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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; and DOES 1–100, inclusive,

Defendants.

CASE NO. BC 616804 (filed Apr. 12, 2016)

NOTICE OF DEMURRER AND DEMURRER BY CITY OF SANTA MONICA TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

[*Request for Judicial Notice, Declaration of Daniel R. Adler, Declaration of George H. Brown, and [Proposed] Order Filed Concurrently*]

Cal. Gov. Code § 6103

HEARING:

Date/Time:	May 22, 2017, at 8:45 a.m.
Dept.:	28
Res ID:	170203193236
Trial Date:	October 30, 2017

Assigned to Hon. Yvette M. Palazuelos

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on May 22, 2017, at 8:45 a.m., or as soon thereafter as the matter may be heard in Department 28 of the above-captioned court, located at 111 N. Hill St., Los Angeles, CA 90012, defendant City of Santa Monica will, and hereby does, bring a demurrer pursuant to Code of Civil Procedure, section 430.10, subdivision (e), on the ground that the first amended complaint (FAC) fails to state facts sufficient to constitute a cause of action under either the California Voting Rights Act (CVRA) or the Equal Protection clause of the California Constitution.

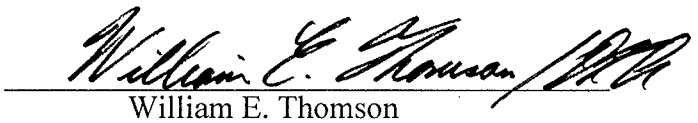
The complaint does not allege a cause of action under the CVRA because it fails to allege the constituent facts of racially polarized voting—that Latinos have preferred certain candidates and have voted as a bloc, that whites have also voted as a bloc, and that the white bloc usually outvotes the Latino bloc. The FAC also fails to allege two key elements of the statute, injury and causation, as it alleges no facts showing that Latino-preferred candidates would have won office under an alternative electoral system.

The FAC also does not state a cause of action under the Equal Protection clause, because it does not allege facts showing that the adoption of the City's current at-large electoral system was either motivated by discriminatory purpose or has had a discriminatory effect.

The City met and conferred telephonically with plaintiffs on March 22, 2017, under Code of Civil Procedure, section 430.41, subdivision (a), but plaintiffs declined to agree to amend or dismiss the FAC. The City therefore brings this demurrer as to both causes of action alleged by plaintiffs in their first amended complaint. This demurrer is based on (1) this notice of demurrer and demurrer; (2) the attached memorandum of points and authorities; (3) the concurrently filed declaration of Daniel R. Adler and attached exhibits; (4) the concurrently filed request for judicial notice and all other matters of which the Court may take judicial notice under sections 451, 452, and 453 of the California Evidence Code, (5) the records and files in this matter; and (6) such other evidence and argument of counsel as this Court may permit.

DATED: March 30, 2017

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr.
George H. Brown
William E. Thomson
Theane Evangelis
Tiaunia N. Henry

By: 
William E. Thomson

Attorneys for Defendant
City of Santa Monica

GROUNDS FOR DEMURRER TO FIRST AMENDED COMPLAINT

Defendant City of Santa Monica hereby demurs to both of the two causes of action raised in plaintiffs' first amended complaint on the following grounds:

Demurrer to plaintiffs' first cause of action

for a violation of the California Voting Rights Act

Plaintiffs' first amended complaint fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

Demurrer to plaintiffs' second cause of action

for a violation of the California Constitution's Equal Protection Clause

Plaintiffs' first amended complaint fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

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I. INTRODUCTION

Plaintiffs' first amended complaint (FAC) suffers from the same infirmities as their initial complaint, and this Court should sustain the City's demurrer for much the same reasons that it granted the City's motion for judgment on the pleadings.

Plaintiffs have, to be sure, sprinkled a few new assertions throughout the FAC, but not facts sufficient to state a cause of action under either the California Voting Rights Act (CVRA) or the Equal Protection clause of the California Constitution. For instance, whereas the initial complaint named no unsuccessful City Council candidates apart from plaintiff Maria Loya herself, the FAC alleges three more—spanning a 22-year period—and labels all of them, without explanation, as Latino-preferred. (FAC ¶¶ 21–25.) One of those candidates was Tony Vazquez, who lost his bid for reelection in 1994. (FAC ¶ 21.) Although the FAC alleges that Vasquez was preferred by Latino voters in 1994, it fails to acknowledge that Vazquez went on to win two recent Council elections (2012 and 2016) and to serve a term as the City's Mayor. (See Ex. A,[1] Adler Decl. ¶ 2(b); Ex. B, Adler Decl. ¶ 3(a).) Presumably, Vazquez was also Latino-preferred when he ran these successful campaigns, but it is impossible to say on the basis of the FAC, which merely labels him and the other candidates as "Latino-preferred" and alleges no facts to support that label. In any event, bare-bones allegations that four Latino-preferred candidates lost over 22 years—in only four of the thirteen elections held over that period, which attracted 159 candidates for forty-five Council seats—is far from sufficient to show that Latino-preferred candidates "usually" are defeated by white bloc voting.

Nor, for that matter, does the FAC explain how a single one of the four identified candidates could or would have won under an alternative electoral system. At most, the FAC suggests that one of the candidates would have carried four particular precincts of the Pico neighborhood (FAC ¶ 24), but this geographic area is not meaningful because it is far too small to constitute a hypothetical district. And *neighborhoods* do not themselves have protectable rights under the CVRA, although that is how

[1] The City requests that the Court take judicial notice of the contents of all the exhibits attached to the accompanying request for judicial notice for the reasons set out in that request.

Plaintiffs have structured their claim. Plaintiffs' hybrid race-geography claim has no basis in the language of the CVRA, which safeguards the voting rights of protected *classes*, not subsections of such classes that happen to live in a particular neighborhood. And judicially noticeable facts demonstrate that roughly three-quarters of the City's Latinos live outside of the Pico neighborhood, in any event

The FAC also fails to state a cause of action under the Equal Protection Clause of the California Constitution. Plaintiffs do not allege any facts demonstrating that the City government, those responsible for proposing the Charter amendment instituting the City's current electoral system, or the voters who approved that amendment intended to discriminate against Latinos. Plaintiffs also continue to ignore the fact that at-large elections were adopted and replaced a "ward" system in 1914, not 1946, which is fatal to their Equal Protection claim. Indeed, the 1946 amendment adopting a council-manager form of government *expanded* the number of at-large seats on the City's governing board from three to seven, thereby *increasing* the voting power of cohesive voting groups. Further, Plaintiffs omit not just pre-1946 history, but also post-1946 history: They fail to mention the voters' approval of the at-large system in the 1975 and 2002 elections, which would have cured any discrimination in any event.

This Court should sustain the City's demurrer without leave to amend and dismiss this action.

II. PROCEDURAL HISTORY

This suit was filed in April 2016, on behalf of plaintiffs Pico Neighborhood Association (PNA), Maria Loya, and Advocates for Malibu Public Schools (AMPS). AMPS filed a request for dismissal shortly after the suit was commenced. The City filed a motion for judgment on the pleadings on December 29, 2016. On February 3, 2017, after briefing and argument, this Court granted the City's motion as to both causes of action, with leave to amend within twenty days.

The PNA and Loya filed their first amended complaint (FAC) on February 23, 2017. The FAC alleges that the City's at-large election system violates the CVRA and the Equal Protection clause of the California Constitution. Plaintiffs assert that Santa Monica adopted this system in 1946 to discriminate against "non-Anglo" voters, and that the system now operates to the detriment of Latinos, rendering them unable to elect candidates of their choice. (FAC ¶¶ 1, 31.) Plaintiffs seek an injunction ordering the City to implement a district-based election scheme, as well as an award of attorneys' fees.

The FAC contains a handful of new assertions. These include allegations about four unsuccessful Council candidacies over a 22-year period (see ¶¶ 21–24); allegations concerning problems in the Pico neighborhood (¶ 27); and allegations about racial tensions and statements made in support of the 1946 City Charter amendment (¶¶ 36–39).

On March 16, 2017, the City invited plaintiffs' counsel to meet and confer about the arguments to be raised in this demurrer. (See Code Civ. Proc., § 430.41, subd. (a).) The parties met and conferred on March 22, 2017, but were unable to resolve the City's objections.

III. LEGAL STANDARD

"[T]he party against whom a complaint . . . has been filed may object, by demurrer," on the ground that "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled." (*Guardian N. Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971.) Although courts "assume the truth of all facts properly pleaded," they do not assume the truth of "contentions, deductions or conclusions of fact or law." (*Cansino v. Bank of Am.* (2014) 224 Cal.App.4th 1462, 1468.)

IV. ARGUMENT

Plaintiffs would have this Court overthrow a 71-year-old electoral system on the basis of a few snippets from newspaper articles and cherry-picked candidates who ran unsuccessfully for the City Council. The CVRA and the Equal Protection clause demand much more.

A. Plaintiffs fail to plead facts sufficient to constitute a CVRA violation

This Court granted the City's motion for judgment on the pleadings as to plaintiff's CVRA claim in their initial complaint because plaintiffs had failed to allege that "Santa Monica is subject to RPV"—i.e., "to identify the Latino-preferred candidates for Santa Monica's City Council and how the Latino and white voters voted as a bloc but the white bloc usually acted to defeat the Latino-preferred candidates." (Order at 24.) The FAC also fails this test. It simply labels a handful of candidates as "Latino-preferred," and although it contains a smattering of new allegations about the elections those candidates lost, it fails to allege facts showing a discernable pattern of voting behavior—that a white bloc "usually" outvotes a Latino bloc. Plaintiffs have also once again failed to allege facts satisfying

key elements of the statute—injury and causation.

1. Plaintiffs' allegations do not show a pattern of legally significant racially polarized voting

A valid claim under the CVRA depends, in part, on a showing of "racially polarized voting." (Elec. Code, § 14028.) That term is defined by reference to federal case law (*id.* § 14026, subd. (e)), which requires three fact-intensive showings as to observed voting behavior: a) the protected class at issue votes as a bloc, b) the white majority does the same, and c) white bloc voting *usually* defeats minority bloc voting. (See *Thornburg v. Gingles* (1989) 478 U.S. 30, 49–51.) To allege that something "usually" happens (*ibid.*), plaintiffs must assert facts that show a *pattern*—that prove that "over a period of years, whites vote sufficiently as a bloc to defeat minority candidates most of the time." (*Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, 985.) That is, the electoral history recounted by plaintiffs must "span[] a series of elections"; it cannot consist of "an isolated snapshot of a single election" or "just those elections that, taken in isolation, reveal . . . racially polarized voting." (*Ibid.*)

Plaintiffs have not satisfied this standard. Instead, the election history presented in the FAC is both over- and under-inclusive. It is over-inclusive because it contains assertions relating to two elections that predated the enactment of the CVRA. That statute applies only to elections following its 2003 effective date, because "statutes ordinarily are interpreted as operating prospectively in the absence of a clear indication of a contrary legislative intent." (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 955–956.) Thus, the Court should ignore election results predating the 2004 election.

The FAC's election history is under-inclusive because plaintiffs make allegations regarding the electoral defeats of only four candidates (out of 159) over a 22-year period. (FAC ¶ 21–25; Ex. B, Adler Decl. ¶ 3(b).) Such scattershot allegations—concerning elections in 1994, 2002, 2004, and 2016—do not meet the standard set by the statute and the federal case law it incorporates, because they do not show that a white bloc "usually" outvotes a Latino bloc. (See, e.g., *Lewis v. Alamance Cty., N.C.* (4th Cir. 1996) 99 F.3d 600, 606 & fn. 4 [concluding that the *Gingles* Court, in using the terms "usually," "normally," and "generally," "mean[t] something more than just 51%"].) Here, as in *Lewis*, "a larger, more representative sample of elections" is required to determine whether "the [minority]-

preferred candidates *usually* were defeated." (*Id.* at 606, italics in original.) Under any colorable definition, Plaintiffs must show, at a minimum, that a white bloc defeats a Latino-preferred candidate "more often than not." (See *Williams v. State Bd. of Elections* (N.D. Ill. 1989) 718 F. Supp. 1324, 1328 & fn. 5 [relying on dictionary definition of "usually"].)

While plaintiffs may purport to characterize these as merely an "exemplary" set of elections and candidates, the paucity of plaintiffs' "examples" speaks for itself: Plaintiffs do not allege any more "examples" because they cannot. The Court previously granted the City's motion for judgment on the pleadings, and granted plaintiffs the opportunity to amend. If plaintiffs had a good-faith basis to allege additional elections, they presumably would have done so in their amended pleading. Not only is the FAC silent about nine of the Council elections that took place between 1994 and 2016—in 1996, 1998, 1999, 2000, 2006, 2008, 2010, 2012, and 2014—it also neglects to mention that one of the four named losing candidates, Tony Vazquez, went on to win two more recent elections, in 2012 and in 2016, and even to serve a term as Mayor. (See Ex. A, Adler Decl. ¶ 2(b); Adler Ex. B, Decl. ¶ 3(a).) In an action requesting *injunctive* relief, plaintiffs would have this Court elevate distant and poorly pleaded history over contrary and verifiable contemporary facts. That makes no sense.

And the allegations concerning the two elections that do postdate the CVRA's enactment are deficient on their own terms, because they fail to allege facts showing that whites or Latinos vote cohesively, much less that white bloc voting "usually" defeats Latino bloc voting. Plaintiffs allege that in 2004 a famous candidate, Bobby Shriver, received the most votes citywide—indeed, that he won the most votes in six of the City's seven neighborhoods—and that plaintiff Maria Loya received the most votes in the Pico neighborhood. (FAC ¶ 23.) Plaintiffs also conclusorily assert that Loya "was strongly preferred by the voters" in that neighborhood and by "Latinos more generally throughout the city." But these allegations are just as consistent—if anything, *more consistent*—with Shriver being the Latino-preferred candidate than Loya. Plaintiffs do not allege total or Latino population figures for 2004 (or even 2000, then the most recent Census), but if they are anything like more recent figures, then the vast majority of Latinos then resided, as they do now, outside of the Pico neighborhood. (See FAC ¶ 15; Ex. D, Adler Decl. ¶ 5(a).) Shriver may therefore have won the election *because of* citywide Latino support, not in spite of it. Indeed, *any* of the four candidates who actually won might have been

a Latino-preferred candidate; given that voters could each vote for four candidates, *all four winners* could have been Latino-preferred. The FAC alleges no facts to the contrary. Furthermore, judicially noticeable facts undermine any assertion that whites voted as a bloc against Loya. Voting in 2004 was extremely fragmented, not cohesive. *Sixteen* candidates ran for only four Council seats in that year, and nine of those candidates, including Loya, received at least 5% of the vote. (See Ex. B, Adler Decl. ¶ 3(c).) And although Shriver did indeed have the highest vote total, he hardly won a landslide victory, as he won only about 16% of the vote. (See *ibid.*)

In the most recent election, in November 2016, there were eleven candidates for City Council. (See Ex. B, Adler Decl. ¶ 3(d).) Plaintiffs conclusorily allege that Oscar de la Torre, the husband of plaintiff Maria Loya and the designated representative of plaintiff PNA, was "the preferred candidate of Latino voters" (FAC ¶ 24), but again fail to observe that there were four Council seats available. Accordingly, if indeed Latinos vote cohesively, they likely preferred more than one candidate. Tony Vazquez—who, plaintiffs allege, was a Latino-preferred candidate when he ran for the Council in 1994 (FAC ¶ 21)—won a council seat in 2016 for the second time. (See Ex. B, Adler Decl. ¶ 3(a).) The other victorious candidates, including Terry O'Day, who lives in the same neighborhood as de la Torre (FAC ¶ 24), could very well have been Latino-preferred; the FAC alleges no facts to the contrary.

There is another reason the allegations concerning the 2016 election cannot, in concert with the 2004 electoral allegations, establish the requisite pattern to demonstrate racially polarized voting: "Elections conducted prior to the filing of [a CVRA] action . . . are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action." (Elec. Code, § 14028, subd. (a).)[2] Plaintiffs are therefore attempting to prove a pattern of voting behavior with just two electoral allegations—one concerning the lone electoral defeat raised in the initial complaint (Loya in 2004), and the other concerning an electoral defeat with limited probative value (de la Torre in 2016). Even at the pleading stage, these two elections—twelve years apart and separated by five other elections—are insufficient to establish that Latinos vote cohesively for the same candidates.

But even if the FAC adequately pleaded Latino bloc voting on the basis of a mere handful of

[2] This case illustrates the wisdom of that rule, as there is an incentive to engage in behavior intended to benefit the litigation at the expense of the campaign—for example by limiting campaign efforts to a narrow geographic area.

elections and candidacies, it alleges no facts showing that *whites* vote as a bloc. Nor could it. City voting has been consistently highly fragmented for decades, with votes distributed across a very competitive field of approximately twelve to fifteen candidates. In 2016, the electorate was again highly fragmented, with all but four of the eleven candidates garnering at least 5% of the vote. (See Ex. B, Adler Decl. ¶ 3(d).) And the Latino-preferred Vazquez came in second, winning re-election with almost 16% of the vote. (*Ibid.*) Voter fragmentation and the electoral victories of a Latino-preferred candidate undermine the notion that whites usually vote as a bloc to defeat Latino-preferred candidates. Further, the fragmentation of the electorate in 2004 and 2016 is not unusual; over the last seven election cycles, candidates have won office with, on average, approximately 15% of the vote, and in some cases with just 10% of the vote. (See Ex. B, Adler Decl. ¶ 3(e).) Given these facts, there cannot be legally significant racially polarized voting because there is no white bloc voting under *Gingles*; accordingly, the white majority has not "vote[d] sufficiently as a bloc to enable it. . . usually to defeat the minority's preferred candidate." (*Gingles*, *supra*, 478 U.S. at 51.)

Finally, plaintiffs' electoral allegations fail not just because two of the four "exemplary" elections predate the enactment of the CVRA, and not just because they do not constitute a pattern, but because they are not pleaded concretely, as this Court demanded in its order granting the City's motion for judgment on the pleadings. (Order at 25 [plaintiff must plead "the who, where, when, what, and how"].) In the case of each election, the plaintiffs have done nothing more than parrot the language of the statute and the case law, formulaically presenting the legal conclusions that, inter alia, "Latino voters cohesively preferred" particular candidates and that the "non-Hispanic white majority of the electorate voted as a bloc against" those candidates. (FAC ¶¶ 21–24.) These are not factual allegations, but instead "mere labels pinned on by the pleader." (*McDonell v. Am. Trust Co.* (1955) 130 Cal.App.2d 296, 300.) Such labels—mere legal conclusions—are not enough to state a cause of action under California law. In *McDonell*, the complaint failed to state a cause of action for willful misconduct because it did no more than tautologically "characterize[] defendant's conduct as 'willful misconduct.'" (*Id.* at 300–301.) And in another case, the court similarly held that a plaintiff's bare-bones allegation that a hospital had acted "recklessly" or "fraudulently" was not enough to plead an elder abuse claim. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 410.)

This Court should reach the same conclusion here. "Latino-preferred" is nothing more than a label; no *facts* demonstrate that the four candidates were Latino-preferred, that Latinos voted as a bloc, or that white voters voted as a bloc. That the four candidates were themselves apparently Latinos is not dispositive, as plaintiffs conceded in prior briefing. (See Opp. to Mtn. for Judgment on the Pleadings at 8, quoting *Gingles*, *supra*, 478 U.S. at 68 ["it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important"].) Here, the closest plaintiffs come to alleging that any of the named losing candidates was Latino-preferred is the assertion that two of them were the top vote-getters in the Pico neighborhood. (FAC ¶¶ 23–24.) But judicially noticeable public records show that almost three-quarters of Santa Monica's Latinos live elsewhere. (See FAC ¶ 15, Ex. D, Adler Decl. ¶ 5(a).) The allegation that a candidate performed well in one neighborhood suggests nothing about Latino voters citywide; that candidate could have "c[o]me in first" there (FAC ¶ 23) without securing a single Latino vote. Nor, for that matter, do the candidacies singled out by plaintiffs "indicate" that "when a Latino candidate is perceived as having even a remote chance of winning a city council election in Santa Monica, the Latino electorate votes cohesively for that Latino candidate."[3] (FAC ¶ 41.) Plaintiffs cannot bootstrap their way to legally sufficient facts: Repeating the mere conclusory label that a candidate was Latino-preferred does not make it a "fact."

2. Plaintiffs fail to allege either injury or causation

The CVRA also requires that plaintiffs demonstrate both injury—that Santa Monica's at-large election system has "*impair[ed]* the ability of a protected class to elect candidates of its choice"—and causation—that this "impair[ment]" happened "*as a result* of the dilution . . . of the rights of voters who are members of a protected class." (Elec. Code, § 14027, italics added.) "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." (*Gingles*, *supra*, 478 U.S. at 50, fn. 17, italics in original.)

The statute thus demands a comparison—between the voting power of a protected class under

[3] And to the extent that plaintiffs are suggesting that a Latino *surname* is enough to draw Latino voters, then the City renews the argument, presented in its motion for judgment on the pleadings, that Latino-surnamed candidates have dramatically outperformed non-Latino-surnamed candidates in elections for City offices and are currently more than proportionally represented in those offices. (See Ex. A, Adler Decl. ¶ 2(a); Ex. B, Adler Decl. ¶ 3(g).)

the challenged system and the voting power it would have under an alternative system. The complaint does not allege the facts necessary to make that comparison: It is unclear how much voting power Latinos had at the time of any identified election or how much power they would have had under a different electoral system. Plaintiffs do not even note what percentage of the population was Latino at the time of each election, instead reporting only 2010 Census figures (FAC ¶ 15)—and thereby making it impossible to determine from the complaint whether Latino voters could have had the power to elect a candidate of their choice. But it is clear that Tony Vazquez, whom the plaintiffs describe as a Latino-preferred candidate in 1994 (FAC ¶ 21), was elected in 2012 and 2016, when he was presumably again Latino-preferred. Therefore at least one of the seven Council seats is held by a Latino-preferred candidate—despite the fact that Latinos represent less than one-seventh of the City's total population (and likely an even smaller share of its voting-age population). (FAC ¶ 15.) Under these circumstances, it is doubtful that plaintiffs can show injury due to vote dilution, or prove an entitlement to more seats that would be consistent with constitutional principles. In any event, they have not done so here.

Although the statute requires it, the FAC also alleges no facts showing that elections would have turned out differently under another electoral system. Plaintiffs suggest that at least one of the four candidates they mention, Oscar de la Torre, "would likely have prevailed" in the 2016 election if the City had "utilized a district-based election system." (*Id.* ¶ 24.) But their only fact in support of that contention is that de la Torre narrowly beat Terry O'Day—by 79 votes—in four precincts. Plaintiffs fail to mention, however, that even in those four precincts de la Torre barely edged out Tony Vasquez, who won re-election, by *seven* votes. (See Ex. B, Adler Decl. ¶ 3(d).) Plaintiffs also neglect to mention, but judicially noticeable public records show, that for the 2016 election cycle the City was divided into 54 precincts. (*Ibid.*; Ex. C, Adler Decl. ¶ 4.) Those precincts contained a total of 68,644 registered voters, and 51,662 voters cast ballots. (See Ex. B, Adler Decl. ¶ 3(d).) In the four precincts noted by plaintiffs, there were only 4,727 registered voters and 3,208 ballots cast, or 6–7% of all registered voters and ballots cast. (See *ibid.*) Those four precincts, then, cover fewer than *half* the voters who would reside in a hypothetical district.[4]

[4] The "four precincts that lie entirely within the Pico Neighborhood" (FAC ¶ 24) represent approximately 6.9% of the City's registered voters. (See Ex. B, Adler Decl. ¶ 3(d).) And given that 39% of the Pico Neighborhood is Latino (see Ex. D, Adler Decl. ¶ 5(a)), plaintiffs appear to be bringing a

In sum, plaintiffs have not alleged facts showing that an alternative election system would have produced a different result in any of the four elections they raise in the FAC—or, of course, any of the many other elections about which they say nothing at all. The FAC therefore fails to state a cause of action under the CVRA, because it does not demonstrate that Latino voters have suffered any injury as a result of the City's electoral system.

B. The complaint fails to plead facts sufficient to constitute a cause of action under the California Constitution's Equal Protection Clause

The FAC also falls well short of stating a violation of the Equal Protection Clause of the California Constitution. Such a claim "require[s] a showing of *intentional* discrimination"—which is "notoriously difficult" to make "absent direct evidence of a discriminatory rationale." (*Smith v. Henderson* (D.D.C. 2013) 982 F. Supp. 2d 32, 49, italics in original.) Plaintiffs have not cleared that high hurdle.

There are three ways to make the required showing of intentional discrimination. First, a plaintiff may observe that the law is discriminatory on its face. (See, e.g., *Strauder v. West Virginia* (1880) 100 U.S. 303.) But here the City's Charter, which establishes an at-large method of electing seven councilmembers, is facially neutral. Second, a plaintiff may contend that a law, although facially neutral, has been applied in a racially discriminatory way. The classic case for this theory is *Yick Wo v. Hopkins* (1886) 118 U.S. 356. There, the City of San Francisco passed a facially neutral ordinance prohibiting the operation of laundries in wooden buildings. But only white laundry owners, not Chinese owners, were granted variances to operate such laundries—a practice for which there was "no reason . . . except hostility to the race and nationality to which the petitioners belong." (*Id.* at 374.) Cases like *Yick Wo* are exceedingly uncommon, and this is not one "of those rare cases in which a statistical pattern of discriminatory impact [alone] demonstrated a constitutional violation" (*McCleskey v. Kemp* (1987) 481 U.S. 279, 293–294 & fn. 12), and so "the Court must look to other evidence" (*Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* (1985) 429 U.S. 252, 266 (*Arlington*)). Accordingly, if plaintiffs are to show purposeful discrimination, it must be by the third method, the "usual mold" (*Spurlock v. Fox* (6th Cir. 2013) 716 F.3d 383, 401)—that a facially neutral law, applied evenhandedly,

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claim on behalf of 2.7% (39% x 6.9%) of the City's population. Such a small figure cannot support the weight of such a big demand—that this Court throw out a decades-old electoral system.

has had a disparate impact on ethnic minorities that was intended by the relevant decisionmakers.

The FAC flunks both halves of this test. First, it does not allege facts showing disparate impact. Plaintiffs attempt to show disparate impact by alleging that since 1946 "there have been 71 individuals elected to the city council," and "only one has been Latino." (FAC ¶ 41.) But this Court rejected that very allegation in granting judgment on the pleadings as to plaintiffs' CVRA claim, because the ethnicity of officeholders says nothing about which candidates and officeholders were preferred by Latino voters. (Order at 25.) What is more, judicially noticeable facts show that the 1946 Charter amendment necessarily *expanded* minority voting rights. Plaintiffs, still not accounting for the electoral history of Santa Monica, repeatedly and erroneously assert that the City "adopted" an at-large election system in 1946. (See FAC ¶¶ 2, 4, 19, 35, 36, 38–42, 45.) As the City explained in its motion for judgment on the pleadings, this simply is not true, for the City *already had* an at-large election system. Under the prior system, which was in place from 1914 until 1946, voters elected three commissioners on an at-large basis—one for public safety, a second for finance, and a third for public works. (See Ex. E, Adler Decl. ¶ 6.) Candidates could run for only one of these offices, and whoever secured the greatest number of votes would win. (See *ibid.*) Accordingly, a bare majority of voters could elect their favored candidates for any open offices in every election. When the City moved from this three-commissioner, at-large system to its present seven-councilmember, at-large system, cohesive voting groups gained substantially more voting power, because candidates no longer ran for a single particular seat, but for one of three or four seats. This first-past-the-post electoral system necessarily made it easier for relatively small groups of voters to succeed in electing their candidate of choice. (See *ibid.*) As a mathematical matter, then, the 1946 Charter amendment could have had only a salutary effect on the very people plaintiffs allege were harmed by it. Plaintiffs have therefore not even alleged the factual predicate that would demand investigation into purportedly discriminatory intent. This Court should sustain the City's demurrer as to plaintiffs' Equal Protection claim for that reason alone.

Even if this Court were inclined to conclude that the FAC alleges disparate impact, it should nevertheless sustain the City's demurrer because the FAC fails to allege discriminatory intent. To allege intentional discrimination, it is not enough for plaintiffs to demonstrate that the amendment had a disparate impact, because "neither explicit discrimination nor discrimination by 'disparate impact' is

unconstitutional unless motivated at least in part by purpose or intent to harm a protected group." (*Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361–1362 (*Kim*); see also *Arlington*, *supra*, 429 U.S. at 265; *Soto v. Flores* (1st Cir. 1997) 103 F.3d 1056, 1067 (*Flores*).) Plaintiffs must allege facts showing that those who decided to amend the Charter not only were aware that it might have a disparate impact on racial minorities, but *intended* that disparate impact. (*Personnel Adm'r of Mass. v. Feeney* (1979) 442 U.S. 256, 279 (*Feeney*).)

As an initial matter, the FAC, like the initial complaint, fails to allege anything at all about the adoption of an at-large election system in 1914. Because the 1946 decision strengthened minority voting rights, it is this earlier 1914 decision, if any, that would be the basis for the relevant inquiry. But even if 1946 were the determinative year, the FAC is no different from the initial complaint in that it fails to allege facts showing discriminatory intent. The initial complaint contained only a single factual allegation intended to show that the Charter amendment was enacted with discriminatory motives—that an opponent of the amendment predicted it might have a discriminatory effect. In granting the City's motion for judgment on the pleadings, this Court held that that allegation was inadequate to show discriminatory purpose: "The allegation that an advertisement calling for the rejection of at-large elections in 1946 warned that such system could be used for discrimination of minority groups is insufficient to show discriminatory intent in enacting the at-large system." (Order at 29.)

The FAC does nothing to cure this deficiency. For one thing, Plaintiffs repeat the very allegation that the Court held to be inadequate. (FAC ¶ 40.) For another, the allegations new to the FAC suffer from the same problem as that carryover allegation: They do not show that the "decisionmaker[s]" decided to amend the charter "because of, not merely in spite of, its adverse effects upon an identifiable group." (*Feeney*, *supra*, 442 U.S. at 279, internal quotation marks omitted.) Indeed, Plaintiffs never even identify *who* the relevant decisionmakers were, seeming to suggest that they might have been the Board of Freeholders, who, plaintiffs allege, decided what would appear on the ballot, *or* the voting public, who decided that the amendment should pass. (See, e.g., FAC ¶¶ 35, 42.)

Whatever the answer to that question, none of the allegations new to the FAC shows a discriminatory motive on the part of either group. Plaintiffs claim that this is one of those rare cases where an intent to discriminate was overt—that "proponents of at-large elections *did* proclaim their intent to

exclude racial minorities." (FAC ¶¶ 36–37, italics in original.) In support of this contention, plaintiffs quote a newspaper article—or editorial, or advertisement, or whatever else it may be—but without identifying *who* wrote it, apart from vaguely suggesting that it was penned by "proponents" of the Charter amendment. (FAC ¶ 36.) Plaintiffs also quote the article/editorial/advertisement so selectively that it is impossible to grasp what the unidentified author meant. And it fails to prove discriminatory intent, because the FAC does not connect the allegation to anyone with decision-making authority. "Without the smoking gun of an overtly discriminatory statement by a decisionmaker, it may be very difficult to offer sufficient proof of [a discriminatory] purpose." (*Flores*, *supra*, 103 F.3d at 1067.) Plaintiffs have offered none here, because nothing connects their new allegations, including paragraph 36, with the City of Santa Monica or anyone who set policy for it in the 1940s. The City and its decisionmakers were not and are not responsible for every stray word ever printed in a local newspaper.

Most of the other new allegations are satellites of paragraph 36. They purportedly describe the racially discriminatory backdrop to the mysterious newspaper article/editorial/advertisement and, at most, reflect its illumination of (someone's) supposedly discriminatory purpose rather than generating any light of their own. (FAC ¶¶ 38–40.) Because Paragraph 36 fails to allege discriminatory purpose, these derivative allegations must fail to do so as well. Paragraph 38 is the most conspicuously deficient of these satellites. There, plaintiffs allege that the mere fact that Santa Monica's demographics were changing in the 1940s "demonstrates a racially discriminatory purpose." (*Id.* ¶ 38.) If that allegation could stick, then any charge of racial discrimination in a time of even modest demographic change would. The same goes for the allegations in paragraph 39: The racism of a local cartoonist and other allegations of racial tension do nothing, by themselves, to establish purposeful discrimination on the part of a *decisionmaker* as to the *decision* at issue. (See *Feeney*, *supra*, 442 U.S. at 279.)

Finally, plaintiffs' allegations of intentional discrimination fail because judicially noticeable facts show that, whatever the circumstances in 1946, Santa Monica's voters have twice since then deliberated over proposals to change to district elections, and each time reaffirmed the merits of the at-large plurality system.[5] (Compare Ex. B, Adler Decl. ¶ 3(f) [voters rejecting proposed move to district-

[5] These merits include, among other things, accountability to *all* voters and an interest in doing what is right for the City as a whole. Districts, by contrast, can engender an insular focus on one narrow segment of the electorate and encourage parochial and inefficient logrolling for City funds.

based election system], with FAC ¶ 57 [alleging that the City "still employs an at-large method of election" "[a]s a direct consequence" of the 1946 Charter amendment].) The FAC does not—and cannot—allege any facts suggesting that those subsequent votes were tainted by racial animus, which is fatal to plaintiffs' Equal Protection claim. (See *Arlington*, *supra*, 429 U.S. at p. 265; *Kim*, *supra*, 73 Cal.App.4th at pp. 1361–1362.) Thus, whatever the intent of the Santa Monica electorate in 1946, the complaint contains *no facts* suggesting that voters' subsequent endorsements of the City's at-large election system were animated by racial discrimination.

V. LEAVE TO AMEND THE COMPLAINT WOULD BE FUTILE, BECAUSE JUDICIALLY NOTICEABLE FACTS FORECLOSE PLAINTIFFS' CLAIMS

"Leave to amend should *not* be granted where amendment would be futile." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 374, alterations, quotation marks, and citation omitted, italics in original.) Plaintiffs have now had two opportunities to investigate Santa Monica's electoral history and to plead facts showing that the City's at-large electoral system was enacted for a discriminatory purpose and has operated to weaken Latino voting power. Plaintiffs have failed to do so both times and should not be granted a third chance.

Judicially noticeable demographic data and election returns demonstrate that plaintiffs *could not* allege facts sufficient to state a claim under the CVRA. First, the public record shows that plaintiffs' desired remedy, district-based elections, could not enhance Latino voting power. The complaint alleges that "Latino residents of Santa Monica are concentrated" in the "Pico Neighborhood" (FAC ¶ 6, 23, 27), and implies that a Pico district is a plausible remedy for the alleged dilution of Latino voting power. (See, e.g., FAC ¶¶ 23–24.) Public demographic records, however, reveal that almost three-quarters of the City's Latino population live *outside of* that neighborhood. (See FAC ¶ 15; see also Ex. D, Adler Decl. ¶ 5(a).) Latinos are widely distributed across the City and do not constitute a majority of residents or voters in any single Census tract, much less a district composed of multiple tracts. (Ex. F, Adler Decl. ¶ 7.) The City does not believe that plaintiffs could allege in good faith that any contiguous precincts could be drawn to create a majority-Latino district. (See Code Civ. Proc., § 128.7.) Districts are therefore a recipe for arbitrary results, not for enhancing Latino voting power.

Second, plaintiffs could not allege in good faith facts raising an inference of "racially polarized

voting," because white voters or members of the broader non-Latino electorate do not vote as a bloc. Santa Monica City Council races look nothing like the election regimes challenged in cases like *Gingles*, under which a majority of white voters regularly elected an all-white slate of candidates from a single multi-member district. In Santa Monica, the last seven Council ballots have featured, on average, 13 candidates, and votes have been distributed broadly across all of these candidates, with only a small plurality of votes required to secure a seat. (See Ex. B, Adler Decl. ¶ 3(e).) The necessary votes have been generally in the low double-digit thousands, and in 2014 fewer than 7,000. (See *ibid.*) Indeed, the vote is often so fractured that more than half the field secures at least 5% of it. (*Ibid.*) These judicially noticeable facts belie plaintiffs' mere factual conclusion that "the non-Hispanic white majority of the electorate voted as a bloc against" any of the four named losing candidates. (FAC ¶¶ 21–24.)

In sum, the complaint fails to allege the basic facts necessary to state a claim under the CVRA, and, in the face of contrary demographic and election data, plaintiffs cannot remedy those failings. This Court should sustain the City's demurrer and dismiss plaintiffs' CVRA claim.

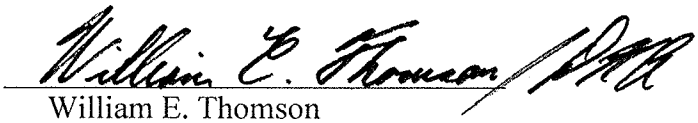
It would also be futile for plaintiffs to try to amend their operative complaint to allege facts showing discriminatory intent on the part of the relevant decisionmakers, whoever they may have been, in 1914, when the City first adopted at-large elections. Plaintiffs have either refused to undertake an investigation of such facts, or have conducted one and found little to support their contentions. Either way, plaintiffs should not be rewarded with yet another opportunity to try to plead this claim.

VI. CONCLUSION

Plaintiffs have had two chances to make their case, and they have come up short both times. There is no reason to believe that the third time will be the charm. The City of Santa Monica respectfully requests that the Court sustain its demurrer without leave to amend and enter judgment in its favor, dismissing this action.

DATED: March 30, 2017

GIBSON, DUNN & CRUTCHER LLP

By: 
William E. Thomson
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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Cindy Britt, declare:

I am employed in the County of Los Angeles, State of California. My business address is 333 South Grand Ave, 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 March 30, 2017, I served **DEFENDANT CITY OF SANTA MONICA'S NOTICE OF DEMURRER AND DEMURRER TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** 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 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 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 in affidavit.

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

Executed on March 30, 2017, in Los Angeles, California.

Cindy Britt