara) and Gleam Davis. Another council member named Terry O'Day lived in the Pico neighborhood. During trial, then, the percentage of self-identified Latinos on the City Council was about 29 percent, which is about twice the percentage of voting-age Latinos in Santa Monica.

D

Now we turn to this lawsuit. Its pertinent procedural history began with Pico's operative complaint of February 23, 2017, alleging the City's at-large election system violated the California Voting Rights Act and the California Constitution. Pico alleged those who adopted and maintained the at-large system did so intentionally to dilute Latino voting power and to deny Latinos effective political participation in City Council elections. Pico also alleged the at-large system prevented Latino residents from electing candidates of their choice or influencing election outcomes.

Seven expert witnesses and nine fact witnesses testified during a bench trial beginning August 1, 2018, and ending September 13, 2018. There were 24 days of testimony. Trial days usually started between 9:30 and 10:30 a.m. and ended between 3:00 and 4:00 p.m., with a 90-minute lunch break, meaning that a "trial day" ranged between three and five hours. The trial court handled other cases for the balance of each day.

The trial devoted more time to experts than to fact witnesses. Pico's main expert, a historian, testified on 10 of the 24 days, for six full days and four partial days. Another Pico expert and two City experts each testified on three days, with one of them testifying for three full days.

Fact witnesses testified more briefly. Only one witness was present at the 1992 meeting and could testify about what he witnessed. That was former Councilmember Antonio Vazquez but, as noted above, Pico avoided asking Vazquez whether the City Council's 1992 vote had been for the purpose of discriminating against Latinos. Nor did Pico seek to present testimony from Richard Fajardo, Doug Willis, or anyone else present when Zane spoke words that decades later Pico would contend were racist. So no eyewitnesses testified from personal knowledge gained in 1992 about the purpose of the City's actions that year.

Rather the factual testimony was about other topics. Plaintiff Loya testified for two partial days, as did her husband Oscar de la Torre. Each of the other fact witnesses testified for one or two days.

On November 8, 2018, the trial court issued a tentative order stating the court was ruling in Pico's favor on both causes of action. This order did not provide legal reasoning, but rather

set a remedies hearing and a briefing schedule. In response to the City's request for a statement of decision, the court ordered Pico to prepare one.

On December 12, 2018, the court prohibited the City from holding any at-large City Council elections and ordered future elections to be district-based elections, according to an attached map.

Pico asked the trial court to clarify this order because, among other reasons, the court's map defined only one district rather than the seven necessary for the City's seven-member council to be elected through district voting. At a hearing, the trial court stated: "I am thinking maybe it makes sense to go with the seven districts [drawn by Pico's expert]; order the special elections; run with your appeal; and we will see where we end up."

The court ordered Pico to include seven districts in its proposed statement of decision and proposed judgment, and again stated, "We will let it run and see where it goes in the court of appeal."

On January 3, 2019, Pico filed its proposed statement of decision and proposed judgment. The City filed objections, including some 200 objections to the proposed statement of decision. The court sustained eight objections and overruled the rest. The trial court's statement of decision and judgment thus basically mirrored Pico's proposals. This ruling, issued on February 13, 2019, was Pico had proved the City violated the California Voting Rights Act as well as the equal protection clause of the California Constitution.

Using data provided by a historian, the trial court found "a consistent pattern of racially-polarized voting" in the City's at-

large elections. The historian analyzed seven City Council elections between 1994 and 2016 involving at least one Spanish-surnamed candidate, and estimated support from Latino voters and support from non-Hispanic white voters. The historian presented analyses showing a statistically significant difference in how non-Hispanic white voters and Latino voters voted in six of the seven elections. In all but one of those six elections, Latino voters cohesively supported the Spanish-surnamed candidates. According to the historian, "in all but one of those six elections, a Latino candidate received the most Latino votes, often by a large margin. And in all but one of those six elections, the Latino candidate most favored by Latino voters lost, making the racially polarized voting legally significant."

The trial court rejected the City's argument the candidate's race was irrelevant under the California Voting Rights Act. The court ruled it would consider only Spanish-surnamed candidates to be Latino candidates. Although City Councilmember Gleam Davis testified she "considers herself Latina because her biological father was of Hispanic descent," the court did not count Davis as Latina, because not enough people knew about Davis's ethnicity.

The trial court found several qualitative factors supported its finding of legally significant racially polarized voting, including the City's history of discrimination against Latinos.

At trial, the City argued the law required Pico to show vote dilution—not simply racially polarized voting—to prove the at-large system violated the California Voting Rights Act. The trial court acknowledged the City's argument that dilution was a separate liability element and held that, assuming dilution was a separate element, the evidence still showed the system diluted

Latino votes. The court noted "it is impossible to predict with certainty the results of future elections" but found the evidence showed "some alternative method of election would enhance Latino voting power."

The trial court also found the at-large system violated the California Constitution's equal protection clause because the City adopted the system with discriminatory intent in 1946, and maintained it with discriminatory intent in 1992. For both years, the trial court analyzed five factors from *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 266–268 to determine whether the City adopted or maintained the at-large system with discriminatory purpose: the impact, the historical background, the specific sequence of events leading to the decision, departures from the normal procedural sequence, and legislative history.

The trial court acknowledged minority leaders in 1946 favored the Freeholders' proposal and none publicly opposed it. The court nonetheless concluded "all understood that at-large elections would diminish minorities' influence on elections." The court found "the evidence of discriminatory intent outweighs the contrary evidence."

Analyzing the same factors, the trial court concluded the City in 1992 deliberately decided "to maintain the existing at-large election structure because of, and not merely despite, the at-large system's impact on Santa Monica's minority population." The trial court based its finding primarily on the Charter Review Commission's report, the July 7, 1992 City Council meeting, and Councilmember Zane's statements about affordable housing at the meeting.

Having basically adopted Pico's statement of decision, the court likewise adopted the district map drawn by a Pico expert as the appropriate remedy. The court found it would "likely be effective, improving Latinos' ability to elect their preferred candidate or influence the outcome of such an election." The trial court ordered the City to implement district-based elections for its City Council in accord with the seven-district map presented at trial.

The City appealed. It also asked the trial court to confirm the final judgment operated as a mandatory injunction that the appeal automatically would stay, or in the alternative to stay a portion of the judgment pending appeal. The trial court denied both requests.

The City petitioned the Court of Appeal for a writ of supersedeas, requesting an immediate stay. We granted the petition.

Based on its trial victory, Pico has asked the trial court to order the City to pay it about $22 million in attorney fees and costs. The trial court set a future hearing on this request.

II

This case presents two legal issues. The first is whether the City violated a statute. The second is whether it transgressed the California Constitution.

This section concerns the statute. The next section, section III, tackles the constitutional issue.

To summarize our statutory analysis, the trial court misinterpreted the statute. Properly interpreted, the statute imposes a dilution element Pico failed to prove. The City's actions complied with the statute.

We independently review issues of statutory interpretation. (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247.)

The next section sketches the background for the statute, which concerns at-large and district voting. The following sections describe and apply the statute.

A

As context for our statutory analysis, we sketch the background against which this statute operates.

People debate whether at-large voting or district (or "ward") voting is the superior form of democracy. Opinions vary.

Some of the briefing in this case speaks to this point. Amicus League of California Cities is an association of 478 cities in California. Joining it in this brief is the California Special Districts Association, which consists of over 900 special districts throughout California. The special districts provide Californians with services relating to police, fire, roads, harbors, waste, sewage, mosquitoes, libraries, parks, and similar matters.

This amicus brief presents the perspectives of these 1,000 plus California jurisdictions. This brief is not a source of facts from which a court could make factual findings. Lawyers wrote this brief, and like any brief, it is merely legal advocacy on behalf of those with an interest in the outcome of this case.

The amicus cities and special districts all hold elections. These entities take different views about at-large voting versus district voting. They recognize at-large voting can dilute minority voting power *in certain circumstances*, and that, when this occurs, it is bad. They argue, nonetheless, that legitimate debate remains over the merits of the two methods.

The amicus brief claims some member district and city officials support at-large elections. The main idea is at-large

voting elects representatives devoted to the welfare of the whole. Supporters say the district alternative leads to ward politics.

"Ward politics" is a term with a possibly pejorative connotation. (See, e.g., Plunkitt, Plunkitt of Tammany Hall (Project Gutenberg 2013) ch. 6 & 23 [talks given by George Washington Plunkitt around 1905].)

Some abuses of ward politics are a matter of record here. Santa Monica's Charter Revision Commission noted ward elections—also called district elections—were the rule in U.S. cities at the end of the 19th century. Widespread graft and corruption in city politics then led to reforming upheaval in municipal governance and swept away ward and district elections.

The record in this case also shows that, by 1989, at-large elections had become the norm in California. Among California cities, for instance, 205 cities then used at-large voting while only 15 cities preferred district voting. In 2014, most local governance bodies in California were elected on an at-large basis. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 788 (*Jauregui*).)

Another aspect of district voting is its requirement of drawing district lines, which in turn poses the issue of gerrymandering. (See *Reynolds v. Sims* (1964) 377 U.S. 533, 578–579.)

Yet, according to amici League and the special districts, today some among their members take a contrary view and favor *district* voting as the more democratic approach.

Officials who favor district voting say they believe their connections to distinct communities allow them to represent those communities better by responding more attentively to local and particular interests.

We also note that, for many decades, esteemed civil rights leaders have observed shifts from ward to at-large elections can deprive minority voters of fair and effective procedures for electing candidates of their choice. (E.g., Days & Guinier, *Enforcement of Section 5 of the Voting Rights Act* in Minority Vote Dilution (Davidson edit., 1984) p. 169.)

Amici League and special districts assert their organizations do not favor one system or the other. Rather they hold there are legitimate arguments for each system. Reasonable people can differ on the choice between district and at-large voting.

B

The Legislature weighed in on the debate about district voting by passing the California Voting Rights Act, which took effect in 2003. The Act consists of eight sections of the Elections Code: sections 14025 to 14032. Henceforth we refer to this statute as the Act. All further statutory references are to the Elections Code unless otherwise indicated.

The Act created a private right of action against political subdivisions of the state of California.

This case requires us to construe the Act. We begin with its language and structure in our quest to ascertain its purpose. Our central goal is to effectuate that purpose. We must interpret the statute's words in context, keeping in mind the statutory purpose. We start by considering the ordinary meaning of the statutory language, the language of related provisions, and the structure of the statutory scheme. If the language of a statutory provision remains unclear after this analysis, we may explore extrinsic sources like legislative history. (*Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1102–1103 (*Scholes*).) We

construe the statutory words in context so we can harmonize individual sections by considering the provision at issue in the context of the statutory framework as a whole. (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 83.)

The Act requires plaintiffs to satisfy five elements to make out a claim:

1. Protected class;
2. Resident;
3. At-large voting;
4. Racially polarized voting; and
5. Dilution.

Protected class. Element one requires plaintiffs to prove membership in a protected class. (§§ 14032 [stating this element], 14026, subd. (d) [defining protected class].) A protected class is a class of voters who are members of a race, color, or language minority group, as defined in the federal Voting Rights Act (52 U.S.C. § 10301 et seq.). (§ 14026, subd. (d).)

Resident. Element two requires plaintiffs to prove they reside in the political subdivision they are suing. (§§ 14032 [stating this element], 14026, subd. (c) [defining political subdivision].) A political subdivision is a geographic area of representation created for the provision of government services, and includes general law cities and charter cities. (§ 14026, subd. (c).)

At-large voting. Element three requires plaintiffs to prove the political subdivision used an at-large method of electing members to the governing body of the political subdivision. (§§ 14027 [stating this element], 14026, subd. (a) [defining at-large method of election].) At-large voting includes any of the following election methods: (1) one in which voters of the entire

jurisdiction elect members to the governing body; (2) one in which candidates must reside in given areas of the jurisdiction and voters of the entire jurisdiction elect members to the governing body; and (3) one that combines at-large elections with district-based elections. (§ 14026, subd. (a).)

Racially polarized voting. Element four requires plaintiffs to prove racially polarized voting occurred in the political subdivision's elections. (§§ 14028 [stating this element], 14026, subd. (e) [defining racially polarized voting].) Racially polarized voting is voting in which a protected class's electoral preferences are different from those of the rest of the electorate in a legally significant way. (§ 14026, subd. (e).)

Dilution. Element five requires plaintiffs to prove the political subdivision's at-large election method impaired "the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the *dilution* or the abridgment of the rights of voters" who belong to a protected class. (§ 14027, italics added.)

Section 14030 is a one-way attorney fee provision: the prevailing plaintiff party is entitled to fees and costs, so long as the plaintiff is not the state or a political subdivision. There is no fee provision for prevailing defendants. Prevailing defendants do not recover costs unless the action was frivolous or the like. (See generally *Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1235–1245.)

The Act defines only five of its statutory terms. (§ 14026, subds. (a)–(e).) The Legislature left a number of statutory terms undefined, as we explain below.

The City does not appear to contest that Pico has satisfied elements one, two, or three, but it does take issue with the trial court's finding of racially polarized voting and dilution.

C

This case turns on element five, which is the dilution element. We thus do not consider element four.

As we have just recounted, the dilution element required Pico to prove the City's at-large method impaired Latinos' ability to elect candidates of their choice or to influence the outcome of an election as a result of the *dilution* or the abridgment of Latino voting rights. (§ 14027.)

We focus on the word dilution, as does Pico. In defending its trial court victory, Pico in its brief to us uses a form of the word *dilution* more than 40 times. It uses a form of the word abridgement only once, and then only in passing. We focus on the issue Pico has posed.

The Legislature decided not to define the word "dilution." We must decipher what the Legislature meant this word to mean. We approach this interpretative work with the standard tools of statutory construction. We start by considering the ordinary meaning of the statutory language. (*Scholes*, *supra*, 8 Cal.5th at p. 1103.)

Dilution is a familiar word with a plain meaning. Dilution is the act of making something weaker by mixing in something else. (The Random House Dict. of the English Language (2d ed. unabridged 1987) p. 554 ["to reduce the strength, force, or efficiency of by admixture"].)

Pouring a quart of water into a quart of milk, for instance, dilutes the milk to half strength. Diluting the milk weakens its nutritional value.

This familiar concept applies to electoral results.

Many techniques can manipulate a voting system to dilute the ability of particular groups to achieve electoral success. Both district voting and at-large voting can be mechanisms of mischief.

In a district voting system, for instance, one can draw district lines to divide a group's supporters among multiple districts so they fall short of a majority in each district.

That is "cracking." (*Gill v. Whitford* (2018) ___ U.S. ___, ___ [138 S.Ct. 1916, 1923–1924] (*Gill*); cf. *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 769 [county intentionally fragmented Latino population to dilute that vote].)

Or one can draw district lines to concentrate a group into a few districts so the group wins there by overwhelming margins but achieves less overall success than if different line-drawing spread the group more evenly through a larger number of districts.

That is "packing." (*Gill*, *supra*, 138 S.Ct. at pp. 1923–1924; cf. *Georgia v. Ashcroft* (2003) 539 U.S. 461, 470, 481, 486–488 [explaining packing and unpacking].)

At-large elections are another possible method for diluting voting power and curbing electoral success, under particular conditions. At-large voting is not a per se violation of minority voting rights. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 48.) This common system can serve legitimate ends. But under certain circumstances it is possible to weaken a group's electoral success by using at-large voting instead of district voting.

A hypothetical example illustrates the point.

In this hypothetical we speak generally of groups, because the groups in electoral cases often are political parties rather than expressly racial or ethnic groups. This statute is drafted

specifically in terms of racial, color, and language groups, but the mechanisms of voting dilution extend beyond these categories.

For our hypothetical, assume everyone votes strictly according to group membership and, if possible, only for candidates who are members of their own group. Further assume one group has voting power of only 10 percent in a given city but, within that city, the group's voting power in neighborhood X is 60 percent. If neighborhood X were a voting district, the group could elect one of its own members as a district representative. The 60 percent neighborhood voting power would guarantee success. But now switch to at-large voting. This switch defeats the group's ability to elect anyone from its own ranks, because 10 percent is not enough to win. Changing from district to at-large voting under these circumstances would weaken that group's electoral success: the change would deny it the ability it previously had to elect a member of its own group.

This hypothetical example shows, with district voting, the group could elect one representative belonging to its group. But with at-large voting, the group could not elect anyone from its own group. Going from one representative to zero would dilute this group's ability to elect candidates from its group. Under these circumstances, an at-large system has diluted the group's voting power in a politically damaging way: the group lost the power to elect a representative of its choice.

The possibility of dilution does not mean it is generally a negative outcome when voters in a minority lose an election. Generally, democracy is majority rule. Under ideal conditions in a democracy, the majority of voters tends to win and the minority of voters tends to lose. When candidates or causes lose elections

simply because too few voters support them, that is not democracy failing. That is democracy working.

The dilution element thus must do the work of distinguishing between the general case, when majority rule is proper, and the special case, when some mechanism has improperly diluted minority voting power.

D

The City correctly notes Pico offered no valid proof of dilution.

As we have observed, the dilution element required Pico to prove the City's at-large method impaired Latinos' ability to elect candidates of their choice or to influence the outcome of an election as a result of the dilution of Latino voting rights. (§ 14027.)

One cannot speak of the dilution of the value of a vote until one first defines a standard as to what a vote should be worth. Justice Frankfurter made this point in his long and bitter dissent from the landmark decision in *Baker v. Carr* (1962) 369 U.S. 186, 300 (dis. opn. of Frankfurter, J.). Frankfurter thought his point was a reason to reject that decision, but the case law in its wake accepted his wisdom and built it into a standard litigation practice. (E.g., *Reno v. Bossier Parish School Bd.* (1997) 520 U.S. 471, 480 [plaintiffs must postulate an alternative voting practice to serve as the benchmark undiluted voting practice, because the concept of vote dilution necessitates the existence of an undiluted practice against which the fact of dilution may be measured].)

Pico agreed it was its burden to postulate a reasonable alternative voting practice to serve as the undiluted benchmark. Pico proposed a district system that, for one district within the City, would have 30 percent Latino voting power, as compared to

the 14 percent city-wide voting power Latinos hold in at-large elections.

Pico's showing was insufficient. Pico failed to prove the City's at-large system diluted the votes of Latinos. Assuming race-based voting, 30 percent is not enough to win a majority and to elect someone to the City Council, even in a district system. There was no dilution because the result with one voting system is the same as the result with the other: no representation.

Pico thus failed to show the at-large system was the reason Latinos allegedly have had trouble getting elected to the City Council. The reason for the asserted lack of electoral success in Santa Monica would appear to be that there are too few Latinos to muster a majority, no matter how the City might slice itself into districts or wards. At-large voting is not to blame. Small numbers are.

Perhaps the same holds true for other minorities in Santa Monica. Pico's briefing, however, gives us little data about other groups and their electoral histories in Santa Monica.

In passing, the trial court mentioned "cumulative voting, limited voting and ranked choice voting" as systems that, as alternatives to district voting, would also "enhance" Latino voting power. The court's treatment of these alternatives was perfunctory. The court did not define cumulative voting, limited voting, or ranked choice voting. Nor did it attempt to analyze how each might satisfy the dilution element. This fleeting reference, which Pico authored, is insubstantial and cannot support the judgment.

E

Pico responds with two arguments.

1

First, Pico argued the Act contains no dilution element at all. In its 95-page brief, Pico devoted only one sentence to this argument. An amicus brief also argued this point. At oral argument, however, Pico expressly and conclusively abandoned this argument, and for good reason.

To grasp this argument, recall element four requires plaintiffs to prove racially polarized voting occurred in elections held by the political subdivision. (§§ 14028 [stating this element], 14026, subd. (e) [defining racially polarized voting].)

Pico claimed a showing of racially polarized voting under section 14028 completely satisfies and thus supplants the dilution element in section 14027. Pico quoted the first sentence of subdivision (a) of section 14028: "A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision."

Pico thus contended the word "dilution" in section 14027 has no content independent of subdivision (a) of section 14028.

Pico's analysis contravened principles of statutory interpretation, in two independently fatal ways. Standard principles of statutory interpretation direct us to the ordinary meaning of the statutory words, the related provisions, and the structure of the statutory scheme. (*Scholes*, *supra*, 8 Cal.5th at p. 1103.)

Two standard factors—statutory text and the rule against surplusage—upend Pico's argument and have forced Pico to abandon it. We now detail the application in this case of these two aspects of statutory interpretation.

a

The statutory text is paramount and is contrary to Pico's argument. Three sections require plaintiffs to satisfy *both* the dilution element of section 14027 and section 14028's requirement of racially polarized voting. The three sections containing this decisive language are sections 14032, 14029, and 14030.

Section 14032 of the Act grants a private right of action to any voter in a protected class who resides in a political subdivision where a violation of sections 14027 *and* 14028 is alleged.

Section 14029 also is compelling, as plaintiffs gain remedies only by establishing a violation of both 14027 *and* 14028.

Section 14030 follows the same pattern for attorney fees and costs.

In sum, the legislature required litigants to prove both dilution *and* racially polarized voting to establish a claim, to have a remedy, and to recover fees.

These statutory passages require sections 14027 and 14028 to have independent content. Pico's argument ran aground on this requirement.

b

A second and independently fatal problem with Pico's argument was the rule against surplusage. If the Legislature had intended the result Pico urges, it would not have included the word "dilution" in the Act. But it did, and that too defeated Pico's argument.

Pico argued the statutory word "dilution" was mere surplusage. But surplusage in legislation is unusual and

disfavored. The venerable assumption is drafters avoid surplusage and therefore so should judges who interpret the drafting. (E.g., *People v. Leiva* (2013) 56 Cal.4th 498, 506 [avoid a construction that makes some words surplusage]; *Market Co. v. Hoffman* (1879) 101 U.S. 112, 115–116 [this rule was old in 1879].)

The word "dilution," moreover, is not just any old word. The word "dilution" has been a core part of the voting rights vocabulary at least since the 1964 decision in *Reynolds v. Sims*, *supra*, 377 U.S. at pages 555 and footnote 29, 557, 563, 567, 568. Dissenting Justice Harlan wrote the entire decision in that landmark voting rights case boiled down to the concept of dilution. (See *id*. at p. 590 (dis. opn. of Harlan, J.).)

It would have been incongruous for the Legislature to make a key word nugatory. Pico cited no precedent for this illogical form of statutory interpretation.

Pico's proposed interpretation of the Act thus was incorrect. (Cf. *Sanchez*, supra, 145 Cal.App.4th at p. 666 [Act was designed to combat a kind of vote dilution].)

In sum, it is incorrect to read the Act to say a mere showing of racially polarized voting necessitates a finding a city has misapplied at-large voting. Under the Act, racially polarized voting is a necessary but not sufficient element. Dilution also is an independent and necessary element. As we have explained, Pico did not prove dilution.

2

Pico's second response is its "influence" argument. Pico argues the change from 14 percent to 30 percent is legally significant because it increases the electoral "influence" of

Latinos. The Legislature added the word "influence" to section 14027 of the Act but did not define it.

Pico proposes a definition of this word that would give a winning cause of action to any group, no matter how small, that can draw a district map that would improve its voting power by any amount, no matter how miniscule. The trial court followed this approach by asking whether "some alternative method of election would enhance Latino voting power." According to this standard, any unrealized increase in a group's percentage would satisfy the dilution element.

This standard is untenable because it would create absurd results.

A hypothetical illustrates this fatal problem.

Assume three facts: there are 3,000,000 voters in a city; 3,000 belong to a small racial group G; and all voters are racially polarized in the sense voters will vote only for candidates of their own race.

In an at-large election, group G would constitute 0.1 percent of the electorate. Suppose we now switch from at-large voting to voting in 15 districts, each with 200,000 voters, and we draw the lines to maximize the voting power of group G. Now one district incorporates all 3,000 voters of group G. Thus group G would increase its voting power from 0.1 percent strength at large to 1.5 percent in that district. A change from 0.1 to 1.5 percent is a 15-fold increase, which seems sizeable in relative terms. This change would improve G's "influence" as Pico would define the term. But a group with a vanishingly small numerical presence—be it .01 percent or 1.5 percent—can have no practical numerical influence in any voting system. There are simply too

few voters in group G to be numerically effective in an environment of race-based voting.

To define "influence" as Pico proposes would merely ensure plaintiffs always win.

Pico cites the case of *Georgia v. Ashcroft*, *supra*, 539 U.S. at pages 470–471, 482–483. *Georgia v. Ashcroft* is inapposite in many ways. It interpreted section 5 of the federal Voting Rights Act, not section 2. These sections combat different evils and, accordingly, impose different duties. (*Id.* at pp. 477–478.) Section 5 deals with "retrogression," *id.* at p. 477, which is not a subject of the California Voting Rights Act. And *Georgia v. Ashcroft* merely held a trial court failed to consider all relevant factors when examining whether a redistricting plan would diminish minority voters' effective exercise of the electoral franchise. (*Id.* at p. 485.) It did *not* hold groups will influence elections at the 30 percent level but not at the 14 percent level. The holding in *Georgia v. Ashcroft* does not assist Pico. (See *Bartlett v. Strickland* (2009) 556 U.S. 1, 19–20 (plur. opn. of Kennedy, J.) [a party asserting § 2 liability must show the minority population in the potential election district is greater than 50 percent].)

Pico seeks to rescue its influence argument by suggesting non-Latinos might "cross over" and vote for Latino candidates, buoying Latino power and clearing the 50 percent threshold to electoral success. This suggestion arbitrarily embraces racially polarized voting when it helps and abandons it when it hurts. It creates a manipulable standard boiling down to plaintiff always wins.

The City agrees some "influence" claims in theory could be valid if evidence showed a near-majority of minority voters in a

hypothetical district would often be sufficient for the minority group to elect its preferred candidates. But the City correctly notes we need not decide that question today, for this case presents no such district.

At oral argument, Pico said plaintiff Maria Loya would have won using the seven-district map the trial court adopted. The trial court, however, made no such finding. Nor did Pico's briefing to us argue this point, which Pico thereby forfeited. Parties cannot fairly raise a new theory for the first time in oral argument, for that tactic deprives the other side of notice and an opportunity to be heard. It likewise deprives the court of a thoughtful adversarial discussion of the issue. (E.g., *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 5, fn. 12, 19 [parties forfeit issues and arguments raised for the first time at oral argument].)

Dilution requires a showing, not of a merely marginal percentage increase in a proposed district, but evidence the change is likely to make a difference in what counts in a democracy: electoral results.

In sum, Pico failed to prove dilution. The City did not violate the statute. In light of this conclusion, we do not reach the issues of whether there was racially polarized voting or whether the trial court's interpretation of the Act would make the Act unconstitutional as applied to this case.

We turn to the constitutional question.

III

The constitutional question concerns equal protection. The trial court found the City's voting system violated equal protection because, in 1946 and again in 1992, the City acted with the purpose of suppressing Latino political power. The court, however, applied an erroneous legal standard to reach

these faulty conclusions. A proper analysis shows Pico did not prove the City adopted or maintained its system for the purpose of discriminating against minorities.

A

Federal and state equal protection standards are not always the same, but they are for this analysis. (See *Jauregui*, *supra*, 226 Cal.App.4th at p. 800 [California decisions involving voting issues closely follow federal constitutional analyses].) The trial court took this approach and no party disputes it.

The City correctly argues the trial court applied the wrong legal rule. We independently review this question of law. (*Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 932.) This analysis does not require us to resolve disputed facts.

In this case there were no eyewitnesses who testified in a pertinent way to the crucial events. Rather, direct evidence about the key events came from three types of historical artifacts: (1) 1946 newspaper excerpts, voting records, and the proposed charter; (2) the 1992 Charter Review Commission report, and (3) the July 7, 1992 City Council meeting video. These historical artifacts are the core of record for the equal protection analysis. They were not created for purposes of litigation.

We independently review trial court findings based on historical artifacts like videotapes. (See *Scott v. Harris* (2007) 550 U.S. 372, 379–380 (*Scott*) [appellate judges interpret "what we see on the video" for themselves; the appellate court gives no deference to the trial court's findings]; *id.* at p. 384 [as a matter of law, appellate judges conclude video shows car driver posed a threat to pedestrians; no deference]; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 ["Because the trial court's findings were based

solely upon documentary evidence, we independently review the record."].)

Historical artifacts differ from the live witness testimony in a case Pico cites: *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 924–928. We are in the same position as the trial court was to evaluate materials like the 1946 newspaper clippings, the 1992 commission report, and the 1992 video. We do not defer to a trial court's reaction to historical artifacts like these, any more than we would defer to a trial court's "findings" that A Room of One's Own concerns Napoleon in Russia or that Citizen Kane shows Druids built Stonehenge. News articles, videos, and other texts that were not created for litigation are different from witnesses in a courtroom testifying and being cross-examined under oath, and are not fit topics for trial court factfinding to which appellate courts will defer.

Deference to factual findings stems from the fact finder's observation of the demeanor of live witnesses and their manner of testifying. (*In re Avena* (1996) 12 Cal.4th 694, 710.) That deference is inappropriate when evidence does not involve the credibility of live testimony. (*In re Resendiz* (2001) 25 Cal.4th 230, 249; see also *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79 [no deference is given to trial court's conclusion about written documents, because trial and appellate courts were in the same position in interpreting that evidence].)

Experts in this case testified about these written and video artifacts, but that does not change our analysis. Appellate courts are not required to defer to expert opinion regarding the ultimate issue in a case. (*Vergara v. State of California* (2016) 246 Cal.App.4th 619, 650.) "Expert" opinion about how a court should interpret, for instance, this 1992 video is simply highly

partisan advocacy in the guise of evidence; this type of "expert testimony" boils down to argument, not evidence. Courts have been familiar with this problem for some time. (Cf. *Winans v. N.Y. & Erie Railroad Co.* (1858) 62 U.S. (21 How.) 88, 101 [courts cannot receive professors to prove to the court the proper or legal construction of instruments of writing; experience shows that opposite opinions of persons professing to be experts may be obtained in any amount].)

B

The central purpose of equal protection is to prevent officials from discriminating on the basis of race. (*Washington v. Davis* (1976) 426 U.S. 229, 239.) An inquiry into the *purpose* of the challenged conduct is essential. A showing of a racially disproportionate *impact* alone is insufficient. (*Rogers v. Lodge* (1982) 458 U.S. 613, 617–618.) To prevail on its equal protection violation claim, Pico had to prove the City adopted or maintained its at-large system with the purpose of discriminating against minorities. (*Washington v. Davis*, *supra*, at pp. 239–244.) The parties agree on this.

Discriminatory *purpose* requires more than *knowledge* of consequences. (*Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, 279 (*Feeney*).) It implies the decision maker selected or reaffirmed a particular course of action not in spite of adverse impact on a group, but because of that impact. (*Ibid.*)

The facts of *Feeney* illustrate the difference between the mental states of purpose and knowledge: between acting with the goal of achieving an end, which is purpose, and merely acting with awareness a side effect will result, which is knowledge.

In *Feeney*, a Massachusetts statute gave veterans preference over others for state jobs. The goal was not to harm

women, but that was the effect, because only two percent of veterans then were women. The statute created winners and losers, and, overwhelmingly, women lost. Legislators knew that would happen. They knew nearly all veterans at that time were men. But the law did not deny women equal protection, even though its authors knew it would disproportionately harm women, because harming women was not their purpose. (*Feeney*, *supra*, 442 U.S. at pp. 270, 274–281.)

This equal protection principle holds true as a general matter. (*Rogers v. Lodge*, *supra*, 458 U.S. at pp. 617–618.) Legislators' awareness of a racially disparate impact is not enough to prove their intent to discriminate by race. (*City of Mobile v. Bolden* (1980) 446 U.S. 55, 66–67, 71 & fn. 17, superseded by statute on other grounds.)

This careful distinction between purpose and knowledge is familiar in the law. The Model Penal Code precisely defined purpose and knowledge. (See Model Pen. Code, § 2.02, subd. (2)(a) & (b).) Its definitions perfectly fit the distinction *Feeney* drew.

People act *purposely* to achieve gender or race discrimination when it is their conscious object to engage in conduct of that nature or to cause such a result. People act *knowingly* when they are aware it is practically certain their conduct will cause a disparate impact along gender or racial lines. (See Model Pen. Code, § 2.02, subd. (2)(a) & (b).)

The logic of this constitutional distinction is apparent. Redistricting legislatures presumably are aware of racial demographics, just as we presume they are aware of age, economic status, and other demographic factors. But this awareness, this *knowledge*, does not prove a *purpose* of race

discrimination. (*Shaw v. Reno* (1993) 509 U.S. 630, 646.) Plaintiffs must show the government adopted or maintained the election system for the purpose of racial discrimination. A knowledge of a disparate impact is not enough. (*City of Mobile v. Bolden*, *supra*, 446 U.S. 55 at pp. 66–67, 71 & fn. 17.)

The trial court departed from these equal protection standards. Its departure invalidates its conclusions. The trial court erroneously concluded the City acted with discriminatory intent in 1946, when the City adopted its at-large system, and in 1992, when the City left this at-large system unchanged. But there was no evidence the City had the *purpose* of engaging in racial discrimination on either occasion. For this reason, the City's actions did not violate equal protection.

We examine events in 1946 and then 1992.

1

In 1946, 100 percent of the leaders of the minority community who expressed a public opinion supported the City's action. None opposed it. The people who knew best and cared most detected no City purpose of race discrimination against them. As a matter of law, this unanimous evidence is a litmus test dictating a finding in the City's favor. The City in 1946 did not act with a purpose of race discrimination.

Contemporaneous and unanimous support from minority community leaders shows the 1946 charter was not a hostile effort to oppress minorities. No one has a more sensitive eye or a stronger vested interest than leaders of minority communities. If they speak publicly with one supporting voice, as they did about the election in 1946, minority leaders are bellwethers for voters who care most keenly about the quality of life for minorities.

Pico's claim is unprecedented. It asks us to rule a city and its electorate engaged in hostile discrimination against minorities when that city and its electorate *did what minority leaders asked*. Pico cites no case with that illogical holding.

Pico does not explain how it, today, has greater insight into the racial realities of 1946 than the unified leaders of the minority communities who, in 1946, lived in Santa Monica. Pico does not argue all these leaders were somehow tricked, out of touch, muzzled, or corrupted. Pico simply suggests their views do not matter. This is error.

Pico incorrectly contends "both proponents and opponents of at-large elections understood such elections would prevent minority representation." To the contrary, the evidence shows there was uniform minority support for the City's 1946 charter change. The only newspaper critiques of the proposed charter were advertisements run by an anonymous group calling itself the Anti-Charter Committee.

The work of the anonymous Anti-Charter Committee does not show a general understanding the Charter would harm minority groups. It is not evidence minority communities were divided in their support of the 1946 charter.

In 1946, the identity of Anti-Charter Committee members became a notorious issue in the City. In its ads attacking the charter, the Anti-Charter Committee identified itself only as "a group of business men [sic] and other private citizens." A newspaper editorial, however, questioned who belonged to, and who contributed to, this "well-heeled group." This editorial contrasted the open and published "names of nearly 200 prominent Santa Monica citizens who have endorsed the new city charter" with the secrecy surrounding the identity of the Anti-

Charter Committee's membership and its source of funding. The editorial asked if the Anti-Charter Committee's contributors included people "who sell certain supplies to the city government under contracts very favorable to them, and who are unwilling to have their names appear?" "The people of Santa Monica are entitled to know who they are."

The Anti-Charter Committee never responded to this editorial, so far as the record shows.

The Anti-Charter Committee's ads provide insight into its perspective. One ad, titled "Who's Going to Manage the City Manager?", states that, "[l]ike Communism, the [charter's] theory of a city-manager-operated city is wonderful. Practically it does not work out. Dictatorship never does."

A different Anti-Charter Committee ad stressed systems like the one in the proposed charter "have higher tax rates and higher indebtedness" than the City's existing system. "Don't write a blank check and give it to a cause that has proved itself a spendthrift!"

Another Anti-Charter Committee ad stated "[t]he first claim of minority groups is that they are making a change in the interest of 'true democracy'—this is much the same manner as the communists work from within."

This same ad continued: "Do you want increased taxes, rule of the city by a few? If you don't, then—VOTE NO . . . ."

Another ad, titled "DO YOU WANT THIS DISASTER IN SANTA MONICA?", reprinted letters to the editor from a paper in Montebello, which the ad said had a government like the proposed Freeholders' charter. The letters expressed anger at the high taxes and expenditures in Montebello. After these letters, the ad concluded:

"What more could be said to prove our point that this proposed Charter will plunge Santa Monica into bitter political strife and chaos; it will mean unbearable taxation, will establish dictatorial rule that will starve out minority groups and will throw our entire model Civil Service into the discard."

Pico puts special emphasis on one Anti-Charter Committee ad titled "MINORITY GROUPS and the Proposed Charter." This ad posited "[t]he lot of a member of a minority, whether it be in a location of not-so-fine homes, or one of race, creed, or color, is never too happy under the best of conditions." The ad predicted the proposed charter would create a "dictatorship" of council members who would "mostly originate from North of Montana" and this "dictatorship type of government" would block access to government. "Where will the laboring man go? Where will the Jewish, colored, or Mexican go for aid in his special problems?"

No evidence shows any "laboring man" or the "Jewish, colored, or Mexican" supported the Anti-Charter Committee or its advertising or opposed the 1946 charter.

Pico's reliance on these ads is misplaced. The Anti-Charter Committee was not an advocate for minorities or for minority voting rights. Pico claims news clippings show everyone in Santa Monica in 1946 understood at-large voting disadvantaged minorities, but the news clippings show the opposite. Nor are they reason to discard the legal principle that unanimous minority support for an electoral result shows the election was not the product of racial prejudice against those minorities.

The same holds for Pico's other supposed sources of insight into the 1946 election. All these arguments unacceptably assume Pico and its experts can know better than minority leaders in 1946 what was good for minorities in 1946.

In sum, Pico failed to prove the City acted with the purpose of discriminating against racial minorities in 1946. (*Feeney*, *supra*, 442 U.S. at pp. 279–281.) To the contrary, minority leaders who spoke in 1946 unanimously favored the City's action. The City did not violate equal protection in 1946.

2

We turn to 1992.

In 1992, the City appointed a 15-member commission that wrote a high-minded and comprehensive, but perplexing, report. The report was perplexing because it expressed strong dissatisfaction with the status quo but offered no consensus alternative. The report's final recommendation was to delay action and gather more information. The City Council met publicly to mull the report. This public discussion was a model of civic engagement: substantive, open, participatory, and cordial. There was never a hint of hostility to minorities. To the contrary, speaker after speaker sought ways of increasing minority empowerment. But after discussing the issue for hours the City Council remained deadlocked about the right alternative to the status quo and resolved simply to study the issue further.

As a matter of law, this series of actions was not purposive race discrimination. The trial court erred again by applying the wrong legal standard. *Feeney* required proof of a *purpose* of racial discrimination. There was none.

"There is, [moreover], an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by

[Pico]." (*Scott*, *supra*, 550 U.S. at p. 378.) Pico's version of events is "so utterly discredited" by this video as to dictate judgment for the City. (*Id*. at p. 380.) The trial court "should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." (*Id.* at pp. 380–381.)

We have studied this 1992 videotape. It contains nothing showing a purpose of racial discrimination.

Pico incorrectly focuses on a single sentence from one speaker, and argues this sentence showed the City's entire deliberation and vote was for the purpose of hostile race discrimination. This one sentence was when Councilmember Zane said "And so, you gain the representation but you lose the housing."

This sentence is not evidence the City had a purpose of hostile discrimination against anyone. This sentence contained no express, implied, or coded racial reference or hostile purpose of racial discrimination.

An objective observer watching this video sees Zane ask about an incentive that district voting creates. This incentive is for district representatives to be more responsive to district voices. Zane questions whether this is a good thing. He was concerned this incentive would imperil a political cause he favored: affordable housing projects.

Zane supported affordable housing. Affordable housing is not a policy with a purpose of harming Latinos or minorities. For instance, Councilmember Antonio Vazquez testified Santa Monicans for Renters' Rights endorsed his successful run for the Santa Monica City Council in 1990, and he thought he probably would not have won without that endorsement.

Zane noted affordable housing projects usually engendered NIMBY protests from neighbors. Zane asked Richard Farjado and Charter Review Commissioner Doug Willis whether they would acknowledge a drawback of district voting in this context. The drawback, Zane explained, was the proclivity of district representatives to oppose affordable housing projects because of their heightened sensitivity to neighborhood protests. "A small district makes those protesters look very powerful," said Zane.

Zane made no reference to Latinos or the Pico area. He suggested he was concerned with a general tendency, not a particular district: "I'm not trying to identify a particular district."

Zane expressed concern district voting would make NIMBY voting so prevalent as to doom affordable housing projects. Richard Fajardo, a former MALDEF lawyer with experience in voting rights cases, agreed "that has been an issue and that has been a problem" because "even within the Latino community" a debate between homeowners and renters would have to continue.

In context and beyond question, Zane's comment was not a statement of discrimination against Latinos. The entire exchange, in context, was a substantive and cogent discussion of the pluses and minuses of district voting. There were no coded messages of hostility to Latinos or revealing Freudian slips.

Pico claims Zane implied the Pico area was a dumping ground for undesirable low-income housing projects. This claim is incorrect. Zane explained he was not discussing particular districts but rather the tendency of any district representative to fear the local protest Zane said typically accompanied affordable housing projects.

We decline Pico's invitation to take the unprecedented and unwise path it urges.

When a city's commission supports minority empowerment but neither it nor the city can achieve consensus about the right alternative to at-large voting, the municipal decision to gather more information does not violate equal protection. As a matter of law, a court need go no further to vindicate this decision against the allegation of an invidious purpose.

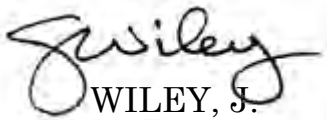
In sum, the City did not act with a racially discriminatory purpose in 1946 or in 1992. Pico's equal protection claims fail.

We gave the parties our tentative opinion in this case in advance of oral argument. This tentative opinion included the equal protection analysis presented here, including our statement of the standard of review and our analysis of the 1946 news clippings and the events of 1992. At oral argument, Pico forcefully and at considerable length presented its response to our tentative opinion, but did not contest our equal protection analysis in any respect.

The City did not violate the California Voting Rights Act or the California Constitution. We do not reach the remedies issue because there was no wrong to remedy.

DISPOSITION

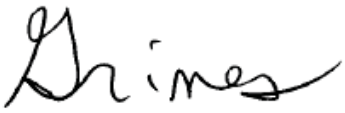
We reverse the judgment. We award costs to, and direct the trial court to enter judgment for, the City of Santa Monica.



WILEY, J.

We concur:

BIGELOW, P. J.



GRIMES, J.

EXHIBIT C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PICO NEIGHBORHOOD ASSOCIATION et al.,

Plaintiffs and Respondents,

v.

CITY OF SANTA MONICA,

Defendant and Appellant.

B295935

Los Angeles County
Super. Ct. No. BC616804

ORDER

THE COURT:

The trial court entered judgment in 2019. It found the City of Santa Monica had created an election system that violated constitutional equal protection as well as the California Voting Rights Act.

This court reversed both rulings in 2020.

The Supreme Court depublished this court's opinion and, in 2023, reversed this court's analysis of the Act. The high court did not review the constitutional issue, nor did it reinstate the trial court's judgment on the Act. The high court identified the proper way to analyze the Act and remanded for a searching evaluation of the totality of the facts and circumstances, including the characteristics of the specific locality, its electoral history, and an intensely local appraisal of the design and impact of the contested electoral mechanisms as well as the design and impact of the potential alternative electoral system.

Appellant and Respondents may each file a supplemental opening brief addressing the Supreme Court's decision and any other legal authorities appearing since this Court's 2020 opinion, consistent with California Rule of Court 8.200(b). The supplemental opening briefs shall not exceed 14,000 words each and shall be filed no later than December 6, 2023 (with no additional grace period under rule 8.220(a) of the California Rules of Court). Appellant and Respondents may then each file a supplemental responding brief, responding to the other side's respective supplemental opening brief. The supplemental responding briefs shall not exceed 14,000 words each and shall be filed no later than February 7, 2024 (with no additional grace period under rule 8.220(a) of the California Rules of Court).

This court invites the parties to include in their briefing whether it would be appropriate to remand the case to the trial court for the necessary searching evaluation of the totality of the facts and circumstances, including the characteristics of the specific locality, its electoral history, and an intensely local appraisal of the design and impact of the contested electoral mechanisms as well as the design and impact of the potential alternative electoral system. (See also *Pico Neighborhood Association v. City of Santa Monica* (2023) 15 Cal.5th 292, 308 [312 Cal.Rptr.3d 319, 339] ["In predicting how many candidates are likely to run and what percentage may be necessary to win, courts may also consider the experiences of other similar jurisdictions that use district elections or some method other than traditional at-large elections."].)

STRATTON, P. J. GRIMES, J. WILEY, J.

EXHIBIT D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PICO NEIGHBORHOOD ASSOCIATION et al., Plaintiffs and Respondents, v. CITY OF SANTA MONICA, Defendant and Appellant.	B295935 Los Angeles County Super. Ct. No. BC616804 **ORDER**

THE COURT:

The trial court entered judgment in 2019. It found the City of Santa Monica had created an election system that violated constitutional equal protection as well as the California Voting Rights Act.

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Neighborhood Association v. City of Santa Monica (2023) 15 Cal.5th 292, 308 ["In predicting how many candidates are likely to run and what percentage may be necessary to win, courts may also consider the experiences of other similar jurisdictions that use district elections or some method other than traditional at-large elections."].)

This case is remanded to the Los Angeles Superior Court for further proceedings consistent with the Supreme Court's guidance.

Motions are moot.

STRATTON, P. J. GRIMES, J. WILEY, J.

EXHIBIT E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
EVA McCLINTOCK, CLERK

DIVISION 8

Los Angeles County Superior Court

PICO NEIGHBORHOOD ASSOCIATION et al.,
Plaintiffs and Respondents,
v.
CITY OF SANTA MONICA,
Defendant and Appellant.
B295935
Los Angeles County Super. Ct. No. BC616804

***** REMITTITUR *****

I, Eva McClintock, Clerk of the Court of Appeal of the State of California, for the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on February 9, 2024 and that this order, opinion or decision has now become final.

Witness my hand and the seal of the Court
affixed at my office this

Apr 15, 2024

EVA McCLINTOCK, CLERK

by: R. Cervantes,
Deputy Clerk

cc: All Counsel
File

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PICO NEIGHBORHOOD ASSOCIATION et al., Plaintiffs and Respondents, v. CITY OF SANTA MONICA, Defendant and Appellant.	B295935 Los Angeles County Super. Ct. No. BC616804 **ORDER**

THE COURT:

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Neighborhood Association v. City of Santa Monica (2023) 15 Cal.5th 292, 308 ["In predicting how many candidates are likely to run and what percentage may be necessary to win, courts may also consider the experiences of other similar jurisdictions that use district elections or some method other than traditional at-large elections."].)

This case is remanded to the Los Angeles Superior Court for further proceedings consistent with the Supreme Court's guidance.

Motions are moot.

STRATTON, P. J. GRIMES, J. WILEY, J.

EXHIBIT F

No. B295935

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

CITY OF SANTA MONICA,

Petitioner-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Respondents and Plaintiffs.

PETITION FOR WRIT OF SUPERSEDEAS OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

Appeal from the Superior Court for the County of Los Angeles
The Hon. Yvette M. Palazuelos, Judge Presiding
Superior Court Case No. BC616804
Department 9 Telephone: (213) 310-7009

Gov't Code, § 6103

IMMEDIATE STAY REQUESTED
(*of order prohibiting Council members from serving after August 15, 2019, which calls for compliance starting on or before April 1, 2019*)

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In this California Voting Rights Act case, the trial court entered a judgment mandating, in paragraph 9, that as of August 15, 2019, the City of Santa Monica must oust all of its duly elected Council members from office—leaving the City with no choice but to hold an election this summer to ensure that there is a new Council in place to run the City. The City has appealed, effectuating an automatic stay of paragraph 9 under section 916 of the Code of Civil Procedure. But the trial court has refused to confirm that a stay is now in place. And plaintiffs have taken the position that paragraph 9 is merely prohibitory, so it is *not* stayed during this appeal, and that if the City does not comply with it, "there will be consequences." (Vol. 5, Ex. GG, p. 1121, fn.2.)

Paragraph 9 provides: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." This is indistinguishable from many other injunctions that the Supreme Court and Courts of Appeal have found to be mandatory in effect—and thus automatically stayed on appeal—even if prohibitory in form, because they coerce a change to the status quo. (See, e.g., *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 838.) Here, the enforcement of paragraph 9 will have a dramatic, irreparable impact on the status quo and the electoral process in Santa Monica. It requires the City to strip its current Council members of their elected positions, scrap an at-large election system that has been in place for

more than seven decades, and hold an election this summer under a brand-new, court-imposed district-based system. Plaintiffs have emphasized that paragraph 9 *requires* a fundamental change to the status quo, and that if the City refuses to disband its current Council and hold an election before August 15, "the Governor will do it for them. He will order an election. *We are not talking about them not having an election*. They have time to do it. *They will do it.* They just don't want to do it." (Vol. 5, Ex. II, p. 1184:18-21, italics added.)

Under the circumstances, in light of the plaintiffs' position that paragraph 9 is not presently stayed and the trial court's refusal to clarify this issue, the City respectfully requests that this Court issue a writ of supersedeas in a corrective capacity, confirming that paragraph 9 of the trial court's judgment is a mandatory injunction and was automatically stayed by the City's filing of its notice of appeal.[1]

Alternatively, if the Court concludes that paragraph 9 is prohibitory in effect as well as form, and therefore not automatically stayed on appeal, this Court should exercise its discretion to stay the enforcement of paragraph 9 during the appeal to avoid irreparable harm to the City, its Council members, and the public. Among other things, the enforcement of paragraph 9 could leave the City without any governing body for some period of time;

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[1] The parties and the trial court agree that paragraph 8 of the judgment, which expressly calls for a district-based election to be held on July 2, 2019, is stayed automatically as a result of the City's appeal. (See Vol. 5, Ex. II, p. 1189:14-16.)

would compel the City to adopt the very method of election and districting plan whose necessity and legality are the subjects of this appeal; would rob the current Council members of the seats they spent time and energy campaigning for and winning; would deprive voters, including Latino voters, of their preferred representatives; and would cost the City almost $1 million in unrecoverable election-related costs.

Finally, the City requests that this Court either issue a decision on this petition before April 1 (the date when the Council would need to pass a resolution calling for an election to occur in late July) or push back the August 15, 2019, deadline in paragraph 9. Elections must be noticed approximately four months in advance, and without either temporary or permanent relief from this Court, the City would be forced to notice a district-based election in early April. (See Vol. 5, Ex. GG, p. 1135, ¶¶ 5(a)–(c).)

II. PETITION FOR WRIT OF SUPERSEDEAS OR OTHER EXTRAORDINARY RELIEF; REQUEST FOR STAY

A. Parties

1. Petitioner, the City of Santa Monica, was the defendant in the underlying action (Los Angeles Superior Court case number BC616804).

2. Respondents, who were the plaintiffs in the underlying action, are the Pico Neighborhood Association and Maria Loya.

B. Factual background

3. Santa Monica is a small, progressive, and inclusive

city. In 1946, the City adopted its current Charter, which calls for the "at-large" election of seven Council members. (See Vol. 2, Ex. E, p. 291.) Each voter may cast up to three votes in gubernatorial election years and up to four votes in presidential election years for candidates of his or her choice. Every voter thus has a say as to who sits in each seat on the Council, and Council members are accountable to every voter.

4. The City's most prominent minority leaders backed the adoption of the current electoral system in the 1946 Charter (see Vol. 5, Ex. BB, p. 1079, ¶ 70), in large part because that system made it more likely that minorities could elect candidates of their choice. The 1946 Charter also featured other provisions that were highly favorable to minorities, including an explicit prohibition against racial discrimination in public employment. (Vol. 4, Ex. X, p. 864.) Not surprisingly, there is no record of any minority residents opposing the 1946 Charter. (*Id.*, p. 931.)

5. Santa Monica voters have twice, in 1975 and in 2002, overwhelmingly rejected proposals to drop the at-large method of election in favor of a districted electoral scheme. (See Vol. 2, Ex. E, pp. 294, 297.) And they did so for sound, "good government" reasons that had nothing to do with race. Under a districted system, each voter would be able to vote only once every four years, and for only one seat on the Council—the one assigned to the particular district in which that voter lives. A Council member under such a system would be directly accountable only to his or her district, not the City as a whole, and voters feared that such Council members would succumb to horse-trading and parochialism.

6. The at-large system has served the City well for 73 years. Council elections are hotly contested, with typically over a dozen candidates running for office, and voter participation is high. The candidates elected as a result of these competitive races represent and are accountable to every last resident in the City. And, critically, under the current at-large election system, candidates preferred by Latino voters have consistently prevailed at the polls, notwithstanding the fact that Latinos presently make up only 13.6 percent of the City's voting population. (See Vol. 2, Ex. E, pp. 303–314.)

C. Procedural background

7. Plaintiffs filed this action on April 12, 2016 (see Vol. 1, Ex. A, pp. 9–25), and filed the operative complaint on February 23, 2017 (see Vol. 1, Ex. B, pp. 27–48). Plaintiffs alleged that the City amended its Charter in 1946 to discriminate against minority voters, in violation of the Equal Protection Clause of the California Constitution, and that the City's at-large electoral system prevents Latino voters from electing candidates of their choice, in violation of the CVRA. (*Ibid.*)

1. The court trial and subsequent proceedings

8. The court trial in this case began on August 1, 2018. The trial lasted for six weeks, concluding on September 13, 2018.

9. The parties then submitted closing briefs and proposed verdict forms, with plaintiffs' opening papers filed on September 25, 2018 (Vol. 1, Ex. C, pp. 50–160 (original); Vol. 1, Ex. D,

pp. 162–257 (corrected)), the City's papers filed on October 15, 2018 (Vol. 2, Ex. E, pp. 266–339), and plaintiffs' reply filed on October 25, 2018 (Vol. 2, Ex. F, pp. 341–355).

10. In its closing brief, the City argued, among other things, that Santa Monica's elections are not characterized by racially polarized voting, because Latino-preferred candidates are not usually defeated by white bloc voting; that the City's at-large electoral system does not dilute Latino voting power, because no hypothetical alternative system would enhance Latino voters' ability to elect candidates of their choice; and that neither the adoption of the City's current Charter in 1946 nor the Council's decision in 1992 not to put a districting measure on the ballot was motivated by racial discrimination. (See Vol. 2, Ex. E, pp. 266–339.) With respect to plaintiffs' Equal Protection claim, the City argued that plaintiffs' factual allegations were false and, even if they were true, would not be enough as a matter of law to show that the relevant decisionmakers affirmatively intended to discriminate against minority voters. (*Id.* at pp. 289–297.)

11. On November 8, 2018, the trial court issued a tentative decision stating only that it had found in favor of plaintiffs on both causes of action, without any reasoning or citations to evidence or case law. (See Vol. 2, Ex. H, pp. 363–364.) The court also instructed the parties to submit further briefing in advance of a hearing "regarding the appropriate/preferred remedy for violation of the California Voting Rights Act." (See *id.* at p. 364.)

12. The City timely filed a request for a statement of decision on November 15, 2018. (See Vol. 2, Ex. I, pp. 366–378.)

13. The parties filed briefs on remedies. (Vol. 2, Ex. J, pp. 380–420; Ex. N, pp. 488–520; Ex. O, pp. 522–536).

14. In their brief concerning remedies, plaintiffs contended that the trial court should order the City to hold an election by April 16, 2019, and also "[p]rohibit anyone not duly elected through a district-based election from serving as a member of the Santa Monica City Council after May 14, 2019." (Vol. 2, Ex. J, p. 384.) Plaintiffs also urged the Court to adopt the seven-district map drawn by their expert witness. (See *id.* at pp. 387–388.)

15. In its brief concerning remedies, the City argued, among other things, that if the court entered judgment in favor of the plaintiffs, it should "disregard plaintiffs' contrived deadlines for holding a special election" and "should instead issue an order that is to be carried out only once any judgment against the City is final, with appellate rights exhausted." (Vol. 2, Ex. N, p. 500.) The City noted that "any order requiring the City to hold a special election or otherwise depart from the status quo would necessarily be mandatory in character, and thus stayed on appeal." (See *id.* at p. 498.) The City also contended that any order prohibiting council members not elected through district-based elections would, "despite its prohibitory label, . . . be mandatory in effect . . . and therefore would be automatically stayed on appeal." (*Id.* at pp. 498–499 n.7.)

16. The City also argued that if any remedy were necessary, the court should order the City to fashion such a remedy subject to judicial approval for three reasons. (See *id.* at pp. 500–505.) First, California law requires as much. (See *id.* at pp. 504–

505.) When a court orders a change from at-large elections to district-based elections, section 10010 of the Elections Code calls for a process of public input on potential district lines. Second, Santa Monica is a charter city and should be allowed to fashion its own proposed remedy, subject to judicial oversight. (See *id.* at p. 503.) Third, federal courts adjudicating statutory vote-dilution claims generally do not design remedies in the first instance and instead leave that task to the relevant legislative body, subject to judicial review. (See *id.* at pp. 503–504.)

17. On November 26, 2018, plaintiffs filed an ex parte application seeking a temporary restraining order prohibiting the City from certifying the results of its November 2018 City Council election. (See Vol. 2, Ex. K, pp. 422–446.) The trial court denied plaintiffs' ex parte application on November 27, 2018. (See Vol. 2, Ex. M, p. 478:24-25.)

18. On December 12, 2018, the court issued a first amended tentative decision. (See Vol. 3, Ex. Q, pp. 594–596.) In addition to the single sentence finding in favor of plaintiffs on both causes of action, the court issued two orders. First, it "enjoin[ed] and restrain[ed] Defendant from imposing, applying, holding, tabulating, and/or certifying any at-large elections, and/or the results thereof, for any positions on its City Council." (*Id.* at pp. 594–595, ¶ 2.) Second, it ordered all City Council elections to "be district-based elections, . . . in accordance with the map attached hereto," which was plaintiffs' trial exhibit 162 depicting a single "Pico Neighborhood District." (*Id.* at p. 595, ¶ 3.)

19. On the same day, the court ordered plaintiffs to file a

proposed statement of decision and proposed judgment by January 2, 2019. (Vol. 3, Ex. R, p. 598.)

20. On December 21, 2018, the City filed a second request for a statement of decision, in light of the court's additional findings on remedies in its amended tentative decision. (Vol. 3, Ex. S, pp. 600–631.)

21. On January 2, 2019, plaintiffs filed an ex parte application for clarification of the court's December 12 order. (Vol. 3, Ex. T, pp. 633–653.) Plaintiffs noted that the map attached to the order defined only one district, not the seven drawn by their expert, and that the court did not specify when district-based elections would be held, or what seats would be subject to election first. (*Id.* at pp. 637–639.)

22. In its opposition, the City reiterated its contentions that the court was obligated under section 10010 of the Elections Code to give the City the opportunity to draw districts in the first instance after soliciting public input, and that any order calling for a special election before the next regularly scheduled general municipal election (in November 2020) would be a mandatory injunction and therefore automatically stayed upon the taking of an appeal. (Vol. 3, Ex. U, pp. 657, 659.)

23. At the hearing on plaintiffs' ex parte application, held on January 2, 2019, the court directed plaintiffs to propose a statement of decision and judgment calling for the seven districts drawn by plaintiffs' expert and a special election in 2019. (See Vol. 3, Ex. V, p. 703:9-11.) The court concluded the hearing by stating, "We will let it run and see where it goes in the Court of

Appeal." (*Id.* at p. 703:11-12.)

24. On January 3, 2019, plaintiffs filed a proposed statement of decision that closely followed the content of their closing brief and a proposed judgment that (a) called for a special district-based election for all seven council seats to be held on July 2, 2019, (see Vol. 3, Ex. W, p. 715), with the districts being those drawn by plaintiffs' expert, and (b) prohibited "any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this judgment, . . . from serving on the Santa Monica City Council after August 15, 2019." (*Ibid.*)

25. Because the proposed statement and proposed judgment were in almost every respect contrary to the factual record and the law, the City timely objected (on January 18, 2019) at great length to both. (See Vol. 4, Ex. X, pp. 772–988.) Among many other things, the City contended that any order of a special election would be automatically stayed by the taking of an appeal, as would any order prohibiting Council members other than those elected by districts from serving past a certain date, as such an order would be prohibitory in form but mandatory in effect. (See *id.* at p. 775.)

2. The judgment, the City's appeal, and the City's efforts to seek confirmation of the automatic stay

26. On February 13, 2019, the trial court (a) overruled all of the City's objections to the proposed judgment in an order con-

taining no reasoning or citations (Vol. 5, Ex. CC, p. 1100); (b) sustained a handful of the City's objections to the proposed statement of decision, overruling the balance without explanation (Vol. 5, Ex. DD, pp. 1102–1103); (c) issued a statement of decision that was nearly identical to plaintiffs' proposed statement (see Vol. 5, Ex. BB, pp. 1028–1098); and (d) issued a judgment that was substantively identical to plaintiffs' proposed judgment. (Vol. 4, Ex. AA, pp. 1005–1019.)

27. Paragraph 8 of the judgment orders the City to "hold a district-based special election," with district lines drawn by plaintiffs' expert, "on July 2, 2019, for each of the seven seats on the Santa Monica City Council." (See *id.* at p. 1017.)

28. Paragraph 9 of the judgment provides: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." (*Ibid.*)

29. On February 21, 2019, the Santa Monica City Council unanimously resolved to appeal from the judgment.

30. Because the City wished to effect an automatic stay of the trial court's judgment and thereby avoid making arrangements for a district-based election—the deadline for the earliest of those arrangements is approximately four months before the election date—the City filed its notice of appeal the next day, on February 22, 2019. (See Vol. 5, Ex. FF, pp. 1107–1109.)

31. On February 28, 2019, the City filed an ex parte application in the trial court concerning paragraph 9 of the judgment,

which prohibits Council members other than those elected in a district-based system from serving after August 15. (See Vol. 5, Ex. GG, pp. 1111–1152.) The City contended that paragraph 9 is effectively mandatory, because it requires the City to oust its current Council members and to hold a district-based election before August 15. The City therefore sought confirmation that paragraph 9 is automatically stayed on appeal. (*Id.* at p. 1122.) In the alternative, the City requested that the trial court exercise its discretion to stay the enforcement of paragraph 9 pending appeal.

32. Plaintiffs contended in their opposition that paragraph 9 is prohibitory in both form and effect. (See Vol. 5, Ex. HH, pp. 1157–1163.) They argued that the City "could comply with paragraph 9 of the Judgment by holding a district-based election for the seats on its city council, or Defendant could opt to exist with no quorum on its city council"—that is, without any governing body at all. (See *id.* at p. 1162.)

33. At the March 4 hearing on the City's application, plaintiffs also contended, citing Elections Code section 10300, that if the City were to choose not to hold a district-based election before August 15, the voters could petition the Governor to appoint commissioners to call an election, which would need to be district-based. Plaintiffs thus argued that the City's only two options were either to hold a district-based election voluntarily before August 15, 2019, or to be forced to do so by the Governor at some point thereafter. (See Vol. 5, Ex. II, p. 1174:19–1175:20.)

34. The trial court took the matter under submission and issued an order denying the City's application for confirmation on

March 6, 2019, with no reasoning or citations to law. (See Vol. 5, Ex. JJ, p. 1208.) The court also struck, without explanation, the declaration of Dr. Jeffrey Lewis, which the City had submitted with its application to demonstrate that voters, including Latino voters, would suffer irreparable harm from the loss of the representation of their preferred candidates. (*Ibid.*)

35. Just two days after the issuance of the trial court's order, the City files this petition for relief from this Court so that it may preserve the status quo pending appeal and avoid calling a district-based special election that it should not be under any obligation to hold.

D. Statement of the case

36. A petition for writ of supersedeas must show "that substantial questions will be raised upon the appeal." (*Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 66–67; Cal. Rules of Court, rule 8.112(a)(4)(A).) The City's appeal raises substantial questions with respect to both of plaintiffs' causes of action.

37. The CVRA has been addressed in published appellate decisions only three times, and those decisions resolve none of the disputed issues in this case. In fact, the leading CVRA case, *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, expressly left unresolved several questions raised in this appeal: (a) "What elements must be proved to establish liability under the CVRA?"; (b) "Is the court precluded from employing crossover or coalition districts (i.e., districts in which the plaintiffs' protected class does

not comprise a majority of voters) as a remedy?"; and (c) "Does the particular remedy under contemplation by the court, if any, conform to the Supreme Court's vote dilution remedy cases?" (*Id.* at p. 690.)

38. The trial court committed numerous legal errors in deciding plaintiffs' CVRA claim, only a few of which are briefly catalogued here.

a. In determining whether the City's elections are characterized by racially polarized voting, the court erred in focusing exclusively on the performance of Latino (or Latino-surnamed) candidates. But it is well settled that minority-preferred candidates need not themselves be members of the protected class. (See, e.g., *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 551 [joining eight other circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority"].) If the trial court had properly identified Latino voters' candidates of choice—in part by acknowledging that in multiple elections, white candidates were preferred by Latino voters to an equal or greater extent than Latino candidates—it could not have concluded that Latino-preferred candidates are usually defeated.

b. The trial court erred in concluding that the City's at-large election system has diluted Latino voting power. To prove vote dilution, a plaintiff must show that a protected class would have greater opportunity to elect candidates of its choice under some other electoral system, which serves as a "benchmark" for comparison. "[I]n order to decide whether an electoral system

has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 88 (conc. opn. of O'Connor, J.).) In Santa Monica, Latino voters account for just 13.6 percent of the voting population (see Vol. 2, Ex. E, p. 273), and would comprise only 30 percent of the voting population in the purportedly remedial district ordered by the court (see Vol. 2, Ex. N, p. 496). Unrebutted testimony demonstrates that the court-imposed districting plan would dilute the voting strength of minority voters in the six other districts—where two-thirds of the City's Latinos reside. (*Ibid.*)

c. If, as plaintiffs have argued and as the trial court's decision suggests, vote dilution is not an element of the CVRA, then the statute must be unconstitutional as applied in this case, to the extent that it authorizes predominantly race-based remedies without a showing of any injury, much less a compelling governmental interest.

d. The trial court adopted the districting plan drawn by plaintiffs' expert, without public input, in violation of section 10010 of the Elections Code. (See Vol. 4, Ex. AA, p. 1019.) That statute requires that a city changing from an at-large method of election to district-based elections—whether doing so voluntarily or, as here, under a court order—must hold a series of public hearings over the boundaries of potential districts. The trial court erred in refusing to allow the City to go through the inclusive, democratic process of public engagement mandated by

law.

e. The trial court erred as a matter of law in concluding that plaintiffs had proven a violation of the Equal Protection Clause. Plaintiffs submitted no evidence, and the court made no findings, demonstrating that the City's electoral system has caused a disparate impact on minority voters—i.e., that some alternative electoral system would have enhanced any minority group's voting strength at any time in the City's history. (E.g., *Johnson v. DeSoto Cty. Bd. of Comm'rs* (11th Cir. 2000) 204 F.3d 1335, 1344.) The fact that few Latinos have served on the Council to date—in addition to being irrelevant, as the focus is on *Latino-preferred* candidates, regardless of their ethnicity—says nothing about how many Latinos *should have* been elected to serve had Latinos voted cohesively throughout the City's history. In addition, the facts found by the trial court do not support its conclusion of intentional discrimination. For example, the court acknowledged that the adoption of the City's current electoral system in the 1946 Charter was favored by every prominent local minority leader, but nevertheless somehow concluded that the Charter (which contained an explicit *anti*-discrimination provision) was motivated by an intent to discriminate against minorities. (See Vol. 5, Ex. BB, pp. 1075, 1079, ¶¶ 65, 70.)

E. Basis for relief

39. Mandatory injunctions are automatically stayed by the taking of an appeal. (Code Civ. Proc., § 916, subd. (a); *Ket-*

tenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191.) "The purpose of the automatic stay provision of section 916, subdivision (a) is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided." (*URS Corp. v. Atkinson / Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 881, internal quotation marks omitted.)

40. Where, as here, an appeal effects an automatic stay, "the writ of supersedeas will issue 'in a corrective capacity' in case of a . . . threatened violation of such stay." (*In re Dabney's Estate* (1951) 37 Cal.2d 402, 408; see also *Hedwall v. PCMV, LLC* (2018) 22 Cal.App.5th 564, 572 ["the appropriate method of challenging the denial of an order to enforce the stay arising under section 916 is a petition for writ of supersedeas"]; *Nielsen v. Stumbos* (1990) 226 Cal.App.3d 301, 303 ["Supersedeas is the appropriate remedy when it appears that a party is refusing to acknowledge the applicability of statutory provisions 'automatically' staying a judgment while an appeal is being pursued."].)

41. Here, plaintiffs have refused to acknowledge that paragraph 9 of the judgment is mandatory in effect and therefore stayed on appeal, and they have contended there will be "consequences" if the current Council is not ousted by August 15. The trial court has likewise refused to confirm that the automatic stay applies to paragraph 9. Accordingly, the City has brought this petition for a corrective writ of supersedeas clarifying that paragraph 9 of the trial court's judgment was automatically stayed by the filing of the City's notice of appeal.

42. In determining whether an injunction is mandatory

and therefore automatically stayed on appeal, courts must identify the *substance* of the injunction, regardless of its form. (*URS Corp.*, *supra*, 15 Cal.App.5th at p. 884.) An injunction is "mandatory in effect if its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered." (*Musicians Club of L.A. v. Superior Court* (1958) 165 Cal.App.2d 67, 71.)

43. Paragraph 9 states: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." (Vol. 4, Ex. AA, p. 1017.)

44. Paragraph 9 is mandatory in effect for two reasons. First, it changes the status quo by compelling duly elected Council members "affirmatively to surrender a position which [they] hold[]," or, presumably, the City to take affirmative action to remove them. (*Clute v. Superior Court* (1908) 155 Cal. 15, 20 [holding injunction was mandatory in effect even though prohibitory in form].)

45. Second, paragraph 9 effectively compels the City to conduct a district-based election in advance of August 15, 2019. The City's Charter assigns all the City's powers to its Council. (§ 605.) If the current Council members cannot continue represent the City after August 15, 2019, then the City will be left without any governing body. To avert that outcome, the City must install new Council members, but the judgment requires that they be elected in a district-based election. And under California law,

any election must be noticed at least 113 days before the election date. (Elec. Code, § 12101.) Accordingly, paragraph 9 effectively requires the City to give notice of an election in short order and to conduct that election in July.

46. Paragraph 9 is analogous to the injunctions entered in many other cases in which the Supreme Court and Courts of Appeal have found relief to be mandatory in effect even if prohibitory in form. (See, e.g., *Feinberg v. Doe* (1939) 14 Cal.2d 24, 29 [order prohibiting employment of non-union worker, "in effect, commands the defendants to release the said employee from their employment"]; *Clute*, *supra*, 155 Cal. at p. 20 [order prohibiting hotel manager from fulfilling duties was mandatory because it "compel[led] him affirmatively to surrender a position which he h[eld]"]; *Davis*, *supra*, 228 Cal.App.2d at p. 838 [order prohibiting actress from filming scenes for other studios tantamount to a mandatory injunction that she film for Paramount]; *Ambrose v. Alioto* (1944) 62 Cal.App.2d 680, 686 [order prohibiting defendant from delivering fish to any canner except one equivalent to an order requiring defendant to deliver to that canner].)

47. In the alternative, if this Court deems paragraph 9 to be prohibitory in effect as well as form, it should exercise its discretion to issue the writ to stay the enforcement of paragraph 9 during the appeal, in order to avoid irreparable harm to the City and the public. (Code Civ. Proc., § 923; e.g., *Mills v. Cty. of Trinity* (1979) 98 Cal.App.3d 859, 861.)

48. For the reasons set out above (¶¶ 38(a)–(e)), the City's appeal raises substantial questions, many of first impression in

California's appellate courts, and the City has a substantial likelihood of prevailing on appeal.

49. Should this Court decline to grant this petition and then later reverse the judgment, the enforcement of paragraph 9 during the pendency of the City's appeal will have worked irreparable harm on the City, its current Council members, and the public. These irreparable harms include:

a. The voters' will would be disregarded. Santa Monica voters have twice rejected a proposal to revert to district-based elections (which were in place in Santa Monica between 1906 and 1914) for entirely non-discriminatory reasons.

b. Relatedly, all Santa Monica voters will lose the candidates that they duly elected to serve until 2020 and 2022—nullifying the fundamental constitutional rights of those voters to have their voices heard in the electoral process. (Cal. Const., art. II, § 2.5 ["A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted"].)

c. The City would be compelled to hold districted elections this summer, with the district lines drawn by plaintiffs' expert rather than through the public-hearing process mandated by section 10010 of the Elections Code. Going through this process would result in voter confusion and almost $1 million in direct and unrecoverable costs to the City.

d. The court-imposed districts threaten to *dilute* the voting power of the vast majority of Latinos who live outside of the one purportedly remedial district ordered by trial court. The likely result of a district-based election this summer is that the

City goes from its current Council, where most of its members were the preferred candidates of Latinos in the 2016 and 2018 elections, to a new Council that Latinos have had little say in electing.

F. The Court has jurisdiction, and this petition is timely.

50. This Court is authorized to grant a writ of supersedeas. "An appellate court may issue a writ of supersedeas to stay a judgment . . . where an appeal from the judgment or order is pending." (*In re Christy L.* (1986) 187 Cal.App.3d 753, 759; see also *Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal.App.2d 368, 374 ["The issuance of a writ of supersedeas . . . is within the inherent power of the court."].)

51. Here, a notice of appeal was filed on February 22, 2019, from a judgment entered on February 13, 2019.

G. Authenticity of exhibits

52. Exhibits A–JJ accompanying this petition are true and correct copies of original documents on file with the trial court or certified reporters' transcripts.

53. Exhibit GG contains three declarations submitted to show the irreparable harm that would be caused if the stay of the trial court's order prohibiting duly elected Council members from serving past August 15, 2019, were not stayed pending this appeal, and the lack of harm to Respondents if a stay is granted. These declarations were filed in the trial court in connection with

the City's application for a stay (and the trial court issued an order striking Dr. Lewis's declaration without explanation).

54. The exhibits are paginated consecutively from page 1 through 1208.

III. PRAYER FOR RELIEF

The City prays that this Court:

1. Issue a writ of supersedeas confirming that paragraph 9 of the trial court's judgment entered on February 13, 2019, was automatically stayed by the City's noticing of an appeal, and that the stay will remain in effect until the appeal is resolved;

2. In the alternative, issue a writ of supersedeas staying paragraph 9 of the trial court's judgment entered on February 13, 2019, and continuing the stay during the pendency of this appeal;

3. Grant any temporary stay of the trial court's judgment pending this Court's determination of this petition (if necessary); and

4. Grant such other relief as is just and proper.

DATED: March 8, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____
Theodore J. Boutrous, Jr.

Attorneys for Petitioner-Defendant City of Santa Monica

IV. VERIFICATION

I, Kahn A. Scolnick, declare as follows:

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on March 8, 2019, in Los Angeles, California.

By: 

Kahn A. Scolnick

V. MEMORANDUM OF POINTS AND AUTHORITIES

A. Introduction

Paragraph 9 of the trial court's judgment states: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." (Vol. 4, Ex. AA, p. 1017.) The trial court refused either to confirm that paragraph 9 is mandatory in effect and therefore automatically stayed on appeal or, in the alternative, to exercise its discretion to stay the enforcement of paragraph 9 so as to avoid irreparable harm to the City, its Council members, and the public. (See Vol. 5, Ex. JJ, p. 1208.)

This Court should issue a writ of supersedeas in a corrective capacity, confirming that paragraph 9 is mandatory in effect because it requires the City to go without a government after August 15—thus forcing the City to change the status quo by holding a district-based election this summer. As a mandatory injunction, paragraph 9 was automatically stayed by the filing of the City's notice of appeal.

In the alternative, this Court should issue the writ in the exercise of its discretion, because without a stay of paragraph 9's enforcement during the appeal, the City, the Council members, and the public will suffer irreparable harm, including the deprivation of voters' constitutional rights to choose their elected officials, and almost $1 million in unrecoverable election-related costs.

B. Standard for granting a writ of supersedeas

Section 923 of the Code of Civil Procedure grants this Court virtually unlimited discretion to issue orders preserving the status quo in protection of its own jurisdiction. (*People ex rel. San Francisco Bay Conservation & Dev. Comm'n v. Town of Emeryville* (1968) 69 Cal.2d 533, 538–539.) "'The right of appeal would be but an empty thing if the appellate court could not, and in proper cases did not, afford to the appellant a means whereby the fruits of victory were fully preserved to him in the event of a reversal of the judgment against him.'" (*Deepwell*, *supra*, 239 Cal.App.2d at p. 66.)

When, as here, an appeal effects an automatic stay, "the writ of supersedeas will issue 'in a corrective capacity' in case of a . . . threatened violation of such stay." (*Dabney's Estate*, *supra*, 37 Cal.2d at p. 408.) "[U]pon a mistaken attempt of the trial court to enforce [an injunction that is mandatory in character], the appellant is entitled as a matter of right to issuance of the writ of supersedeas." (*Food & Grocery Bur. of S. Cal. v. Garfield* (1941) 18 Cal.2d 174, 176–177.) In these circumstances, because "the perfecting of the appeal . . . operates to automatically stay proceedings in the court below, it is unnecessary . . . to balance or weigh the arguments with reference to the possible irreparable injury to appellants or respondents . . . ." (*Feinberg*, *supra*, 14 Cal.2d at p. 29.)

The writ is also available where the injunction at issue is prohibitory in effect. (*City of Pasadena v. City of Alhambra* (1946)

75 Cal.App.2d 91, 98.) The stay of such an injunction is appropriate where (a) the petitioner will suffer irreparable harm absent relief and (b) the petitioner demonstrates that "substantial questions will be raised on appeal." (*Deepwell*, *supra*, 239 Cal.App.2d at pp. 66–67; see also, e.g., *Meyer v. Arsenault* (1974) 40 Cal.App.3d 986, 989; *Wilkman v. Banks* (1953) 120 Cal.App.2d 521, 523.)

C. A corrective writ of supersedeas is necessary to clarify that paragraph 9 of the judgment, though prohibitory in form, is mandatory in effect.

Mandatory injunctions are automatically stayed pending appeal. (Code Civ. Proc., § 916, subd. (a); *Ambrose*, *supra*, 62 Cal.App.2d at p. 686.) The form of the injunction does not determine its effect: "What may appear to be negative or prohibitory frequently upon scrutiny proves to be affirmative and mandatory." (*Byington v. Superior Court* (1939) 14 Cal.2d 68, 70; see also *Davis*, *supra*, 228 Cal.App.2d at p. 835 ["The character of an injunction . . . is determined not so much by the particular designation given to it by the court directing its issuance, as by the nature of its terms and provisions, and the effect upon the parties against whom it is issued."].)

To discern the nature and effect of an injunction, courts assess whether it calls for the disruption of the status quo. "An order enjoining action by a party is prohibitory in nature if its effect is to leave the parties in the same position as they were prior to the entry of the judgment. On the other hand, it is mandatory in

effect if its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered." (*Musicians Club of L.A.*, *supra*, 165 Cal.App.2d at p. 71.)

Paragraph 9 of the judgment states: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." (Vol. 4, Ex. AA, p. 1017.) This injunction, although prohibitory in form, is mandatory in effect because its enforcement would leave the parties in a dramatically different position than the one they occupied before the judgment issued.

First, paragraph 9 coerces the City to hold a district-based election before August 15, 2019, in accordance with the district map drawn by plaintiffs' expert. If the current Council members cannot continue to serve after August 15, then the City must make arrangements for seven new Council members to take their seats. There is no practical alternative, because the City can be governed only by its seven-member Council. (See Santa Monica City Charter, § 400 [defining powers of City], § 605 ["All powers of the City shall be vested in the City Council"], § 600 [City Council shall consist of seven members].)

Under paragraph 9, the only persons eligible to become Council members after August 15 are those who have "been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment." (Vol. 4, Ex. AA, p. 1017.) The City therefore would need to hold a district-based

election. And for that election to take place in time for new Council members to take their seats on or around August 16, 2019, the City would need to notice the election no later than April 8, 2019, which would mean a resolution from the Council by April 1, 2019. (Elec. Code, § 12101 [notice of election must be given at least 113 days before election date]; Vol. 5, Ex. GG, p. 1134, ¶ 3 [City Clerk explaining that the final Tuesday on which an election could take place with sufficient time for votes to be counted before August 15, 2019, is July 30, 2019].) Paragraph 9 thus requires the City to give notice of an election in a matter of weeks and then to hold a district-based election in July—which is exactly what is commanded by the expressly mandatory portion of the judgment that is unquestionably stayed.

Paragraph 9 is analogous to many injunctions entered in other cases that were prohibitory in form but mandatory in effect. In *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, for example, Paramount sued Bette Davis when she refused to film an additional scene for a movie. At the time, Davis was filming another movie under an exclusive contract with a different studio. The trial court prohibited Davis from filming any other movies until she filmed the additional scene for Paramount. Davis appealed and sought a writ of supersedeas. The Court of Appeal granted the writ, holding that "the injunctive order, although framed in prohibitory language, was intended to coerce or induce defendant into immediate affirmative action, i.e., to make the additional scene for Paramount." (*Id.* at p. 838.) Paragraph 9 puts the City in the same position as Davis, leaving it no choice but to

hold a district-based election—in other words, making mandatory the very act that the City has filed its appeal to avoid.

Similarly, in *Ambrose v. Alioto* (1944) 62 Cal.App.2d 680, the trial court prohibited the defendant "from delivering to Sun Harbor Packing Company, or to anyone other than Westgate Sea Products Co., any fish caught on any fishing voyage made by the vessel Dependable," notwithstanding a contract to deliver to Sun Harbor. (*Id.* at p. 681, internal quotation marks omitted.) The Court of Appeal held that this injunction was "but another means of stating that defendant must cease delivering to Sun Harbor Packing Company and must deliver fish to Westgate Sea Products Co.," and therefore was mandatory and automatically stayed pending appeal. (*Id.* at p. 686.)

Paragraph 9 is substantially similar to the challenged injunction in *Ambrose*: it is "but another means of stating" that the City must hold district-based elections in the short term. Just as the defendant-appellant in Ambrose could continue honoring the challenged contract and delivering fish to Sun Harbor during the appeal, so, too, should the current Council be able to remain seated throughout the pendency of the City's appeal. To demand otherwise would be to compel an affirmative act and a departure from the status quo. (*Ibid.*)

Davis and *Ambrose* are only two of the many cases in which California's appellate courts have reaffirmed the principle that substantively mandatory injunctions, even if prohibitory in form, are automatically stayed by operation of law for the duration of an

appeal. (E.g., *Garfield*, 18 Cal.2d at pp. 177–178; *Byington v. Superior Court of Stanislaus Cty.* (1939) 14 Cal.2d 68, 72; *Agricultural Labor Bd. v. Superior Court* (1983) 149 Cal.App.3d 709, 713; *Podesta v. Linden Irrigation Dist.* (1955) 132 Cal.App.2d 250, 261; *In re O'Connell* (1925) 75 Cal.App. 292, 298.)

Second, paragraph 9 is mandatory in effect because its enforcement would require the City to strip the seven current Council members of their titles and oust them from their duly elected positions. Courts have held that this sort of injunction is mandatory in character and therefore automatically stayed on appeal.

The Supreme Court's decision in *Clute v. Superior Court* (1908) 155 Cal. 15 is directly on point. There, the treasurer and manager of a corporation operating a hotel was ousted from his positions. In subsequent litigation over the legitimacy of that ouster, the trial court prohibited the erstwhile corporate officer from holding himself out as such or otherwise doing his job. He appealed and continued to do his job; the trial court held him in contempt. The Supreme Court reversed, holding that the injunction was mandatory, "though couched in terms of prohibition," because it impliedly required the former corporate officer to turn over the hotel and the personal property in it to someone else—it "compels him affirmatively to surrender a position which he holds . . . ." (*Id.* at p. 20.) Accordingly, the injunction was automatically stayed by the taking of an appeal, and "no contempt proceedings against him should have been entertained." (*Ibid.*) The same conclusion should follow here, as an order prohibiting a corporate officer from fulfilling his job duties is little different from the trial

court's order prohibiting Council members from serving after August 15.

The trial court's March 6, 2019, order, which declined to confirm the automatic stay of paragraph 9, contained no reasoning. Nonetheless, the trial court appears to have agreed with plaintiffs' effort to distinguish *Clute* on the ground that *Clute* involved disputed control over real property. Even if that were a valid distinction—and it is not, because the case concerned the surrender of an *office* as well as the surrender of property—the trial court failed to account for the many other cases (including those cited by the City) that had nothing to do with real property.

In *Feinberg v. Doe* (1939) 14 Cal.2d 24, for example, the Supreme Court held that an order prohibiting defendants from continuing to employ a particular non-union worker was mandatory because "[i]t, in effect, commands the defendants to release the said employee from their employment." (*Id.* at p. 29.) Here, similarly, the trial court's order requires the City to strip the current Council members of their seats.

The recent decision in *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, another case not concerning disputed control over real property, holds that an order disqualifying a litigant's lawyer is automatically stayed on appeal. After the trial court denied a motion for stay pending appeal, the Court of Appeal granted a petition for a writ of supersedeas, holding that "[a]n order disqualifying an attorney from continuing to represent a party in ongoing litigation is a mandatory injunction because it requires affirmative acts that upset the status quo. . . ."

(*Id.* at p. 886.) Absent a stay, there was also serious risk of "mooting the appeal," insofar as the petitioner would "need to move on . . . and hire replacement counsel" and might choose not to pursue an independent appeal "because it will not make sense to reinsert [disqualified counsel] into the proceedings even if the order is reversed." (*Ibid*.)

Here, likewise, paragraph 9 would require the City to proceed with a district-based election whose animating premise and particulars (the district lines drawn by plaintiffs and adopted by the Court without public input and in violation of Elections Code section 10010) will be the very subject of the City's appeal. And although holding a district-based election during the appeal would not deprive this Court of jurisdiction, it would plainly moot the City's argument that it should not be compelled to hold any such an election *at any time*, not to mention any dispute over who should be seated on the Council during the pendency of the appeal. If seven new Council members were to assume those seats, and if the City prevails on appeal, there would be no turning back the clock; the City would have been governed by the wrong people, potentially for years.

D. There is no support for plaintiffs' contentions, and the trial court's implicit conclusion, that paragraph 9 is prohibitory in effect.

The trial court (although it offered no reasoning to support its decision) appears to have accepted one or more of plaintiffs' arguments as to why paragraph 9 is prohibitory in effect. None of them has merit.

First, the trial court may have improperly elevated form over substance, concluding that, by its terms, paragraph 9 does not call for the City to do anything at all after August 15. But plaintiffs admitted that paragraph 9, if enforced, would effect a *massive* change in the status quo: "Defendant could comply with paragraph 9 of the Judgment by holding a district-based election for the seats on its city council, or Defendant could opt to exist with no quorum on its city council"—that is, with no Council members at all. (Vol. 5, Ex. HH, p. 1162.) At the hearing on March 4, plaintiffs further suggested that if the City did nothing at all, the Governor might, under section 10300 of the Elections Code, appoint commissioners to call a district-based election. (See Vol. 5, Ex. II, pp. 1174, 1184.)

According to plaintiffs, then, paragraph 9 will result in district-based elections—the very relief, set out in paragraph 8 of the judgment, that is unquestionably stayed—or, in the (completely unrealistic) alternative, in the complete disbanding of the City's government. Whether paragraph 9 compels the City to hold a district-based election or to strip Council members of their seats and

somehow go without a governing body, the effect of "its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered"—the very essence of a mandatory injunction. (*Musicians Club*, *supra*, 165 Cal.App.2d at p. 71.)

Second, plaintiffs are wrong that "[w]here an injunction has both mandatory and prohibitory features, the prohibitory portions are not stayed *even if they have the effect of compelling compliance with the mandatory portions of the injunction*." (Vol. 5, Ex. HH, p. 1157.) This made-up rule flatly contradicts the long line of cases holding that if the effect of an injunction is to compel affirmative action, then its prohibitory form is irrelevant. (See, e.g., *Kettenhofen*, *supra*, 55 Cal.2d at p. 191; *Stewart v. Superior Court* (1893) 100 Cal. 543, 544–546; *URS Corp.*, *supra*, 15 Cal.App.5th at pp. 884–885.)

Further, plaintiffs' only support for their manufactured rule is *Ohaver v. Fenech* (1928) 206 Cal. 118, which they egregiously mischaracterize. Plaintiffs summarize that case with the following parenthetical: "injunction prohibiting the defendants from feeding garbage to their hogs was prohibitory in nature, and therefore not stayed by the subsequent appeal, even though the inevitable consequence of the injunction was to require the defendant to remove the hogs from their then-current location." (Vol. 5, Ex. HH, p. 1157.) But it was the argument of the losing litigant, *not the holding of the Supreme Court*, that the challenged injunction would inevitably require the appellant ranchers to move their hogs.

In response to that argument, the Court in *Ohaver* concluded that "[t]his does not necessarily follow. The appellants may feed their hogs other food" and therefore need not "make any change in the locality in which their hogs are kept." (206 Cal. at p. 123.) In other words, the injunction was truly prohibitory in nature, because it did not impliedly require the defendant to take any affirmative action. Here, by contrast, paragraph 9 *does* impliedly require affirmative action—the City must strip the Council members of their seats and hold a district-based election.

Third, the trial court may have erroneously accepted plaintiffs' contention that a statutory exception to the automatic-stay rule applies in this case. In particular, section 917.8 of the Code of Civil Procedure provides that there is no stay when "a party to the proceeding has been adjudged guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state." The statute simply does not apply here.

Section 917.8's exception to the automatic-stay rule applies only to actions brought in *quo warranto* under section 803 of the Code of Civil Procedure—which is a special cause of action brought on behalf of the Attorney General to determine someone's right to hold a public office. The two sections are phrased in materially identical language.[2] And the California Supreme Court

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[2] Section 803 provides, in relevant part: "An action may be brought by the attorney-general . . . against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, . . . within this state."

has held that where, as here, an action was not brought in *quo warranto* and was instead a challenge to an election, section 917.8 (previously section 949) does not apply; as a result, "the perfecting of the appeal by the party aggrieved, *ipso facto*, operates as a *supersedeas*." (*Day v. Gunning* (1899) 125 Cal. 527, 530; see also *Anderson v. Browning* (1903) 140 Cal. 222, 223 [holding that "the certificate of election continues unimpaired during the pendency of the appeal"].) Legal treatises confirm this narrow construction of section 917.8: "Inasmuch as the language of [section 917.8] is similar to that contained in another statute authorizing an action in quo warranto for usurpation [section 803], it is apparent that the statutory exception under discussion refers *only* to actions of this character." (Cal. Jur. 3d, Appellate Review, § 412, italics added.)

In opposing the City's application for confirmation of the automatic stay, plaintiffs were unable to cite a single case applying section 917.8 or its predecessor to a context like this one, and instead argued that the current Council members are now "unlawfully" holding their seats under the terms of the statute. (Vol. 5, Ex. HH, pp. 1163–1165; Ex. II, pp. 1169–1196.) But *Day* expressly rejected such an argument, holding that "it cannot be said that the respondent is unlawfully holding his office" because "he *entered upon it lawfully* by virtue of his certificate of election. If, by matters arising after his incumbency, he has lost the right to retain the office"—such as, in this case, a judgment that the City's electoral system violates the CVRA, and that the current Council members elected under that system cannot continue to serve after

a specific date—"still it cannot be adjudged in this proceeding that he is usurping, intruding, or unlawfully holding office, within the intent and meaning of section 949." (125 Cal. at p. 529, italics added.) The word "unlawfully," then, is not some catch-all that must cover this case simply because plaintiffs say so. It is a term of art that applies specifically and solely in *quo warranto* proceedings.

And this, of course, is not a *quo warranto* proceeding. The trial court's judgment makes no reference to section 803 or the *quo warranto* remedy. But more importantly, this case was not brought directly by the Attorney General or by a relator authorized by the Attorney General. (See Code Civ. Proc., § 803; see also *Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1228 [addressing circumstances under which private parties may serve as relators after applying for and receiving leave from the Attorney General to bring a *quo warranto* proceeding]; *Oakland Mun. Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, 170 [cause of action for *quo warranto* "is vested in the People, and not in any individual or group"].) Under *Day*, then, section 917.8 does not and cannot apply.

Plaintiffs argued below that *Day* was no longer good law in light of the CVRA. Specifically, plaintiffs contended that the CVRA authorizes state courts to grant any remedy that a federal court might grant in a federal Voting Rights Act case, and that federal courts have the authority to order immediate elections. (Vol. 5, Ex. HH, p. 1165; Ex. II, pp. 1181–1182.) But that argument is entirely beside the point.

The question before the trial court, and now before this Court, is not whether the trial court had the remedial authority to order an immediate election or to prohibit Council members from serving after a certain date. The question, rather, is whether such an order was stayed automatically by operation of law or ought to be stayed in the exercise of judicial discretion. Federal voting rights decisions provide no guidance on the application of the automatic-stay rule, as there is no automatic stay of mandatory injunctions in federal court upon the taking of an appeal. (Wright & Miller, Injunction Pending Appeal, 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.).) And the CVRA neither displaced the case law concerning section 917.8 nor created a new exception to the automatic-stay rule.

E. In the alternative, the Court should exercise its discretion to issue the writ to prevent irreparable harm to the City and the public.

Even if the Court deems paragraph 9 to be prohibitory in effect as well as form, it should nevertheless exercise its discretion to issue the writ in order to prevent the City, its Council members, and the public from suffering irreparable harm. (*City of Pasadena*, *supra*, 75 Cal.App.2d at p. 98 ["Irrespective of whether an injunction is mandatory or prohibitory, this court has the inherent power to issue a writ of supersedeas if such action is necessary or proper to the complete exercise of its appellate jurisdiction [citations], and may issue the writ upon any conditions it deems just."]; see also, e.g., *Mills*, *supra*, 98 Cal.App.3d at p. 861 [issuing writ to avoid "irreparable injury" from repayment of fees collected

by a county planning department]; *Meyer v. Arsenault* (1974) 40 Cal.App.3d 986, 989 [issuing writ to avoid "irreparable injury" in the form of money that likely could not be recovered once paid]; *Wilkman v. Banks* (1953) 120 Cal.App.2d 521, 523 [issuing writ to avoid "irreparable damage" from the loss of "the fruits of a favorable determination on appeal if [appellants] were to be precluded in the meantime from continuing in their business of operating a sanitarium"].)

1. The City's appeal raises substantial issues, several of first impression

In evaluating the petition, the court should consider "the respective rights of the litigants," and accordingly "contemplate[] the possibility of an affirmative of the decree as well as of a reversal." (*Garfield*, *supra*, 18 Cal.2d at p. 177.) Here, there is a substantial likelihood of a reversal on one or more legal grounds, such that there is real risk that the City, the current Council members, and the public would suffer irreparable harm from the enforcement of paragraph 9 during the City's appeal. In entering a judgment in the plaintiffs' favor, the trial court erred in numerous respects, a few of which are briefly catalogued below.

a. The trial court erred in focusing exclusively on the performance of Latino candidates, ignoring the preferences of Latino voters.

To prevail on their CVRA claim, plaintiffs had to prove, among other things, legally significant racially polarized voting—

in this case, that Latino voters cohesively prefer certain candidates, and that those candidates are usually defeated as a result of white bloc voting. (*Gingles*, *supra*, 478 U.S. at pp. 49–51; see also Elec. Code, § 14026, subd. (e) [defining "racially polarized voting" by reference to federal case law].)

The first step in determining whether voting has been racially polarized is identifying the preferred candidates of the relevant minority group. (*Collins v. City of Norfolk* (4th Cir. 1989) 883 F.2d 1232, 1237 ["The proper identification of minority voters' 'representatives of . . . choice' is critical"].) The trial court erred by focusing exclusively on the performance of Latino (or Latino-surnamed) *candidates*, and ignoring the preferences of the Latino *voters* when they preferred candidates of other races. (See, e.g., Vol. 5, Ex. BB, pp. 1044–1045 [table showing regression results only for Latino or Latino-surnamed candidates in seven elections].)

Minority-preferred candidates need not themselves be members of the protected class, as courts have repeatedly held. (See, e.g., *Ruiz*, *supra*, 160 F.3d at p. 551 [joining eight other circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority"].) To indulge the presumption that voters always prefer candidates of their own race "would itself constitute invidious discrimination of the kind that the Voting Rights Act was enacted to eradicate, effectively disenfranchising every minority citizen who casts his or her vote for a non-minority candidate." (*Lewis v. Alamance Cty., N.C.* (4th Cir. 1996) 99 F.3d 600, 607; see also *NAACP, Inc. v. City of Niagara Falls, N.Y.* (2d Cir. 1995) 65 F.3d 1002, 1016 [such a ruling "would

project a bleak, if not hopeless, view of our society" and would "presuppose the inevitability of electoral apartheid"].) If the trial court had properly identified Latino-preferred candidates, in part by acknowledging that in multiple elections white candidates were preferred by Latino voters to an equal or greater extent than Latino candidates, there is no dispute that Latino-preferred candidates were not "usually" defeated.

To take but one example, in the 2008 Council election, a losing Latina-surnamed candidate, Linda Piera-Avila, is estimated to have received the support of just one-third of Santa Monica's Latino voters. (See Vol. 2, Ex. E, p. 313.) But two white candidates, Ken Genser and Richard Bloom, who both won, are each estimated to have received the support of half of Latino voters. (*Ibid.*) The trial court never accounted for the possibility that Latino voters may have legitimately preferred Mr. Genser and Mr. Bloom over Ms. Piera-Avila, or that voters prefer candidates for a variety of reasons having nothing to do with the candidates' race or ethnicity—such as the candidates' stances on the issues of interest to the voters.

The 2002 Council election showcases another flaw in the court's analysis. There, a losing Latina candidate, Josefina Aranda, is estimated to have received the support of 82.6% of Latino voters. (See *id.* at p. 312.) But Latino support for a winning white candidate, Kevin McKeown, was almost identical, at 76.8% (and may indeed have been higher, as there is substantial uncertainty in all of these estimates, which both parties' experts acknowl-

edged). (*Ibid.*) Even assuming for argument's sake that Ms. Aranda's defeat was one of the rare instances in which a Latino-preferred candidate did not prevail in Santa Monica elections, the trial court should not have disregarded the identically strong showing of Mr. McKeown simply because he is white.

When Latino-preferred candidates are counted accurately, and not on the basis of an erroneous and unconstitutional assumption that they must themselves be Latino (or Latino-surnamed), it becomes clear that those candidates prevail more often than not, contradicting the trial court's conclusion that Latino-preferred candidates usually lose. (Vol. 2, Ex. E, pp. 278–281, 311–315.) Because plaintiffs did not prove a legally significant pattern of racially polarized voting for this and other reasons, the trial court's judgment should be reversed.

b. The trial court erred in holding that plaintiffs proved vote dilution.

A public entity violates the CVRA only if its at-large method of election "*impairs* the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, *as a result of the dilution* or the abridgment of the rights of voters who are members of a protected class." (Elec. Code, § 14027, italics added.) Courts interpreting similar language in § 2 of the federal Voting Rights Act require proof of *harm* (vote dilution) and *causation* (a connection between the harm and the electoral system). (E.g., *Gingles*, *supra*, 478 U.S. at 48, fn. 15; *Gonzalez v. Ariz.* (9th Cir. 2012) 677 F.3d 383, 405; *Aldasoro v.*

Kennerson (S.D.Cal. 1995) 922 F.Supp. 339, 369, fn. 10.) California courts have stated, but not yet held, that the CVRA similarly demands proof of vote dilution caused by an election system. (E.g., *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 802.)

To prove vote dilution, a plaintiff must show that a protected class would have greater opportunity to elect candidates of its choice under some other electoral system, which serves as a "benchmark" for comparison. (See, e.g., *Reno v. Bossier Parish Sch. Bd.* (1997) 520 U.S. 471, 480; *Holder v. Hall* (1994) 512 U.S. 874, 880 (plurality); *Gingles*, *supra*, 478 U.S. at 50, fn. 17.) "[I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." (*Gingles*, *supra*, 478 U.S. at 88 (conc. opn. of O'Connor, J.).)

Because Latino voters account for just 13.6 percent of the City's voting population and are dispersed throughout the City, they would comprise only 30 percent of the voting population in the purportedly remedial district ordered by the court. (See Vol. 2, Ex. E, p. 283; Ex. N, pp. 496–497.) Plaintiffs' expert on remedial effectiveness could not identify a single judicially created district in California or elsewhere in which the minority voting population was anywhere near that small. (*Ibid.*) And not only would the purportedly remedial district cure no ills, unrebutted testimony demonstrates that it would create new ones by diluting the voting strength of minority voters, including Latinos, outside of

that district. (*Ibid.*) This is particularly concerning given that two-thirds of the City's Latinos live *outside* the purportedly remedial district. (Vol. 4, Ex. X, pp. 799, 852.)

Because it is impossible, given the City's basic demographic facts, to prove that any other electoral system would give Latino voters the ability to elect candidates of their choice, the trial court's judgment should be reversed.

c. The trial court's holding renders the CVRA unconstitutional as applied to the facts of this case.

If, as plaintiffs have argued and the trial court's decision suggests, vote dilution is not an element of the CVRA, then the statute must be unconstitutional to the extent that it authorizes predominantly race-based remedies without a showing of any injury, much less a compelling governmental interest.

The United States Constitution forbids the imposition of any predominantly race-based remedy unless that remedy is narrowly tailored to serve a compelling governmental interest. (*Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463–1464; *Shaw v. Hunt* (1996) 517 U.S. 899, 907–908.) Courts have assumed without deciding that governments have a compelling interest in remedying vote dilution. (*Cooper*, 137 S.Ct. at p. 1464.)

Here, the trial court has adopted a purportedly remedial district that was drawn, by the admission of plaintiffs' expert, to maximize the number of Latino voters within it, without any compelling justification for engaging in such race-based classifications. (E.g., Vol. 2, Ex. N, pp. 495–497; Vol. 4, Ex. X, pp. 858–

861.) There is no evidence of vote dilution: The districting plan approved by the trial court would not give Latinos within the purportedly remedial district the ability to elect candidates of their choice, and it would splinter two-thirds of the City's Latinos across six other districts, submerging them in overwhelmingly white districts. (See Vol. 2, Ex. E, pp. 283, 287; Ex. N, pp. 496–497.) There thus could not have been any lawful basis for the court to compel the City to adopt districts.

d. The trial court's judgment violates Elections Code section 10010.

The trial court rubber-stamped a districting plan drawn by plaintiffs' expert, without public input, in violation of section 10010 of the Elections Code. That statute requires that a city changing from an at-large method of election to district-based elections hold a series of public hearings over the boundaries of potential districts. Section 10010 expressly "applies to . . . a proposal that is required due to a court-imposed change from an at-large method of election to a district-based election." The court erred in refusing the City's repeated requests to follow the inclusive, democratic process of public engagement mandated by law. (E.g., Vol. 2, Ex. N, pp. 504–505; Vol. 4, Ex. X, pp. 775, 883–884.)

e. The trial court's findings are legally insufficient to demonstrate discriminatory impact or intent.

The trial court erred in concluding that plaintiffs had proven a violation of the Equal Protection Clause. To prevail on that claim, plaintiffs were obligated to demonstrate that the City's

at-large electoral system has caused a disparate impact that was intended by the relevant decisionmakers. (See *Rogers v. Lodge* (1982) 458 U.S. 613, 617; *Personnel Adm'r of Mass v. Feeney* (1979) 442 U.S. 256, 279.) Even if the facts found by the trial court were entirely correct—and they were not—those facts still would not remotely clear this high bar.

As an initial matter, plaintiffs submitted no evidence, and the court made no findings, demonstrating that the City's electoral system has caused any disparate impact—which must be proven with evidence that a protected class would have greater opportunity under some other method of election. (E.g., *Johnson v. DeSoto Cty. Bd. of Comm'rs* (11th Cir. 2000) 204 F.3d 1335, 1344.) No minority group, including Latinos, has ever accounted for a large percentage of the City's total population. (E.g., Vol. 4, Ex. X, pp. 76–77.) Plaintiffs did not prove, and the trial court did not find, that some alternative electoral system would have given any minority group the power to elect candidates of its choice at any time in the City's history. Accordingly, the fact that few Latinos have served on the Council—in addition to being irrelevant, as the question is whether *Latino-preferred* candidates have so served—says nothing about how many Latinos *should have* been elected to serve had Latinos voted cohesively throughout the City's history.

The facts found by the Court also do not support its conclusion of intentional discrimination. For example, the court acknowledged that the adoption of the City's current at-large elec-

toral system in the 1946 Charter was favored by prominent minority leaders and members of the local Committee on Interracial Progress (none of whom opposed the Charter). (Vol. 5, Ex. BB, p. 1078.) Yet the court nevertheless concluded that those who supported and adopted the Charter—which also contained an explicit *anti*-discrimination provision—were somehow motivated by an intent to discriminate *against* minorities. (See *id.*, pp. 1075, 1079.)

The trial court also inexplicably concluded that in 1946, proponents and opponents of the new Charter alike all understood "that at-large elections would diminish minorities' influence on elections." (Vol. 5, Ex. BB, p. 1080.) The reality is exactly the opposite. Plaintiffs could not identify a single member of any minority group in 1946 who (a) contended that at-large elections diminished minorities' influence on elections, (b) advocated for districted elections, or (c) opposed the new Charter. The opponents of the 1946 Charter were *not* calling for district-based elections—rather, they wanted to retain the status quo of a three-commissioner, designated-post system that was far less favorable to minorities. (Vol. 2, Ex. E, p. 293.) The local newspaper even published an article titled, "New Charter Aids Racial Minorities," which described a meeting with the local chapter of the NAACP, led by its chairman (who also publicly advocated for the new Charter), where it was pointed out that "the opportunity for representation in minority groups has been *increased* two and a half times over the present charter by expansion of the City Council from three to seven members." (Vol. 2, Ex. E, pp. 288, 327, italics

added.)

The trial court reached an equally outlandish conclusion in finding that the City Council decided in 1992 not to put district elections on the ballot because they were somehow intending to discriminate against minorities. Plaintiffs admit there is no evidence of racial animus on the part of the Council in 1992; in fact, the Council members consistently expressed a desire to *expand* minority representation. (Vol. 2, Ex. E, pp. 295, 335.) Plaintiffs' only argument about 1992, which the trial court accepted, was based on a single statement by a single Council member relating to preserving affordable housing. (Vol. 5, Ex. BB, p. 1083.) The City cannot find a single published decision grounding a weighty finding of intentional discrimination on anything so flimsy.

2. The City, its current Council members, and the public will be irreparably harmed without a stay.

If this Court ultimately reverses the judgment, then the enforcement of paragraph 9 during the pendency of the City's appeal will have worked irreparable harm on the City, its current Council members, and the public at large. Paragraph 9, if not stayed, will leave the City no choice but to immediately scrap its longstanding electoral system in favor of a district-based election scheme using the district maps drawn by plaintiffs' expert without any public input—the necessity and lawfulness of which are the very questions presented by this appeal. If this Court ultimately reverses on liability and/or remedy, then City and its voters will have gone

through an unnecessary and unlawful election process. The irreparable harms that will flow from that process include:

First, the current Council members will have lost much of the terms that they and their volunteers and financial supporters invested time and funds into winning.

Second, voters will have lost the representation of the candidates they preferred and elected. Notably, most of the City's current Council members were preferred by Latino voters. In the 2016 election, Tony Vazquez, one of two Latino-preferred candidates (see Vol. 2, Ex. E, p. 314), prevailed. He has since left the Council for a seat on the State Board of Equalization; the Council appointed Ana Jara, a Latina, to fill his seat for the balance of his term (until November 2020). (See Vol. 5, Ex. GG, pp. 1146, 1150-1152.) In the 2018 election, Latino voters' top three choices all won seats on the Council: Sue Himmelrich, Greg Morena, and Kevin McKeown. (See *id.* at p. 1142.)

Third, and relatedly, voters who elected the current Council members in 2016 and 2018 will have had their votes nullified—depriving these voters of their fundamental constitutional rights to have their voices heard in the electoral process. (Cal. Const., art. II, § 2.5 ["A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted"]; see also *United States v. City of Houston* (S.D. Tex. 1992) 800 F.Supp. 504, 506 ["When elections have been held—even under a voting scheme that does not technically comply with section 5 [of the Voting Rights Act]—the people have chosen their representatives. Neither the Justice Department nor this court should lightly overturn

the people's choices."].)

Fourth, the City will have paid the County almost $1 million for its assistance in providing computer records of voters' names and addresses, furnishing printed indices of voters to be used at polling places, and furnishing election equipment for a standalone election this summer. (Vol. 5, Ex. GG, pp. 1134, 1139.) That money will be unrecoverable.

Fifth, voters will have lost the electoral system that they have determined best suits their City, in part because it makes Council members accountable not just to a particular neighborhood, but to the City as a whole, and in part because it gives voters a say over every seat in elections held every two years, rather than a say over a single seat in elections held every four years. Santa Monica voters have twice overwhelmingly rejected proposals to abandon this system. (Vol. 2, Ex. E, pp. 294, 297.)

Sixth, if the City must hold an election before August 15, 2019, and if this Court later reverses the trial court's judgment, there would need to be yet *another* Council election for all seven Council members—which would be the third City Council election in a two-year span. In addition to the expenditure of time and resources by the City and the candidates, such a frequency of elections, under two entirely different schemes, would risk voter confusion and fatigue, and undermine voters' confidence in the electoral system.

3. Respondents' interests would not be harmed by a stay.

The City showed at trial why plaintiffs have not suffered

and will not suffer any harm from the continued maintenance of the current at-large election system. Latino-preferred candidates routinely get elected in Santa Monica. (Vol. 2, Ex. E, pp. 278–281.) And even if they did not, the City's Latino voters are too few in number and too dispersed throughout the City for any alternative electoral scheme, including districts, to give them the ability to elect candidates of their choice. (*Id.*, pp. 281–284.) Put simply, there is no wrong to right in this case.

Even if the City's basic demographic facts were different, and even if it were possible to create a district in which Latino voters could elect candidates of their choice, there still would be no prospect of real harm here. As noted above, the current Council members, who were elected in the 2016 and 2018 elections, were almost all preferred by Latino voters. Accordingly, removing this Council would, if anything, *harm* the interests of Latino voters, who would lose the benefit of the very representation they themselves sought at the polls, in favor of a brand-new election system that would threaten to dilute the voting power of Latinos citywide by fracturing their votes across seven districts. (E.g., Vol. 2, Ex. N, p. 496; cf. Phil Willon, A Voting Law Meant to Increase Minority Representation has Generated Many More Lawsuits than Seats for People of Color (L.A. Times, Apr. 7, 2017) ["The threat of legal action has forced cities to switch to council districts, but in some cases the move hasn't resulted in more minority representation because the city already is well-integrated and drawing districts where minorities predominate is difficult."].)

Finally, to the extent plaintiffs would suffer any harm at all

from a stay of paragraph 9, it would necessarily be of a short duration—the time required to dispose of this appeal. If the City is wrong, and the judgment is affirmed, the at-large election system will no longer be used to elect City Council members. But if the City is correct, and the judgment is reversed, the City and its voters will have incurred massive expenses and endured a great deal of disruption and uncertainty for no reason. The prospect of multiple elections, as well as uncertainty as to who will make decisions on the City's behalf even a few months hence, will interfere with the City's ability to govern itself.

In sum, even if plaintiffs might suffer any harm from a stay, it does not remotely compare with the harms the City and its voters will certainly suffer absent a stay.

VI. CONCLUSION

For these reasons, this Court should grant the City's petition for a writ of supersedeas, and it should confirm that paragraph 9 of the trial court's judgment is mandatory in effect, and thus automatically stayed during the pendency of the City's appeal. In the alternative, this Court should stay the enforcement of paragraph 9 of the trial court's judgment until the final resolution of this appeal.

DATED: March 8, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____
Theodore J. Boutrous, Jr.

Attorneys for Petitioner-Defendant City of Santa Monica

CERTIFICATION OF WORD COUNT

Pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the undersigned hereby certifies that this petition and the accompanying memorandum contain 13,227 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, the verification, and the signature blocks.

DATED: March 8, 2019

Kahn A. Scolnick

EXHIBIT G

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PICO NEIGHBORHOOD ASSOC. et al., Respondents, v. CITY OF SANTA MONICA, Appellant.	B295935 (Super. Ct. No. BC616804) (Yvette M. Palazuelos, Judge) **STAY ORDER**

We have read and considered the petition for writ of supersedeas filed on March 8, 2019. We have also read and considered the opposition and motion to strike, both filed on March 21, 2019, and the reply and opposition to motion to strike filed on March 25, 2019.

The motion to strike is denied.

The petition for writ of supersedeas is granted. Paragraph 9 of the judgment entered on February 13, 2019 operates as an automatic stay pending the disposition of this appeal.

GRIMES, Acting P.J. STRATTON, J. WILEY, J.

EXHIBIT H

From:	Scolnick, Kahn A.
To:	Kevin Shenkman; Douglas Sloan
Cc:	McRae, Marcellus; Henry, Tiaunia; Adler, Daniel R.; Azad, Ryan
Subject:	RE: ex parte notice
Date:	Tuesday, June 25, 2024 11:59:53 PM

Hi Kevin. The City opposes any application to advance the September 18 hearing date on plaintiffs' motion. What is plaintiffs' purported basis for seeking to advance that hearing date?

Is plaintiffs' position that their motion needs to be heard before September 18 because the ruling on that motion could have some potential effect on the November 2024 election? If so, that's a flawed premise and not a valid basis for advancing the hearing date. Most important, even assuming the trial court were to grant plaintiffs' motion and issue a new judgment in plaintiffs' favor before the November 2024 election (which we think is highly doubtful under the circumstances), and even if that hypothetical judgment directed the City to change its election system to a district-based system for the November 2024 election (as in paragraph 6 of plaintiffs' proposed judgment), that would be a mandatory injunction and thus subject to an automatic stay on appeal. You'll recall that we went through that exact same exercise in 2019 after Judge Palazuelos issued the judgment and refused to acknowledge the mandatory stay on appeal. The Court of Appeal promptly issued a writ of supersedeas making clear that any such judgment is automatically stayed until the appeal is resolved. For that reason, there's no conceivable way that a new judgment in plaintiffs' favor could impact the November 2024 election, which means there's no legitimate ground for seeking to advance the September 18 hearing date.

It's also worth pointing out that plaintiffs could have filed this motion months ago, following the issuance of remittitur, but they did not file anything until today. Thus, any perceived urgency at this point is of plaintiffs' own creation.

One more issue. The City is going to file its own motion this week to determine further proceedings on remand. We have reserved a hearing date of September 20 for that motion. For obvious reasons, the City's motion should be heard at the same time as plaintiffs' motion to reissue the judgment, so we should discuss a coordinated hearing date and briefing schedule. But again, there's no valid reason to advance the hearing on these motions to any date before September 18.

Thanks.

Kahn A. Scolnick

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GIBSON DUNN
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue, Los Angeles, CA 90071-3197

From: Kevin Shenkman <shenkman@sbcglobal.net>
Sent: Tuesday, June 25, 2024 10:22 PM
To: Scolnick, Kahn A. <KScolnick@gibsondunn.com>; Douglas Sloan <douglas.sloan@santamonica.gov>
Subject: ex parte notice

[WARNING: External Email]

Kahn and Doug -

I am writing to provide notice that we will be appearing in Department 16 of the Los Angeles Superior Court, located at 111 N. Hill St., Los Angeles, CA, at 8:30 a.m. on Thursday, June 25, 2024 to seek ex parte relief - namely, advancing the hearing date of Plaintiffs' motion to reissue judgment in Case No. BC616804.

Please let me know whether Defendant will oppose the requested relief, and feel free to call me at 310-457-0970. Frankly, I think it is in the best interests of all parties concerned, including Defendant, to gain the certainty concerning the November 2024 election that will come with the Court ruling on Plaintiffs' motion to reissue judgment as soon as is practicable.

-Kevin