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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

DEFENDANT CITY OF SANTA MONICA'S ANSWERING BRIEF CONCERNING REMEDIES

Complaint Filed: April 12, 2016
Trial Date: August 1, 2018
Hearing Date: December 7, 2018

Assigned to Judge Yvette Palazuelos
Dep't 28

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I. Introduction

The City of Santa Monica maintains that no remedy is appropriate here because, as the overwhelming evidence showed at trial, the City's at-large election system is fair, inclusive, and fully complies with California law. Plaintiffs' arguments to the contrary are based on a fundamental misunderstanding and misapplication of California and federal law. The City hopes to convince the Court as much once it has had a chance to review and object to the Court's forthcoming statement of decision. But even if the City is unsuccessful in that regard, the Court should not adopt plaintiffs' remedial proposal. Instead, the Court should proceed in the sensible manner that the City proposes below, consistent with California law and basic democratic principles.

First, regarding the *timing* of *any* remedy, the Court should take into account that this case raises important issues of first impression that California's appellate courts have not yet resolved. The Court and plaintiffs have recognized that any order requiring the City to adopt a new method of election would be in the nature of a "mandatory" injunction, and thus automatically stayed upon the taking of an appeal. And during the pendency of such an appeal, the Council members selected in the 2016 and 2018 elections, all duly elected at-large, would remain on the Council. Any remedial order should therefore be made effective only when the judgment becomes final—including following any appeal—and not according to an arbitrary timetable of plaintiffs' devising.

Second, if the Court accepts plaintiffs' argument that a change to district-based elections is the appropriate remedy, then California law and fundamental tenets of democracy would require that the City be given an opportunity to conduct a public process and fashion proposed districts subject to judicial approval. Even if the Court orders the City to adopt plaintiffs' "Pico" district, plaintiffs have no legitimate reason to ask this Court to impose the other six districts drawn by their expert in the few weeks between his deposition and the trial (relying heavily on input from a non-Latino community member who does not live in the Pico Neighborhood and may have political interests quite separate from this case), rather than allowing the City to undertake an inclusive and democratic process that would ensure that *all* City residents have an opportunity to be heard. In fact, California's Elections Code *requires* such a process. And such a process is consistent with both federal courts' general practice of giving the relevant legislative body the opportunity to fashion an appropriate remedial plan,

subject to judicial review, and charter cities' local control over their own municipal affairs, again, subject here to appropriate judicial review.

In sum, the Court should decline to order any remedy at all; but, if the Court determines a district-based remedy is appropriate, the Court should order the City to undertake a public process to devise a districting plan for judicial review within a reasonable time after any judgment becomes final, including after any appeal. Specifically, as explained below, the Court should grant the City at least 120 days from the date the judgment becomes final (with appellate rights exhausted) to propose an appropriate districting plan reflecting required community input, with the setting of a special election to follow the Court's adoption of the City's proposed plan (subject to any modifications the Court may require).

II. No remedy is appropriate because plaintiffs have not proven a violation of the CVRA or the Equal Protection Clause.

The City urges the Court not to confirm its tentative decision in favor of plaintiffs. As the City explained in its closing brief, the City's at-large election system (adopted in 1946 with the effect of *enhancing* minority voting rights, and expressly retained by Santa Monica's voters in the intervening years) fully complies with California law, so no remedy is warranted.

Plaintiffs failed to prove a violation of the California Voting Rights Act (CVRA) because no evidence demonstrates a cognizable pattern of racially polarized voting or the dilution of Latino votes. To the contrary, Latino-preferred candidates have consistently won seats on the City Council and the City's other governing boards.[1] (City's Closing Br. at pp. 6–9.) As the City has explained, in order to find a CVRA violation here, the Court would need to adopt plaintiffs' erroneous view of the law, including that (a) Latinos in Santa Monica can prefer only one candidate in any election (despite casting up to three or four votes); (b) Latino voters cannot prefer non-Latino candidates (even when those non-Latino candidates receive the highest share of Latino votes); and (c) white bloc voting "usually" (that is, at least more than half the time) defeats Latinos' candidates of choice in Santa Monica elections

[1] Plaintiffs have not sought, and there is no basis for ordering, any change in the at-large method of electing members of the Rent Control Board, School Board, or College Board.

even though plaintiffs have at most identified only four of ten Latino-surnamed candidates in the last quarter-century who lost because of white bloc voting. (*Id.* at pp. 3–9.)

Plaintiffs have also failed to prove a violation of the Equal Protection Clause. No evidence demonstrates that the relevant decisionmakers affirmatively intended to discriminate against minorities by adopting or maintaining the at-large election system in 1946, 1975, or 1992. Quite the opposite: The adoption of the City's current electoral system in 1946 was favored by prominent minority residents and indisputably expanded minority voting strength; 1975 was marked by notable electoral victories of minority candidates, who themselves advocated against a change to districts; and the Council's decision not to adopt a districted method of election in 1992 was not driven by racial or ethnic animus (as plaintiffs admit) and could not have been driven by a desire to protect incumbency, as three of the four councilmembers who opposed a turn to districts did not run for reelection under the at-large system. (See City's Closing Br. at pp. 18–25; *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763.)

Because no finding of liability can reasonably or lawfully be premised on the evidence adduced at trial, there is no basis for ordering any remedy.

III. Imposing a remedy under these circumstances would be an unconstitutional application of the CVRA.

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. (See *Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463–1464; *Shaw v. Hunt* (1996) 517 U.S. 899, 907–908; *McLaughlin v. Florida* (1964) 379 U.S. 185, 191–192; see also *Lee v. City of Los Angeles* (9th Cir. Nov. 19, 2018) __ F.3d __, 2018 WL 6033523, at *5 [explaining that the Equal Protection Clause prohibits "'separating . . . citizens into different voting districts on the basis of race' without 'sufficient justification'"], quoting *Cooper*, 137 S.Ct. at p. 1463.) In this case, the predominant factor motivating any remedial order would necessarily be race—since the only conceivable basis for a change in the City's electoral system would be to attempt to enhance Latino voting power, the alleged dilution of which is the entire premise of plaintiffs' lawsuit.

Courts have assumed without deciding that governments have a compelling interest in remedying vote dilution. (*Cooper*, 137 S.Ct. at p. 1464.) Here, however, because there has been no vote dilution (City's Closing Brief at pp. 9–12), no compelling governmental interest would justify the Court's reliance on race to impose a remedy. The CVRA therefore cannot constitutionally authorize a race-conscious remedy in this case.

Moreover, the CVRA recognizes that a district-based election system may not be an effective remedy. The statute authorizes courts to consider "[t]he fact that members of a protected class are not geographically compact or concentrated . . . in determining an appropriate remedy." (Elec. Code, § 14028, subd. (c).) In Santa Monica, it is undisputed that Latinos are not "geographically compact or concentrated," with the result that it is impossible to draw a district in which Latinos account for more than *30* percent of eligible voters. (Tr. 288:15-22, 395:19–396:6, 1931:11–1935:21.) In reality, Latino voters in any "influence" district would be unable to elect candidates of their choice without substantial "crossover" voting from whites; at the same time, because Latino voters would be concentrated in any "influence" districts, Latino voters outside the "influence" districts would need even more crossover votes from white voters to prevail. The United States Supreme Court has repeatedly condemned systems characterized by such "packing" and "cracking." (E.g., *Johnson v. De Grandy* (1994) 512 U.S. 997, 1007; *Thornburg v. Gingles* (1986) 478 U.S. 30, 46, fn. 11.)

This also highlights a fundamental flaw and inherent contradiction in plaintiffs' case. On the one hand, plaintiffs claim that a cohesive white voting bloc in Santa Monica "usually" votes differently from Latinos to such a degree that it "usually" defeats Latinos' candidates of choice. On the other hand, plaintiffs argue that if there were a district where Latinos made up 30 percent of the eligible voters—but where whites were still the plurality—the Latino-preferred candidate in such a district would somehow be able to obtain the most votes. Common sense dictates that both cannot be true, particularly when the analysis of plaintiffs' own expert confirms that Latinos do not vote cohesively with other minority groups in Santa Monica. (See Exs. 271–290.)

All of this explains why the results in plaintiffs' proposed Pico District would be the same or worse for Latino-preferred candidates than in the City's current at-large elections. (City's Closing Br. at pp. 11–12.) Because Latino voting strength would not be significantly increased, and may very well

be diminished, there can be no compelling interest justifying a court-ordered conversion of the City's electoral system to districts, and any such order would be unconstitutional. That conclusion is consistent with the Supreme Court's plurality decision in *Bartlett v. Strickland* (2009) 556 U.S. 1, which held that Section 2 of the federal Voting Rights Act cannot mandate the formation of influence districts.[2]

Although plaintiffs are not seeking an order requiring the adoption of an alternative at-large system, it bears noting that such an order would likewise be impermissibly motivated by race. And it would be no more effective at increasing Latino voting power. Even if elections were de-staggered, such that all seven councilmembers would be elected in each election, the threshold of exclusion would be 12.5 percent, only marginally below Latinos' 13.6 percent share of eligible voters. But historical Latino cohesion and turnout—which matter for purposes of assessing the viability of an alternative at-large scheme[3]—are nowhere close to universal, as they would need to be for Latino voters to surpass the threshold of exclusion. (Tr. 2959:8–2960:10, 2978:9-15, 3116:21–3117:2; Ex. 1652 at 21; Ex. 1796, Tr. 3757:2-11.)[4] Accordingly, there is no compelling interest justifying a court-ordered change to an alternative at-large electoral system, and such an order would therefore be unconstitutional.

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[2] No court adjudicating a statutory vote-dilution claim has *ever* ordered the creation of districts where the CVAP of the relevant minority group in the purportedly remedial district would be as low as in this case—just 30 percent. (Ex. 162; Ex. 163; Ex. 1209 at p. 10; Tr. 288:15-22.) Plaintiffs contend that the experience of San Juan Capistrano proves that districted elections can increase Latino representation "even in districts that are not majority-Latino" (Pls' Br. at p. 6), but they neglect to mention that the CVRA lawsuit brought against San Juan Capistrano was resolved by settlement, not court order, or that the Latino share of eligible voters in the target district in that case was 44%—far larger than the share in plaintiffs' proposed Pico district. (Tr. 2932:16-22.)

[3] Among other inaccuracies, plaintiffs continue to misrepresent the City's position concerning the circumstances under which it is appropriate to consider voter turnout in assessing the viability of potential remedies. (Pls' Br. at p. 8.) As the City explained in its closing brief, it is improper to consider voter turnout in assessing whether a minority group could constitute the majority of eligible voters in a hypothetical district. (See, e.g., *United States v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 425–427.) But courts *do* consider voter turnout in assessing whether a minority group's *actual* voters would exceed the threshold of exclusion under an alternative at-large election system. (See, e.g., *United States v. Euclid City Sch. Bd.* (N.D. Ohio 2009) 632 F.Supp.2d 740, 770.)

[4] In his declaration in support of plaintiffs' proposed remedies, Professor Levitt opines only that a change to an alternative at-large system "*might* improve the electoral capacity of Latinos over the status quo . . . ." (Levitt Decl. ¶4, italics added.) Such speculation cannot provide a compelling justification for such a change.

IV. Any remedy should follow the date on which any judgment in favor of plaintiffs becomes final.

If the Court ultimately confirms its tentative decision in favor of plaintiffs and enters judgment accordingly, the judgment will be subject to appeal.[5] An appeal would offer the Court of Appeal its first opportunity to consider a wide array of questions left undecided in the only three published CVRA decisions to date, not least of them being, "[w]hat elements must be proved to establish liability under the CVRA?" (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 690.)[6]

As plaintiffs acknowledge (Pls' Br. at p. 12), under long-established California law, the filing of any appeal will result in an immediate and automatic stay of any mandatory injunction issued by this Court. (See, e.g., *Byington v. Superior Court* (1939) 14 Cal.2d 68, 71 ["It is well settled that . . . an injunction mandatory in character is automatically stayed by appeal."]; *Agric. Labor Bd. v. Superior Court* (1983) 149 Cal.App.3d 709, 716 ["California has had the rule that an appeal automatically stays mandatory injunctions for more than 100 years."].) And without a doubt, 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, e.g., *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 884 [explaining that mandatory injunctions are automatically stayed "to preserve the status quo pending appeals," and 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'"].)[7]

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[5] A final decision whether to appeal will not be made until a judgment is in place and there is an opportunity to review and consider that judgment and the court's explanation of the factual and legal bases for it. Any judgment will not be final until appellate rights are exhausted.

[6] Other significant issues not yet addressed by the Courts of Appeal include several relevant to the arguments above relating to whether any remedy is appropriate: (a) "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?"; (b) "Is the court precluded from employing any alternative at-large voting system 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?" (*Sanchez*, *supra*, 145 Cal.App.4th at p. 690.)

[7] Plaintiffs seek other relief that is prohibitory in name only. For example, they request that this Court "[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." (Pls' Br. at p. 1.) But such relief, despite its prohibitory label, would be mandatory in effect—as it would require the City to oust its current council—and

Nothing in plaintiffs' opening remedies brief suggests that there is any exception to the longstanding rule that mandatory injunctions are stayed pending appeal (in fact, there is no exception), let alone that this case would qualify for such an exception if it did exist.

First, the authorities plaintiffs cite are irrelevant. All but one of them are from federal courts. As plaintiffs note (Pls' Br. at p. 12, fn. 5), the general rule in federal courts is that mandatory injunctions are *not* stayed pending appeal. Rather, appellants in federal cases must move for a stay (see Fed. R. App. Proc. 8), and such motions are sometimes granted and sometimes denied in voting-rights cases analogous to this one. (See, e.g., *Michigan State A. Philip Randolph Inst. v. Johnson* (6th Cir. 2016) 833 F.3d 656 [denying request for stay]; *Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, 978 [noting stay was granted and that "elections were held under the preexisting scheme"].) A motion for a stay would not be required in this case, by contrast, because the judgment and any mandatory injunction would be automatically stayed pending appeal under settled California law, as explained above. The lone California case plaintiffs cite, *Garrett v. City of Highland*, does not call for a contrary result. There, the defendant did not file a notice of appeal (or even request a statement of decision), and so the judgment was not stayed. (San Bernardino Super. Ct. No. CIVDS1410696.)

Second, there is no basis for plaintiffs' novel legal theory that a court has the inherent power to order an election to take place during an appeal, notwithstanding the automatic-stay rule. (Pls' Br. at pp. 12–13.) Indeed, any such order would itself be a mandatory injunction subject to the very same rule. It should come as no surprise, then, that neither the lone case plaintiffs cite, *Palmco Corp. v. Superior Court*, nor any other California case stands for the proposition that a trial court may reinstate a mandatory injunction that has been automatically stayed pending appeal. *Palmco* was an appeal from an order requiring the defendant to transfer the rights to supply airlines to a competitor, and the Court of Appeal there appropriately recognized that the injunction *was* subject to an automatic stay. (16 Cal.App.4th 221, 225 [automatic stay in effect for the two and a half years during which the appeal

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therefore would be automatically stayed on appeal. (See, e.g., *Davenport v. Blue Cross of Cal.* (1997) 52 Cal.App.4th 435, 447 ["The substance of the injunction, not the form, determines whether it is mandatory or prohibitory," and an injunction is deemed mandatory where it "compelled affirmative action which would substantially change the parties' positions"].)

was pending].) The trial court in *Palmco* did not attempt to override the stay or reinstate the injunction; it instead simply ordered an accounting to track damages accruing during the pendency of the appeal. (*Ibid.*) Here, as in *Palmco*, any mandatory injunction would be stayed pending resolution of the appeal.

The Court should thus disregard plaintiffs' contrived deadlines for holding a special election and seating newly elected councilmembers in early 2019.[8] The Court should instead issue an order that is to be carried out only once any judgment against the City is final, with appellate rights exhausted. As discussed immediately below, that order should grant the City at least 120 days from the date the judgment becomes final to propose an appropriate districting plan reflecting required community input, with the setting of a special election to follow the Court's ruling on the City's proposed plan.

V. If any remedy is necessary, the Court should order the City to propose it.

The City emphatically disputes the Court's tentative findings on liability. Should a judgment of liability become final, with appellate rights exhausted, however, the City would agree with plaintiffs that the Court should order a transition to a district-based method of election. Alternative at-large methods of election may, as plaintiffs note (Pls' Br. at p. 5), leave the City open to opportunistic lawyers bringing further potential challenges under the CVRA, which creates a cause of action only where a political subdivision holds at-large elections. (Elec. Code, § 14027.) Given the parties' agreement that the creation of districts would be appropriate if a finding of liability becomes final, the Court may

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[8] Plaintiffs' arbitrary timeline is also flawed because it conflicts with Elections Code requirements for the timing of elections. Santa Monica's City Charter provides for "special municipal elections" and states that except as otherwise provided by ordinance, such elections shall be held in accordance with the provisions of the Election Code. (Santa Monica City Charter, §§ 1401, 1403.) Santa Monica's Municipal Code in turn authorizes special election dates to be set "on an established election date as provided for by the California Elections Code" or on any other date "as permitted by law." (Santa Monica Muni. Code, § 11.04.180.) Effective January 1, 2019, absent circumstances not present here, the Elections Code mandates that all municipal elections, including special elections, to fill municipal offices must be held on established election dates that, for 2019, would be March 5, 2019, or November 5, 2019. (*See* Elec. Code, §§ 1000, subd. (b) & (c), 1002, 1003, 1400.) Complying with the time requirements for nominations and other procedural prerequisites to an election would render the March 5, 2019, election date impracticable. (See, e.g., *id.*, § 12101 [notice must be published not "later than the 113th day before any municipal election to fill offices"]; *id.*, § 10220 [nominations due not "later than the 88th day before a municipal election"]; Santa Monica Muni. Code, §11.04.010 [nominations due no later than "close of business on the eighty-eighth day before a municipal election"].) As a result, even if a judgment were to become final (including exhaustion of appellate rights) shortly after the scheduled December 7, 2018 remedies hearing, the earliest possible date for a special election to elect a new City Council would be November 5, 2019.

disregard the bulk of plaintiffs' opening brief (pages 4–9), which largely addresses the supposed advantages of districts over alternative at-large methods of election.

The issue for the Court, then, is not which remedy to order but *how* to order a change to districts. Plaintiffs ask the Court simply to adopt their proposal, contending that it was "unrefuted" (Pls' Br. at pp. 5, 7 & fn. 1.) Plaintiffs are wrong. True, the City did not submit its own competing plan, but it was under no obligation to do so. Indeed, it would have been highly impractical and inefficient (and potentially wasteful) for the City to have gone through the public hearing and outreach process that California law requires (see pages 12–13 below) in order to draw a district map before trial and before any finding of liability.

At trial, the City cast substantial doubt on the remedial effectiveness of plaintiffs' proposal through cross-examination of plaintiffs' experts (and evidence introduced during those examinations). The very purpose of cross-examination is, of course, to "refute" the opposing party's evidence. (See, e.g., *Crawford v. Washington* (2004) 541 U.S. 36, 74 ["cross-examination is a tool used to flesh out the truth, not an empty procedure"], conc. opn. of Rehnquist, C.J.; *In re Marriage of Swain* (2018) 21 Cal.App.5th 830, 842; *People v. Ochoa* (1953) 118 Cal.App.2d 566, 569.) Here, cross-examination revealed, among other things:

- In preparing his maps, Mr. Ely relied on the viewpoint of a Santa Monica resident, Patricia Crane, who is not Latina, does not reside in the Pico Neighborhood, has no expertise or experience in districting, was not selected by the electorate in any form or fashion, and indeed was a primary advocate for a recent development-related political proposal that was not adopted by the voters at the polls. (Tr. 400:14–401:6, 2685:19-23, 2687:18-2688:4, 2691:21–2692:3.) This was a far cry from the high standard of extensive community input required by the California Elections Code.
- Excluding the "Pico" district (which was based on the Pico Neighborhood, as defined by Mr. Ely, with additional areas included in an effort to add in areas with concentrations of Latino voters, Tr. 405:8–407:18), the resulting districts are at best arbitrary and at worst may benefit particular political interests or candidates over others based on a non-democratic process. (See, e.g., Tr. 400:20–401:6 [Mr. Ely spoke with only one resident before drawing district lines].)

- Candidates identified as Latino-preferred by Dr. Kousser did not receive the most votes in Mr. Ely's Pico District. Plaintiffs' experts admitted that Mr. Ely's analysis is "unrealistic" and likely has little probative or predictive value (e.g., Tr. 440:4–441:1, 459:20–460:7; see also Tr. 438:23-25 [Mr. Ely: "It's in no way predictive of what would happen in a district election"]; Tr. 1614:23-25). But to the extent that it has any predictive value at all, the analysis shows only that election results may not have been any different (or may have been worse for Latinos) under a districted system.[9] Indeed, in 2012, Tony Vazquez won a seat on the City Council in the actual citywide at-large election, but was not the top vote-getter, and so would not have been elected, in plaintiffs' Pico District. (Ex. 1304; Tr. 469:12-22.)
- Before drawing the districts that plaintiffs are now proposing, Mr. Ely also went on a neighborhood tour—which is something he has "rarely" done in voting-rights cases—that was guided by Oscar de la Torre; Mr. Ely acknowledged that this tour could have presented him with a biased view of Santa Monica and its neighborhoods. (Tr. 383:11–385:20.)
- Mr. Levitt could not identify a single judicially created district in which the citizen-voting-age population of the relevant minority group was as low as 30 percent. (Tr. 3092:24–3093:15, 3095:3-22.)[10] And Mr. Ely conceded that this case is the first time that he had ever proposed at trial a remedial district in which the relevant minority group accounted for less than 50 percent of eligible voters. (Tr. 404:13-17.)

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[9] For example, according to Mr. Ely's analysis: (a) in 1996, the top three vote-getters in his Pico district were Feinstein, Genser, and Rosenstein, who all also prevailed citywide; (b) in 2002, the top two vote-getters in his Pico district were McKeown and O'Connor, who both also prevailed citywide; (c) in 2008, the top four vote-getters in his Pico district were Bloom, Genser, Katz, and Shriver, all of whom also prevailed citywide; and (d) in 2012, the top four vote-getters in his Pico district were Davis, O'Day, Vazquez, and Winterer, all of whom also prevailed citywide. (Compare Ex. 1304 [Mr. Ely's seven election analyses], with (a) Ex. 1399 [1996 election results]; (b) Ex. 1387 [2002 election results]; (c) Ex. 1391 [2008 election results]; and (d) Ex. 1393 [2012 election results].)

[10] Plaintiffs point to *Georgia v. Ashcroft* to justify the creation of an "influence" district with minority CVAP as low as 25% (Pls' Br. at p. 6), but that was a *Section 5* (preclearance) case, not a *Section 2* (vote dilution) case. The Supreme Court has repeatedly held that "[t]he inquiries under §§ 2 and 5 are different" and "'the lack of [influence] districts cannot establish a § 2 violation.'" (*Bartlett v. Strickland* (2009) 556 U.S. 1, 25 [collecting cases].)

- Mr. Ely also acknowledged that in Santa Monica, "not every Latino would benefit from having district elections" because "there's going to be some districts in which Latinos are much less concentrated than other districts in which they're more concentrated than they are in the City." (Tr. 398-2-14.) And for four of the seven districts in plaintiffs' proposal, the Latino CVAP is below the citywide CVAP of 13.67 percent. (Ex. 262; Tr. 399:14-26.)

These are but a few examples. Questioning the factual bases and remedial efficacy of plaintiffs' proposal was one of the themes of the City's cross-examination of plaintiffs' experts. The Court should not accept plaintiffs' false assertion that their proposed district plan emerged from the trial unscathed and ready for implementation.

In any event, plaintiffs' argument that the City's days-long cross-examination of its experts does not amount to "refutation" is ultimately a red herring. Even if a change to districts were justified, the Court could at most order the City to fashion a districting plan, not itself do so, for three reasons.

First, Santa Monica is a charter city whose ordinances "supersede state law with respect to 'municipal affairs.'" (*State Bldg. & Constr. Trades Council v. City of Vista* (2012) 54 Cal.4th 547, 555, quoting Cal. Const., art. XI, § 5.) In *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, the Court of Appeal held that charter cities are subject to the CVRA and that the trial court had authority to enjoin the certification of election results under § 14029. To the extent *Jauregui* also held that courts may themselves fashion remedies for charter cities after finding that their at-large electoral systems result in vote dilution, the case was wrongly decided. There may be a statewide interest in remedying vote dilution, but there is no such interest in remedying it by court order. Charter cities should be able to fashion their own remedies, subject to judicial review and oversight.

Second, even if the City of Santa Monica were not a charter city, it would still be appropriate for the Court to give the City an opportunity to propose a districting plan after soliciting the input of the community. Courts adjudicating statutory vote-dilution claims generally do not fashion remedies in the first instance and instead leave the design of a remedy to the relevant legislative body, subject to judicial review and approval. Judicial relief is appropriate only where the legislative body fails to deliver a constitutionally permissible proposal. (See, e.g., *Westwego Citizens for Better Gov't v. City of Westwego* (5th Cir. 1991) 946 F.2d 1109, 1123–24 [collecting cases]; *McGhee v. Granville Cty, N.C.*

(4th Cir. 1988) 860 F.2d 110, 115 [confirming that the trial court "has properly given the appropriate legislative body the first opportunity to devise an acceptable remedial plan," and holding that trial court erred in rejecting the defendant's proposed plan]; *United States v. City of Euclid* (N.D. Ohio 2007) 523 F.Supp.2d 641, 644 ["If a district court finds a defendant's method of election violates Section 2, . . . the defendant is given the first opportunity to propose a remedial plan"]; *Cane v. Worcester Cty., Md.* (D. Md. 1994) 840 F.Supp. 1081, 1091 [concluding that, "in exercising its equitable powers, the Court should give the appropriate legislative body the first opportunity to provide a plan that remedies the violation"].)[11]

"Moreover, these principles do not apply only to state legislatures: this Court has repeatedly held that it is appropriate to give affected political subdivisions at all levels of government the first opportunity to devise remedies for violations of the Voting Rights Act." (*Westwego Citizens*, *supra*, 946 F.2d at p. 1124.) In *Westwego Citizens*, for example, the court held that a city's at-large method of electing its aldermen violated Section 2 of the Voting Rights Act, but the Fifth Circuit held that "[i]t must be left to that body to develop, in the first instance, a plan which will remedy the dilution of the votes of the city's black citizens," and ordered that the trial court give the defendant city "120 days to develop and submit" a proposal. (*Ibid.*) This Court should similarly give the City of Santa Monica the first opportunity to propose a districting plan.

Third, California law also requires that the City be given the opportunity to propose a districting plan, after soliciting broad public input. The Elections Code provides that "a political subdivision that changes from an at-large method of election to a district-based election . . . *shall* do all of the following before a public hearing at which the governing body of the political subdivision votes to approve or defeat an ordinance establishing district-based elections." (Elec. Code, § 10010, subd. (a), italics added.) "Before drawing a draft map or maps of the proposed boundaries of the districts, the political subdivision *shall* hold at least two public hearings over a period of no more than 30 days, at which the

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[11] Plaintiffs may suggest that giving the appropriate legislative body the first opportunity to devise a constitutionally permissible remedy is appropriate only in *re*districting cases, not cases, such as this one, where districts would be drawn in the first instance. But in all of the cases cited immediately before this footnote, the court found that an at-large method of election violated Section 2 of the Voting Rights Act and held that the trial court should allow the appropriate legislative body to propose a remedy for the court's review. This Court should follow those courts' example.

public is invited to provide input regarding the composition of the districts." (*Id.*, subd. (a)(1), italics added.) Next, "[a]fter all draft maps are drawn, . . . [t]he political subdivision *shall* also hold at least two additional hearings over a period of no more than 45 days, at which the public is invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable." (*Id.*, subd. (a)(2), italics added.)

This sequence of events is mandatory not just in cases where a would-be defendant voluntarily elects to adopt districts to avoid suit, but also in cases where a court has ordered a switch to districts. (Elec. Code, § 10010, subd. (c) ["This section applies to, but is not limited to, a proposal that is required due to a court-imposed change from an at-large method of election to a district-based election."].) Accordingly, if the Court requires the City to adopt a districted method of election, it must allot adequate time for the City to hold the public hearings mandated by the Elections Code before returning to the Court with a proposed map.[12]

VI. Conclusion

The Court should not confirm its tentative decision finding in favor of plaintiffs. If it does so, and concludes that a district-based remedy can constitutionally be imposed, then the Court should order the City to propose a districting plan within 120 days (providing time to permit compliance with the Elections Code requirements for public input) after a judgment in favor of plaintiffs becomes final following the exhaustion of appellate rights, such that a new election could be held at the soonest

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[12] Plaintiffs suggest that because the California Constitution is "supreme over state statutes," this Court's remedial analysis should be "unimpeded by state administrative statutes," such as the districting requirements contained in the Elections Code. (Pls' Br. at p. 3.) Plaintiffs are inviting plain error. The doctrine that plaintiffs are referencing permits courts to strike down state statutes if they impinge upon constitutional rights without sufficient justification. (See, e.g., *Am. Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 341 [striking down a statute that required parental consent for abortions because it intruded upon the Constitutional right of privacy, and no "compelling interest" justified such an intrusion].) But there is no authority whatsoever for the proposition that courts may impose remedies to address alleged constitutional violations without any regard for state statutes or decisional law. Nor can plaintiffs plausibly argue that the relevant Elections Code requirements are in "clear and unquestionable" conflict with the Equal Protection Clause, such that the statutes themselves could be deemed unconstitutional. (*Cal. Housing Fin. Agency v. Elliott* (1976) 17 Cal.3d 575, 594 [setting forth the proper analysis for determining whether a statute is unconstitutional].) Simply put, it is entirely possible to comply with both the Equal Protection Clause and the Elections Code by proceeding in the manner that the City has proposed; the Court should do so.

practicable date under the Elections Code (see fn. 8, *supra*).[13]

DATED: November 30, 2018

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
Attorneys for Defendant
City of Santa Monica

[13] Subject to reservation of all its arguments regarding liability and remedies, the City has submitted a proposed remedial order that would implement this timing.

PROOF OF SERVICE

I, Cynthia Britt, 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 November 30, 2018, I served

DEFENDANT CITY OF SANTA MONICA'S ANSWERING BRIEF CONCERNING REMEDIES

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 placed a true copy in a sealed envelope 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**: In accordance with an agreement of the parties to accept service by electronic transmission, 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 November 30, 2018, in Los Angeles, California.

Cynthia Britt