CITY OF SANTA MONICA
DOUGLAS SLOAN, SBN 194996
City Attorney — Douglas.Sloan@smgov.net
1685 Main Street, Room 310
Santa Monica, CA 90401
Telephone: 310.458.8336

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS JR., SBN 132099
tboutrous@gibsondunn.com
MARCELLUS MCRAE, SBN 140308
mmcrae@gibsondunn.com
KAHN A. SCOLNICK, SBN 228686
kscolnick@gibsondunn.com
TIAUNIA N. HENRY, SBN 254323
thenry@gibsondunn.com
DANIEL R. ADLER, SBN 306924
dadler@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

Attorneys for Defendant,
CITY OF SANTA MONICA

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

DEFENDANT CITY OF SANTA MONICA'S MOTION REGARDING FURTHER PROCEEDINGS ON REMAND

Hearing Date: September 20, 2024
Hearing Time: 9:00 a.m.
Reservation ID: 531742414492

Assigned to Judge Steve Cochran
Department 16

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I. Introduction

To resolve this case, this Court will need to decide whether the City of Santa Monica's method of electing its Councilmembers dilutes the voting strength of Latino voters. Answering that question, the California Supreme Court has explained, will turn on whether some other voting system would generate a net gain in Latinos' ability to elect their preferred candidates. This Court's final judgment will determine whether the City must scrap its 78-year-old voting system and face a fee request from plaintiffs that was already up to $22 million before the appellate phase.

This case returns to this Court almost six years after a bench trial before Judge Palazuelos, who adopted plaintiffs' proposed statement of decision and entered judgment in their favor on both their claim under the California Voting Rights Act (CVRA) and their claim that the City violated California's Equal Protection Clause by intentionally adopting and maintaining an at-large election system to harm Latino voters. In 2020, the Court of Appeal reversed that judgment in full. (Declaration of Kahn Scolnick, Ex. A.) In the first opinion to address the elements of the CVRA, the Court of Appeal concluded that the CVRA requires evidence that the City's voting system dilutes minority voting power, that plaintiffs "offered no valid proof of dilution," and that the trial court "applied an erroneous legal standard to reach [its] faulty conclusions" on plaintiffs' Equal Protection claim. (*Id.* at pp. 30, 37-38.)

Plaintiffs petitioned for review. The California Supreme Court declined to grant review on the Equal Protection claim, which means the Court of Appeal's decision is now law of the case on that score. But the Supreme Court did grant review on the CVRA claim, directing the parties to brief what a plaintiff must prove to establish vote dilution under the CVRA. (*Pico Neighborhood Assn v. City of Santa Monica* (2020) 474 P.3d 635.) The parties disputed whether "dilution" is an element of the CVRA at all—that is, whether plaintiffs needed to prove that Latinos' voting power is weaker under the current election system than it would be under some other election system—and if dilution is an element, what that proof might look like. Last year, the Supreme Court confirmed that dilution is an element of the CVRA and announced a new legal standard for analyzing it. (*Pico Neighborhood Assn. v. City of Santa Monica* (2023) 15 Cal.5th 292.) Because the Supreme Court "express[ed] no view on the ultimate question of whether the City's at-large voting system is consistent with the CVRA," it

remanded the case to the Court of Appeal to decide the unresolved issues in this case. (*Id.* at p. 324.) After receiving a combined 276 pages of supplemental briefing by the parties, on top of the 352 pages of initial briefing, the Court of Appeal remanded the case to this Court "for further proceedings consistent with the Supreme Court's guidance" on assessing claims of vote dilution. (Scolnick Decl., Ex. B at p. 2.)

It now falls to this Court to assess plaintiffs' CVRA claim under the legal framework announced by the Supreme Court, which made clear that plaintiffs must demonstrate an "incremental gain in [Latinos'] ability to elect" candidates of their choice. (15 Cal.5th at p. 322; accord, e.g., *ibid.* [plaintiffs must prove "net gain in the protected class's potential to elect candidates under an alternative system"].) This Court will be the first to perform that analysis. Judge Palazuelos did not do so because she concluded principally that dilution is not an element of the CVRA at all. And neither the Supreme Court nor the Court of Appeal expressed any view on whether plaintiffs can satisfy this new net-gain standard. Nor, for that matter, did the Court of Appeal or Supreme Court decide whether plaintiffs had satisfied the other substantive element of the CVRA—the requirement to prove a legally significant pattern of racially polarized voting.

The Court should decide those questions—which will have extraordinary consequences for the voting rights of the City's nearly 90,000 residents—in light of contemporary evidence. The existing record is necessary but insufficient to answer the questions left open by the Supreme Court and the Court of Appeal. In the time it has taken for this case to travel up and down California's judiciary, the City has held three Council elections. The results of those elections will help this Court determine whether voting is racially polarized and whether Latino voters have greater power under the current election system than they would under any hypothetical alternative system plaintiffs might propose. The most recent elections have resulted in the election of two new Latino Councilmembers (in addition to the two who were already serving on the Council at the time the complaint was filed and the case was tried). That means the seven-member Council now has four Latino members—even though Latinos account for only 13.6% of the City's voting-eligible population. Considering this new evidence is necessary not only to properly assess plaintiffs' CVRA claim under the proper legal standard but also to ensure that the Court does not require the City to adopt a new electoral system that would offer

no practical benefit to minority voters, in violation of the federal Constitution. (See *Cooper v. Harris* (2017) 581 U.S. 285, 291.)

The City submits this motion to outline a proposal for the proceedings on remand. Consistent with the Court of Appeal's order remanding this case, this Court should analyze plaintiffs' CVRA claim under the legal framework announced by the Supreme Court. In conducting that analysis, the Court should receive further briefing and post-trial evidence bearing on plaintiffs' CVRA claim under the correct legal standard. Specifically, the Court should permit the parties to file simultaneous supplemental briefs of up to 25 pages, excluding declarations and exhibits, presenting arguments under the proper legal standard and introducing new evidence concerning the results of the three most recent Council elections. The parties should then have 30 days to file simultaneous supplemental responding briefs of up to 15 pages each.

II. Background

This case has a long history. Here is the short version, which includes a brief summary of the California Voting Rights Act and the election system that plaintiffs want this Court to declare unlawful.

A. The California Voting Rights Act

The Legislature enacted the CVRA in 2002. It spans eight sections of the Elections Code (sections 14025-14032), and it permits voters of a protected class to challenge a jurisdiction's at-large election system. An at-large system is one in which voters may, in every election, cast as many votes as there are candidates; in a districted system, by contrast, voters may cast only one vote and may do so only in elections for their assigned districts. Under the CVRA, if members of a protected class can prove that a defendant's at-large method of election dilutes the voting power of the class and that voting is racially polarized (§§ 14027, 14028), the court may order "appropriate remedies, including the imposition of district-based elections" (§ 14029), and the plaintiffs may recover their attorney's fees and litigation expenses (§ 14030).

Before this case, the CVRA had been subjected to very little appellate scrutiny because, until around ten years ago, virtually all CVRA cases settled. (See Fagone & Lempres, *A Powerful California Law Is Reshaping How You Vote. Lawyers Are Making Millions Off It* (Dec. 27, 2023) S.F. Chronicle <https://www.sfchronicle.com/projects/2023/california-voting-law/>.) In fact, until 2020—when the

Court of Appeal issued its opinion in this case—there was no appellate authority addressing even what elements must be proved to establish a violation. So when this case went to trial in 2018, Judge Palazuelos was largely writing on a blank slate.

B. Santa Monica's method of electing its Councilmembers

Santa Monica has about 90,000 residents. (Scolnick Decl., Ex. D at 9111:15-16.) At the time of trial, Latinos accounted for 13.6% of its voting-eligible population. (*Id.*, Ex. C, Ex. E at 2470:8-10; *Pico*, 15 Cal.5th at p. 308.)

Since 1946, the City has been governed by a seven-member Council elected at large. Elections happen every other year, with four Councilmembers elected in presidential-election years and the other three elected in gubernatorial-election years. (E.g., Scolnick Decl., Ex. F, G.) Voters may cast up to three or four votes in each election, depending on the number of open seats. (*Id.*, Ex. G.)

Before adopting the at-large system currently in place, the City experimented with other election systems. Between 1906 and 1914, the City was divided into seven districts, each of which elected one councilmember. (Scolnick Decl., Ex. H.) In 1914, voters switched from seven councilmembers elected by district to three commissioners elected at large to "designated posts." (*Id.*, Ex. I, Ex. J at 4390:22-25.) But in 1946, at the urging of local minority leaders, the voters chose to return to a seven-councilmember system, this time elected at large, and they abandoned designated posts—which tended to restrict minorities' electoral opportunities. (*Id.*, Ex. K at 7552:18-23, 7560:9-7561:27.) "All minority leaders in [the] record supported the proposed change in 1946." (*Id.*, Ex. A at p. 6.)

C. This lawsuit

Maria Loya (who unsuccessfully ran for City Council in 2004) and the Pico Neighborhood Association (a neighborhood group chaired at the time of trial by Loya's husband, Oscar de la Torre) sued the City in 2016. (Scolnick Decl., Ex. L.) They claim the City's at-large system violates the CVRA by diluting Latinos' votes and that by adopting and maintaining that system, the City intentionally discriminated against minority voters in violation of California's Equal Protection Clause. (*Id.*, Ex. L, M.)

The trial court held a six-week bench trial in the fall of 2018. A central question in this case,

as in any other case brought under the CVRA or its federal analog, Section 2 of the Voting Rights Act, is whether Latino voters cohesively supported candidates who ended up losing because of white bloc voting. That question is impossible to answer directly, of course. Ballots are secret, so the parties could not tally up the precise number of votes each candidate received from each ethnic group. Instead, each side called an expert to present statistical estimates of different groups' support for various candidates. (Scolnick Decl., Ex. N at 2957:3-28.) The two experts produced essentially identical estimates of voting behavior. (Compare *id.*, Ex. O with Ex. P.) The only meaningful difference in the work of the two experts was that the City's expert addressed a wider range of elections. Whereas plaintiffs' expert analyzed only those seven elections featuring at least one Latino-surnamed candidate whom he deemed "serious" (see, e.g., *id.*, Ex. Q at 18; Ex. S at 3179:3-3181:2), the City's expert analyzed all Council elections for which precinct-level data were available (see *id.*, Ex. O).

The evidence showed that Santa Monica voters had elected their first African-American Councilmember in 1971, their first Latino Councilmember in 1990, and their first Asian-American Councilmember in 1992. (Scolnick Decl., Ex. T.) At the time of trial, in a city where only one in seven eligible voters is Latino, two of the City's seven Councilmembers were Latino, and another Councilmember lived in the Pico Neighborhood, which plaintiffs contend has been underrepresented. (*Id.*, Ex. U at 4823:3-4, Ex. V at 7811:6-13.) Shortly after trial, one Latino Councilmember (who by then had won three at-large Council elections) left the Council to assume a seat on the State Board of Equalization.

D. Judge Palazuelos enters judgment for plaintiffs

Judge Palazuelos issued a tentative decision stating only that the court found in favor of plaintiffs on both of their causes of action. (Scolnick Decl., Ex. W.) The court ordered plaintiffs to prepare a proposed statement of decision and judgment (*id.*, Ex. X at p. 32), which plaintiffs did (*id.*, Ex. Y, Z). Judge Palazuelos adopted both on February 13, 2019. (*Id.*, Ex. AA.) Her decision "basically mirrored [plaintiffs'] proposals," with only a few tiny revisions. (*Id.*, Ex. A at p. 18.)

As for plaintiffs' CVRA claim, the decision concluded that voting was racially polarized in Council elections by examining only white and Latino voters' respective levels of support for Latino-surnamed candidates in the seven elections plaintiffs' expert analyzed. (Scolnick Decl., Ex. AB at

pp. 12-18.) Viewing election data through that narrow lens, the decision reported racially polarized voting in "6 of the 7 elections." (*Id.* at p. 18.) The decision did not account for, among other things, the fact that the City elected multiple Latino-preferred candidates who did not happen to be Latino-surnamed. (See, e.g., *id.*, Ex. P.) The decision also discounted the electoral successes of two Latino candidates—one on the theory that she isn't actually a Latina to begin with, and the other, a three-time winner, on the theory that he was only "able to eke out a victory, coming in fourth place in this four-seat race." (*Id.*, Ex. AB at p. 20.)

The decision also concluded that voting patterns in other City elections (School Board, Rent Control Board, etc.) "support the conclusion that the levels of support for Latino candidates from Latino and [white] voters, respectively, is always statistically significantly different, with [white] voters consistently voting against the Latino candidates who are overwhelmingly supported by Latino voters." (Scolnick Decl., Ex. AB at p. 25.) The statement did not mention that 14 of the 16 Latino-surnamed candidates who ran in local non-Council elections between 2002 and 2016 *won*. (*Id.*, Ex. AC, AD, AE, AF, AG, AH.)

The decision expressed doubt that "'dilution' is a separate element of a violation of the CVRA." (Scolnick Decl., Ex. AB at p. 38.) It then stated, in one sentence, that plaintiffs had proved vote dilution by "present[ing] 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." (*Id.* at pp. 38-39.)

As for plaintiffs' Equal Protection claim, the decision concluded that the City intentionally discriminated against minority voters in adopting its election system in 1946 and in maintaining its election system after a thorough investigation and debate in 1992. (Scolnick Decl., Ex. AB at pp. 48-59.)

Judge Palazuelos ordered the City to adopt a seven-district map drawn by plaintiffs and hold a special district-based election in July 2019; the court also prohibited any Councilmembers elected at-large from serving after August 15, 2019. (Scolnick Decl., Ex. AB at pp. 59-71.)

E. The Court of Appeal reverses the judgment in full

The City appealed. (Scolnick Decl., Ex. AI.) Judge Palazuelos denied the City's motion to

recognize the judgment as a mandatory injunction that was automatically stayed on appeal (*id.*, Ex. AK), so the City filed a petition for a writ of supersedeas (*id.*, Ex. AK), which the Court of Appeal granted (*id.*, Ex. AL).

In its appellate briefing, the City explained, among other things, why the CVRA requires vote dilution and how dilution should be defined. Plaintiffs, by contrast, argued that the statute "contains no dilution element at all," or if it does, that plaintiffs had satisfied it by showing that Latino voters, who account for 13.6% of voters in the at-large system, would account for 30% of voters in a hypothetical district. (Scolnick Decl., Ex. A at pp. 32, 34-35.)

The Court of Appeal unanimously reversed the trial court's judgment. As for plaintiffs' CVRA claim, the court did "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." (Scolnick Decl., Ex. A at p. 37.) It instead resolved the claim solely on dilution grounds. The Court of Appeal held that the CVRA requires proof of dilution—that "the City's at-large method impaired Latinos' ability to elect candidates of their choice." (*Id.* at p. 30.) And the Court concluded that plaintiffs had "offered no valid proof of dilution" at trial. (*Ibid.*) If Latinos were not electing all their preferred candidates, the reason was Latino voters' "[s]mall numbers"—not the City's at-large election—and Latino voters would fare no better in a district system. (*Id.* at p. 31.)

As for plaintiffs' Equal Protection claim, the Court of Appeal concluded that plaintiffs "did not prove the City adopted or maintained its [election] system for the purpose of discriminating against minorities." (Scolnick Decl., Ex. A at p. 38.) There was no discrimination in 1946, when the City adopted its current system; to the contrary, the City's minority leaders "unanimously favored" at-large elections. (*Id.* at pp. 42-46.) The Court of Appeal described the trial court's contrary ruling that "a city and its electorate engaged in hostile discrimination against minorities when that city and its electorate *did what minority leaders asked*" as "illogical" and "unprecedented." (*Id*. at p. 43.) Likewise, there was no discrimination in 1992, when the City Council considered the possibility of switching to a different election system; "[t]here was never a hint of hostility to minorities." (*Id.* at p. 46.) The Court of Appeal "studied" the key evidence the trial court had relied on—a videotape of a 1992 Council meeting—and held that the trial court's interpretation of that video was "so utterly

discredited . . . as to dictate judgment for the City." (*Id.* at p. 47, cleaned up.)

The Court of Appeal directed the trial court to enter judgment for the City. (Scolnick Decl., Ex. A at p. 50.)

F. The Supreme Court grants review only on plaintiffs' CVRA claim, clarifies the legal standard for proving dilution, and remands

Plaintiffs petitioned for review of the entire Court of Appeal decision. The Supreme Court granted the petition, but only "to determine what constitutes dilution of a protected class's ability to elect candidates of its choice or to influence the outcome of an election within the meaning of the CVRA." (*Pico Neighborhood Assn. v. City of Santa Monica* (2023) 15 Cal.5th 292, 310.) The Supreme Court also ordered the Court of Appeal's decision depublished (*ibid.*), but it remains law of the case with respect to plaintiffs' Equal Protection claim (*People v. Rivera* (1984) 157 Cal.App.3d 494, 495; Cal. Rules of Court, rule 8.115(b)(1)).

In November 2020, shortly after the Supreme Court granted review, voters elected two additional Latino Councilmembers. One of them, Oscar de la Torre, is married to one of the plaintiffs and is the former chairman of the other. He joined the Council after winning five straight at-large School Board elections. (Scolnick Decl., Ex. O.) Both of the newest Latino Councilmembers also live in the Pico Neighborhood. And by the time the Supreme Court issued its opinion in 2023, there were (and continue to be) four Latinos on the Council—the majority of the Council in a city where Latinos account for less than one-seventh of the voters.

The Supreme Court ultimately rejected both sides' theories of dilution, as well as what it understood to be the Court of Appeal's reasoning in ruling against the plaintiffs on that element. It held that plaintiffs' theory—that "proof of racially polarized voting, in itself, establishes 'dilution'"—runs counter to both the text of the CVRA and the federal statutory and decisional law against which the CVRA was enacted. (15 Cal.5th at pp. 314-315.) "Plaintiffs' construction would allow a party to prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system." (*Id.* at p. 315.)

Turning to the Court of Appeal's decision, which the Supreme Court interpreted as having "effectively embraced" the federal rule that a vote-dilution plaintiff must prove that the relevant minority group would account for the majority of voters in a hypothetical district, the Court held that

the Court of Appeal "erred in importing" the federal requirement into its interpretation of the CVRA. (15 Cal.5th at p. 316.) The Court reasoned that the Legislature "intended to make the CVRA more expansive" than its federal analog. (*Id.* at p. 317.)

The Supreme Court also rejected the City's proposal—namely, that CVRA plaintiffs must prove that "'the relevant minority group would account for a near-majority of voters in a hypothetical district with a history of reliable crossover support from other voters.'" (15 Cal.5th at p. 318.) The Court explained that "defining a near majority presents a new set of line-drawing problems." (*Ibid.*)

Instead, the Supreme Court adopted a new legal standard meant to answer the question "whether the prospect of crossover support from other voters under a lawful alternative electoral scheme would offer the protected class, whatever its size, the potential to elect its preferred candidate." (15 Cal.5th at p. 319; accord *id.* at pp. 307-308.) The Court explained that the showing necessary to prove dilution might vary substantially across cities. In some cases, a group will be too small in any system to elect its preferred candidates, even if it is far more concentrated in a district than in the city as a whole. (*Id.* at p. 321.) Increasing a protected class's share of eligible voters from 0.1% citywide to 1.5% in a district, for example, would have no effect on that group's ability to elect its preferred candidate; it would have zero ability either way. (*Ibid.*) And in other cases, what plaintiffs must prove won't be much different from a near-majority or majority-minority requirement: "When the hypothetical alternative is district elections, a high degree of racially polarized voting may, in many cases, effectively require the protected class to constitute a substantial or very substantial minority of voters." (*Id.* at p. 319.)

When analyzing dilution under the CVRA, the Supreme Court explained, "[c]ourts should consider the totality of the facts and circumstances of the particular case, 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 system." (15 Cal.5th at p. 320, citations and quotation marks omitted). Yet the Court made clear that, to prevail on a vote-dilution claim, a CVRA plaintiff must prove not only "what percentage of the vote would be required to win," but also that the relevant minority group would have *greater* voting power under some other election system. (15 Cal.5th at pp. 320, 322.) In other words, "[t]he dilution element

also ensures the protected class is not made worse off." (*Id.* at p. 322.) Courts therefore must consider, among other things, whether "the incremental gain in the class's ability to elect its candidate of choice" in a remedial district would be "offset by a loss of the class's potential to elect its candidates of choice elsewhere in the locality." (*Ibid.*)

The Supreme Court also clarified that this case concerns only the ability of Latinos to *elect* their preferred representatives. Although the CVRA permits claims premised on a protected class's "ability to *influence* the outcome of an election," the Court saw no need to decide what plaintiffs must prove to succeed on such a claim. (15 Cal.5th at pp. 323-324, italics added.) "Plaintiffs did not argue in the trial court or in th[e Supreme Court] an influence theory distinct from their claim that the City's at-large election system diluted their ability to elect their candidates of choice." (*Id.* at p. 324.)

The Supreme Court "express[ed] no view on the ultimate question of whether the City's at-large voting system is consistent with the CVRA" and remanded the case to the Court of Appeal to decide "whether, under the correct legal standard, plaintiffs have established that at-large elections dilute their ability to elect their preferred candidates," as well as "whether plaintiffs have demonstrated the existence of racially polarized voting" and "any of the other unresolved issues in the City's appeal." (15 Cal.5th at pp. 324-325.)

G. After further briefing on plaintiffs' CVRA claim under the new legal standard, the Court of Appeal remands to this Court

On remand, the Court of Appeal issued an order calling for supplemental briefing, noting that the Supreme Court did not "reinstate the trial court's judgment" and instead only "identified the proper way to analyze" the CVRA. (Scolnick Decl., Ex. AM at p. 1.) The Court of Appeal also "invite[d] the parties to include in their briefing whether it would be appropriate to remand the case to the trial court" to perform the analysis necessary to decide whether the City's current election system dilutes Latino voting strength. (*Id.* at p. 2.) Plaintiffs vigorously opposed remand, arguing that the Court of Appeal should reinstate the judgment in their favor (on the CVRA claim) based on the existing record.

After briefing, the Court of Appeal issued an order remanding the case to this Court "for further proceedings consistent with the Supreme Court's guidance." (Scolnick Decl., Ex. B at p. 2.) The Court of Appeal reiterated that the Supreme Court "did not review the [Equal Protection] issue," which the Court of Appeal had rejected, "nor did it reinstate the trial court's judgment on the [CVRA]" claim.

(*Id.* at p. 1.) The Supreme Court only "identified the proper way to analyze the [CVRA] 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." (*Ibid.*)

On June 21, this case was reassigned to this Court.

III. Argument

More than five years have passed since Judge Palazuelos issued a judgment in favor of plaintiffs. In that time, the Court of Appeal thoroughly rebuked the trial court's analysis of the Equal Protection claim. And the Supreme Court announced a new legal standard by which courts should evaluate vote dilution—an element of the CVRA that the statement of decision (drafted by plaintiffs and adopted by Judge Palazuelos) did not meaningfully address because plaintiffs insisted it was not an element at all. The City has held three elections since the 2018 trial, and analysis of those elections would bear directly on plaintiffs' burden to prove both racially polarized voting and vote dilution.

The Court should not analyze plaintiffs' CVRA claim under the Supreme Court's new legal standard without considering the most recent elections. Due to the nature of elections—which regularly generate new candidates and results—courts deciding voting-related claims often allow parties to supplement the record with relevant post-judgment evidence when a case returns on remand years after the since-vacated judgment issued. California courts also allow parties to submit new evidence after an appellate court announces a new legal standard that the trial court did not apply. For both these reasons, this Court should allow the parties to file supplemental briefs addressing plaintiffs' vote-dilution claim under the Supreme Court's new legal framework and presenting post-judgment election-related evidence bearing on that analysis before deciding whether to force the City to change its 78-year-old at-large voting system and alter the voting rights of Santa Monica residents.

A. Courts allow parties in election cases to present new evidence on remand

Voting-rights claims, including those brought under the CVRA, necessarily depend on election outcomes. And elections are regularly held and decided while a case is on appeal. That is why courts deciding an election case on remand often reopen the record to consider recent election results.

Take *Vecinos de Barrio Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, for example. There, the First Circuit vacated the district court's finding that Holyoke's at-large election system diluted Latino votes and remanded the case for the district court to reconsider the plaintiffs' vote-dilution claim in light of the First Circuit's opinion. (*Id.* at p. 992.) Because another election had been held since the district court issued its judgment, the First Circuit said the court was "free to reopen the record" and "take additional evidence" on remand when "reconsider[ing] all (or any part) of its findings." (*Ibid.*) Although the First Circuit did not "anticipate an entirely new trial," it made clear that the trial court could "permit the parties to supplement the existing record with additional facts (including, but not limited to, evidence gleaned from the new round of municipal elections that have recently been completed)" that would shed light on "Holyoke's rapidly changing political environment." (*Id.* at pp. 989, 992.)

And that is precisely what the district court did: On remand, it "issued a memorandum" to the parties that "established [a] timeline for supplemental discovery and further evidentiary proceedings." (*Vecinos de Barrio Uno v. City of Holyoke* (D.Mass. 1997) 960 F.Supp. 515, 516.) The court proceeded to receive four days of "further testimony . . . from both the parties' experts and testimony from several fact witnesses" before issuing a new decision completely contrary to the one the First Circuit had vacated. (*Ibid.*) The court found that "[r]ecent developments within Holyoke make it impossible to say . . . that the current City Council election system" dilutes the Latino' voting power. (*Ibid.*)

Other courts of appeals have reached much the same conclusion in election cases remanded to the trial court. In *Westwego Citizens for Better Government v. City of Westwego* (5th Cir. 1990) 906 F.2d 1042, for example, the Fifth Circuit held that the district court had "erred in refusing to consider," on remand from an earlier appeal in the same case, "highly relevant evidence" of a post-judgment election. (*Id.* at p. 1045.) "[G]iven the long term nature and extreme costs necessarily associated with voting rights cases," the Fifth Circuit explained that it was "appropriate to take into account elections occurring subsequent to trial." (*Ibid.*) It thus remanded to the district court once again so that the parties could have "the opportunity to present the results of the 1989 aldermanic election." (*Ibid.*)

The Third Circuit has also recognized the propriety of considering new evidence in election cases on remand. In *Jenkins v. Red Clay Consolidated School District Board of Education* (3d Cir.

1993) 4 F.3d 1103, it "suggest[ed] that the district court on remand receive evidence on the 1991 election," which took place after the trial but before the district court issued its judgment. (*Id.* at p. 1136.) On remand, the district court "admitted additional evidence" and held that, in light of the legal standard announced by the Third Circuit, the "plaintiffs ha[d] failed to prove by a preponderance of the evidence that, based upon the totality of circumstances, the political process in Red Clay" diluted minority voting power. (*Red Clay Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.* (D.Del. Apr. 10, 1996) 1996 WL 172327, at *1.)

Here, the election results in the record are stale by nearly a decade; the City has held *three* Council elections since the trial. Those election results are highly relevant to the issues before this Court: whether there is any legally significant racially polarized voting in the City's Council elections and whether the City's at-large elections dilute the voting power of Latinos. This Court should thus permit the parties to introduce this new evidence so it can evaluate plaintiffs' CVRA claim based on the current state of affairs in the City.

B. Courts allow parties to introduce new evidence relevant to a new legal standard announced on appeal

Allowing the parties to introduce evidence concerning the most recent Council elections would be consistent not only with the practice of federal courts in closely analogous election-law cases, but also with the practice of California courts in cases where an appellate court has announced a new legal standard.

Here, the appellate decisions in this case were the first to ever evaluate the elements of the CVRA. The California Supreme Court granted review to give guidance to lower courts on the legal standard for evaluating vote dilution under the CVRA. And the Court has now announced that standard, under which "[c]ourts should consider the totality of the facts and circumstances of the particular case, 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 system." (*Pico*, 15 Cal.5th at p. 320, citations and quotation marks omitted.) "The key inquiry in establishing dilution of a protected class's ability to elect its preferred candidate under the CVRA" under a different election system "is what percentage of

the vote would be required to win." (*Ibid.*) Neither the parties nor Judge Palazuelos had the benefit of that standard during trial. What's more, the best evidence of what it would take for minority-preferred candidates to win in Santa Monica is what has happened in Santa Monica's elections, including the three elections that took place after trial. This Court should allow the parties to introduce evidence related to those elections so the Court may evaluate, under the new legal standard announced by the Supreme Court, plaintiffs' contention that Santa Monica's voting system is somehow preventing Latino-preferred candidates from winning office.

"When a trial court applies the wrong legal standard," it is natural that "the record might not be fully developed" as it relates to the right standard. (*In re J.R.* (2022) 82 Cal.App.5th 526, 532.) When some parties and the court focus on what turns out to be the wrong legal test, it may be the case "that further information was available, but not presented, at the time" of the trial court's judgment. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 167.) As a result, when a court announces "the applicable test for the first time," the parties "should be allowed to present additional evidence to meet that test if they choose." (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 190.)

That rule helps ensure "fairness" and "prevent injustice to a party who had no reason to expect a changed rule at the time of trial." (*Deffenbaugh-Williams v. Wal-Mart Stores, Inc.* (5th Cir. 1999) 188 F.3d 278, 282.) In other words, when an appellate court announces a new legal framework and remands, "the better, fairer outcome is to permit the parties to make new submissions, if they wish, in light of the significant intervening clarification of the law." (*Millipore Corp. v. Travelers Indem. Co.* (1st Cir. 1997) 115 F.3d 21, 34.) Without such an opportunity, the trial court will be unable to render a decision that grapples with the relevant facts—some of which may have never been introduced in the record.

Allowing the parties to introduce new evidence concerning recent election results would also comport with the CVRA. The statute provides that elections predating the filing of an action "are *more probative* to establish the existence of racially polarized voting than elections conducted after the filing of an action." (Elec. Code, § 14028, subd. (a), italics added.) That pre-complaint elections are "more probative" does not mean that post-complaint elections are irrelevant—to the contrary, it means that post-complaint elections must be "probative" to some degree, at least. (See, e.g., *Segal v. ASICS*

America Corp. (2002) 12 Cal.5th 651, 662 [courts must give statutes their "plain and commonsense meaning," cleaned up].) That makes perfect sense—the impact of an election system is fluid over time, so courts ought not turn a blind eye to how the challenged election system is working in practice, especially if a case spans many years and several election cycles. And after all, if post-complaint elections were irrelevant, the Supreme Court would not have taken judicial notice of them. (Scolnick Decl., Ex. AO.) Moreover, plaintiffs argued both at trial and on appeal that Oscar de la Torre's loss in the 2016 Council election supports their case (e.g., Ex. AO at pp. 25-26, 62-63), and they wrote that conclusion into the statement of decision that Judge Palazuelos adopted (*id.*, Ex. AB at pp. 20-21). If de la Torre's post-complaint defeat in 2016 matters, then so should his post-complaint victory in 2020.

IV. Conclusion

Before analyzing plaintiffs' CVRA claim under the new legal standard announced by the Supreme Court, this Court should permit the parties to file briefs explaining their respective positions on how the City's election system measures up under that standard. And in those briefs, the parties should be able to address the last three Council elections. The City therefore proposes that the parties be allowed to file simultaneous supplemental briefs of up to 25 pages, excluding declarations and exhibits. The parties should then have 30 days to file simultaneous supplemental responding briefs of up to 15 pages each.

DATED: June 26, 2024

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

Attorneys for Defendant
City of Santa Monica

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

DEFENDANT CITY OF SANTA MONICA'S MOTION REGARDING FURTHER PROCEEDINGS ON REMAND

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

Kevin I. Shenkman
Mary R. Hughes
Andrea A. Alarcon
SHENKMAN & HUGHES PC
28905 Wight Road
Malibu, California 90265
shenkman@sbcglobal.net
mrhughes@shenkmanhughes.com
aalarcon@shenkmanhughes.com

Morris Baller
Laura L. Ho
Anne Bellows
Ginger L. Grimes
GOLDSTEIN, BORGEN, DARDARIAN, & HO
155 Grand Avenue, Suite 900
Oakland, CA 94612
mballer@gbdhlegal.com
lho@gbdhlegal.com
abellows@gdbhlegal.com
ggrimes@gbdhlegal.com

Milton Grimes
LAW OFFICES OF MILTON C. GRIMES
3774 West 54th Street
Los Angeles, California 90043
miltgrim@aol.com

Robert Rubin
LAW OFFICE OF ROBERT RUBIN
3012 Excelsior Blvd. # 802
Minneapolis, MN 55416
robertrubinsf@gmail.com

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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 R. Adler

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PICO NEIGHBORHOOD ASSOCIATION ET AL VS CITY OF SANTA MONICA

Case Number: BC616804 Case Type: Civil Unlimited Category: Civil Rights/Discrimination
Date Filed: 2016-04-12 Location: Stanley Mosk Courthouse - Department 16

Reservation

Case Name: PICO NEIGHBORHOOD ASSOCIATION ET AL VS CITY OF SANTA MONICA	Case Number: BC616804
Type: Motion re: (further proceedings on remand)	Status: RESERVED
Filing Party: Santa Monica, City of, California (Defendant)	Location: Stanley Mosk Courthouse - Department 16
Date/Time: 09/20/2024 9:00 AM	Number of Motions: 1
Reservation ID: 531742414492	Confirmation Code: CR-5XCDEVW3E8UY7TXMT

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Description	Fee	Qty	Amount
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Amount: $0.00	Type: GOVT_EXEMPT
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