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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION; and MARIA LOYA,

Plaintiffs,

v.

CITY OF SANTA MONICA, and DOES 1 through 100, inclusive,

Defendants.

Case No.: BC616804

PLAINTIFFS' OPPOSITION TO DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: May 22, 2017
Time: 8:45 a.m.
Dept.: 28

Plaintiffs Pico Neighborhood Association ("PNA") and Maria Loya (collectively, "Plaintiffs") respectfully submit the following Memorandum of Points and Authorities in Opposition to Defendant City of Santa Monica's ("Defendant") Demurrer to the First Amended Complaint ("FAC").

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I. INTRODUCTION

The California Legislature enacted the California Voting Rights Act ("CVRA") in order to ease the burden on plaintiffs who suffer vote dilution as a result of at-large elections and racially polarized voting, and to remedy what it considered "restrictive interpretations given to the federal act." Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2. Yet, Defendant would not only have this Court adopt nearly every one of those substantive "restrictive interpretations," but would also apply a pleading standard far more onerous than any court has applied to claims under the federal Voting Rights Act ("FVRA"), a result that would frustrate and otherwise discourage minority voters from asserting their rights to be free from at-large elections historically known to dilute their votes. That incongruous result should be rejected by this Court so that Plaintiffs may have their claims decided on the merits.

Likewise, Defendant would have this Court require Plaintiffs to allege, at the pleading stage, every piece of evidence supporting their Equal Protection claim, and establish that every decision to change or not change Defendant's system of elections over the past 103 years was motivated by racial animus. That too is unsupported by the law. The relevant question is whether the charter provision in effect today was adopted, at least in part, to disparately impact racial minorities; and Plaintiffs need only, at this stage, put Defendant on notice of their claim that it was. The FAC easily meets that standard.

II. PLAINTIFFS STATE A CLAIM FOR VIOLATION OF THE CVRA

A. The CVRA, Legislative Intent, and At-Large Elections

The dilutive effect of at-large elections, and the background, remedial purpose and elements of the CVRA were discussed at length in connection with Plaintiffs' Opposition to Defendant's Motion for Judgment on the Pleadings, and so that discussion is not repeated here. What is most important in connection with the instant demurrer is what must be shown to establish a violation of the CVRA, and the "Legislature['s] inten[t] to expand protections against vote dilution over those provided by the federal Votin Rights Act of 1965." *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781, 807.

While the CVRA is similar to Section 2 of the FVRA (52 U.S.C. § 10301), it is also different in several key respects, as the Legislature sought to remedy the "restrictive interpretations given to the federal act." Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2. So, while cases decided under the FVRA may provide guidance, a more expansive view of the CVRA is clearly warranted.

With certain requirements of the FVRA eliminated – namely the feasibility of a majority-minority

district (Elec. Code § 14028(c)) and the "totality of the circumstances" test (Elec. Code § 14028(e)) – what is left to establish a violation of the CVRA is racially polarized voting ("RPV"). Elec. Code § 14028(a). Specifically, a violation of the CVRA "***is established*** if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision ***or*** in elections incorporating other electoral choices by the voters of the political subdivision." Elec. Code § 14028(a) (emphasis added). "Racially polarized voting" consists of two interrelated elements: 1) "the minority group … is politically cohesive"; and 2) "that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances … — usually to defeat the minority's preferred candidate." *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1413, quoting *Thornburg v. Gingles* (1986) 478 U.S. 30, 50-51 ("*Gingles*").

Further, the CVRA specifies the precise elections to be considered in analyzing RPV. Specifically, where, as here, a plaintiff seeks to show "that racially polarized voting occurs in elections for members of the governing board," the CVRA confines the relevant elections to those including at least one candidate that is a member of the applicable minority group. Elec. Code § 14028(b) ("The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class …").[1] It is the success of minority-preferred candidates who are themselves members of the minority group that counts the most. Elec. Code § 14028(b) ("One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members

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[1] The CVRA's focus on elections involving minority candidates is consistent with the view of a majority of federal circuit courts that racially-contested elections are most probative of an electorate's tendencies. *See U.S. v. Blaine Cty.* (9th Cir. 2004) 363 F.3d 897, 911 (rejecting defendant's argument that trial court must give weight to elections involving no minority candidates); *Ruiz v. Santa Maria* (9th Cir. 1998) 160 F.3d 543, 553 ("minority v. non-minority election is more probative of racially polarized voting than a non-minority v. non-minority election" because "[t]he Act means more than securing minority voters' opportunity to elect whites."); *Westwego Citizens for Better Gov't v. City of Westwego* (5th Cir.1991) 946 F.2d 1109, 1119 n. 15 ("[T]he evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates."); *LULAC v. Clements* (5th Cir. en banc 1993) 999 F.2d 831, 864 ("This court has consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates ...."); *Citizens for a Better Gretna v. City of Gretna* (5th Cir.1987) 834 F.2d 496, 502 ("That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference [for a black candidate]."); *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.* (3d Cir. 1993) 4 F.3d 1103, 1128-29 ("The defendants also argue that the plaintiffs may not selectively choose which elections to analyze, but rather must analyze all the elections, including those involving only white candidates. It is only on the basis of such a comprehensive analysis, the defendants submit, that the court is able to evaluate whether or not there is a pattern of white bloc voting that usually defeats the minority voters' candidate of choice. We disagree."); *but see Lewis v. Alamance Cty.* (4th Cir. 1996) 99 F.3d 600 (affirming finding of no racially polarized voting in part because minority-preferred candidates who were white won in elections with no minority candidates, though the dissent pointed out that is contrary to the holdings of other courts).

of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action"); *see also Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, 1318, aff'd mem., 488 U.S. 988 (1988) (it is not enough to avoid liability under the FVRA that "candidates favored by blacks can win, but only if the candidates are white.").

B. Plaintiffs' FAC Alleges Racially Polarized Voting in Defendant's At-Large Elections

Plaintiffs' FAC alleges each of the elements of a claim under the CVRA. The FAC alleges that Defendant utilizes an at-large method of election for selecting the members of its governing board. (FAC ¶¶ 1, 16, 17, 49). The FAC also alleges racially polarized voting, and specifies that racially polarized voting occurs in precisely the elections the CVRA directs this court to ultimately evaluate – "Santa Monica's City Council elections" "in which at least one candidate is a member of a protected class." (FAC ¶¶ 2, 20-25, 30-32, 50); Elec. Code § 14028(a) and (b). To demonstrate the point, the FAC includes a detailed discussion of four exemplary Santa Monica city council elections, and alleges in detail, with respect to each election, exactly what this Court listed in its February 3, 2017 ruling: "wh[o] [the] Latino-preferred choices were, that Latinos voted as a bloc, wh[o] the white-preferred candidates were, that whites voted as a bloc, and that the white bloc usually defeats the Latino bloc." (FAC ¶¶ 21-24). As alleged in the FAC, in each of those elections, "Latino voters cohesively preferred" the Latino candidate (Tony Vazquez in 1994, Josefina Aranda in 2002, Maria Loya in 2004 and Oscar de la Torre in 2016), but each of them lost because "the non-Hispanic white majority of the electorate voted as a bloc against" them. (*Id.*).[2] In each of those elections, the top three choices of the non-Hispanic white majority (also listed in the FAC) were victorious. (*Id.*)

This is far more detail than is required to allege racially polarized voting. Notably, in its Demurrer, Defendant does not cite a single voting rights case addressing a pleading challenge. While there are not many such cases, the court in *Luna v. Kern County* (E.D. Cal. Sept. 2, 2016) 2016 WL 4679723, Case No. 1:16-cv-00568-DAD-JLT rejected a motion remarkably similar to Defendant's demurrer in this case, finding a complaint with far less detail than the FAC in this case, to be sufficiently detailed, particularly in its allegations of racially polarized voting. (Compare FAC ¶¶ 1-2, 20-25, 30-33, 50 with *Luna* Complaint ¶¶ 2

[2] Contradicting the FAC, Defendant contends that Bobby Shriver was the Latino-preferred candidate in 200 and Tony Vazquez was the Latino-preferred candidate in 2016. (Demurrer, pp. 5-6). They were not. As alleged in the FAC, Maria Loya was the Latino-preferred candidate in 2004 and Oscar de la Torre was the Latino-preferred candidate in 2016. Both lost. (FAC ¶¶ 23, 24). In any event, this is not a proper subject f a demurrer; at most, it is a disputed issue of fact appropriate for trial.

30, 40).[3] It would be incongruous with the CVRA's legislative history and purpose, to establish more onerous pleading requirements for stating a claim under the CVRA than the federal courts have established for stating a FVRA claim. *Cf. Jauregui*, 226 Cal. App. 4th at 808 ("The Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act of 1965. It is incongruous to intend this expansion of vote dilution liability but then constrict the available remedies in the electoral context to less than those in the Voting Rights Act of 1965. The Legislature did not intend such an odd result.").

The FAC further alleges, with detailed examples, the presence of the "probative but not necessary factors" listed in Section 14028(e) of the CVRA: a "history of discrimination" (FAC ¶¶ 26); "denial of access to those processes determining which groups of candidates will receive financial or other support in a given election" (FAC ¶ 29); "the extent to which [Latinos] bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process" (FAC ¶¶ 26-28); "and the use of overt or subtle racial appeals in political campaigns (FAC ¶¶ 21, 36). As alleged in the FAC, these factors contribute to the dilutive effect of at-large elections in the particular circumstances of Santa Monica. (FAC ¶¶ 26, 28, 29). For example, the high cost of at-large city council campaigns in Santa Monica combine with racially polarized voting to impair the ability of Latinos, whose financial means are relatively modest compared to the white residents of Santa Monica, to elect candidates of their choice or to influence the outcome of the Santa Monica City Council elections. (FAC ¶¶ 26-29).

Without citing any authority (because none exists), Defendant persists in arguing that the FAC is insufficient because its allegations of Latino voter cohesion and majority bloc voting sufficient to usually defeat Latino-preferred candidates, both generally (FAC ¶¶ 1-2, 30-33, 50) and in connection with four specific exemplary Santa Monica city council elections involving Latino candidates (FAC ¶¶ 20-25), are not enough. Not only does Defendant's argument ignore the standard for pleading racially polarized voting explained in *Luna*, it also ignores how minority cohesion and majority bloc voting are shown. Specifically, group voting behavior is shown principally through ecological regression analysis based on precinct-level election results and demographics. *See Gingles*, 478 U.S. at 53, n. 20; *Sanchez v. Colorado* (10th Cir. 1996) 97 F.3d 1303, 1321 (reversing district court's rejection of plaintiffs' ecological regression evidence of RPV

[3] The complaint addressed by the *Luna* court is attached as Exhibit 1 to Plaintiffs' Request for Judicial Notice for the convenience of this Court.

That analysis is necessarily performed by experts, so providing any more detail than is in the FAC would require Plaintiffs to disclose their experts' work at the pleading stage – well prior to the time set by Section 2034 of the Code of Civil Procedure. *See, e.g., Gingles* at 52-54 (accepting Dr. Grofman's ecological regression analysis). As the *Luna* court ruled in the voting-rights context, and the California Supreme Court has ruled in other contexts, a plaintiff is not required to provide expert opinion in her complaint. *Luna* at *5 (rejecting defendant's argument that a proposed redistricting map must be provided at the pleading stage because such a map would require expert analysis); *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 570 (a complaint need only plead ultimate facts, not evidentiary facts); *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79-80 (plaintiff allowed to make allegation "in a conclusory fashion" because the issue must be resolved by "competent expert testimony")

C. The FAC's Allegations of Racially Polarized Voting Are More Than Sufficient

With racially polarized voting pled both generally and in connection with four specific exemplary elections that are discussed in far greater detail than is required, Defendant asks this Court to adopt improper methodologies, seeks to discount as many of those elections as it can, and turns to arguing what an analysis of those and other elections *might* show that is *not* mentioned in the FAC. But Defendant's arguments, conspicuously devoid of any authority, not only raise questions of fact and proof inappropriate for resolution in a demurrer, but also reflect a distorted view of racially polarized voting and the CVRA.

1. <u>The FAC's Discussion of Four Exemplary Elections is More Than Sufficient.</u>

Defendant argues that pleading four exemplary elections in which Latinos sought seats on Defendant's city council is not enough to support an inference that the second prong of racially polarized voting – that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate – is met because this is (1) under-inclusive since it did not plead half of all elections and (2) over-inclusive since pre-2003 elections and post-filing elections are not relevant. These two contentions are meritless.

First, Defendant argues the FAC is under-inclusive in that Plaintiffs must have pled at least half of the 1994-2016 elections because the definition of the word "usually" requires that the minority-preferred candidate be defeated in half of all elections. Defendant is incorrect. An overwhelming majority of courts have rejected this mechanical approach to analyzing the second prong of racially polarized voting. *Ruiz v. City of Santa Maria*, (9th Cir. 1998) 160 F.3d 543, 550, 554 (reversing a grant of summary judgment based o minority-preferred candidates having "a success rate of 50%" because "[t]he district court erred in applying

simple mathematical approach—counting the number of successful Hispanic-preferred candidates divided by the number of elections—in its *Gingles* ["usually"] analysis"); *see* n.1 *supra* (illustrating *Lewis* is at odds with the CVRA and nearly all other circuits). Instead of the approach Defendant suggests, courts make "a searching practical evaluation of the past and present reality" with "a functional view of the political process" to determine whether the white voting bloc is able to usually defeat the minority preferred candidate in relevant elections. *Id.* at 554, *quoting Gingles*, 478 U.S. at 45. A court, under the CVRA, also considers the factors that are "probative but not necessary" to establish a violation. Elec. Code § 14028(e).

Moreover, even if Plaintiffs were required to plead the details of a majority of the relevant elections, under the CVRA only those elections including at least one Latino candidate are relevant. Elec. Code § 14028(a) ("The occurrence of racially polarized voting shall be determined from examining results of elections in which ***at least one candidate is a member of a protected class*** . . . "); Elec. Code § 14028(b); *see also* n. 1 *supra* (showing that is also consistent with the majority view of the FVRA). The FAC identifies 4 Latino candidates (Tony Vazquez, Josefina Aranda, Maria Loya, and Oscar de la Torre) who participated in a total of 5 elections (1994, 2002, 2004, 2012, 2016).[4] So, even if Plaintiffs were required to allege details of racially polarized voting specific to at least half of the relevant elections, the FAC's discussion of 4 out of those 5 elections is more than sufficient.[5]

Second, Defendant argues that the FAC is over-inclusive. Defendant argues pre-2003 elections should be "ignored" because the statute applies only to elections following its 2003 effective date since statutes are ordinarily interpreted as operating prospectively, not retroactively. But, Defendant's argument rests on a fundamental misunderstanding of retroactivity. A law is not retroactive "merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7-8. Instead, "the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." *In re E.J.* (2010) 47 Cal.4th 1258, 1237; *see also People v. Grant* (1999) 20 Cal.4th 150 (finding a statute requiring three violations not retroactive so long as one of the required acts took place after the statute's effective date). Indeed, the CVRA functions prospectively because it enjoins the future us

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[4] As this Court has ruled, the ethnicity of any individual is not subject to judicial notice, so on a demurrer the Court may look only to the allegations of ethnicity in the FAC. (February 3, 2017 Order, pp. 1-2, n. 1).

[5] There is also nothing properly in the record on this demurrer that demonstrates there was a Latino-preferre candidate in elections other than the four exemplary elections discussed in detail in the FAC. The FAC has identified four Latino-preferred candidates, and all of them lost (FAC ¶¶ 21-24)– meeting any definition of "usually" lose.

of at-large election systems; it does not retroactively alter results of elections that have already taken place. Elec. Code § 14027 ("An at-large method of election may not be imposed or applied ...").[6] The consideration of elections prior to the enactment the CVRA to show racially polarized voting, and thus prohibit the future imposition of at-large elections, does not mean that the CVRA is being applied retroactively. In fact, federal courts adjudicating claims under the analogous FVRA - including the leading FVRA case, *Thornburg v. Gingles* – have had no problem considering elections prior to the effective date of the applicable FVRA provisions to show racially polarized voting. *Gingles*, 478 U.S. at 44, App. A (relying on racially polarized voting in 1978 and 1980 elections to affirm finding of liability under the 1982 amendment to the FVRA).

Defendant also argues that this Court should ignore the most recent election for its city council – in November 2016 – because that election occurred after the filing of this action. But, while this Court can ultimately decide how much *weight* to give to that election, there is no question that the CVRA contemplates elections occurring after the filing of an action should be considered. *See* Elec. Code § 14028(a) (describing the relative probative value of elections occurring after the filing of a CVRA action). At trial, Plaintiffs' witnesses will explain why this most recent election shows a great deal about Santa Monica's politics. In any event, at the pleading stage, the 2016 election is at least relevant.

2. The FAC's Identification of Latino-Preferred Candidates is More Than Sufficient.

Defendant attempts to muddle the clear allegations of racially polarized voting in the FAC, which identifies the Latino-preferred candidate and the non-Hispanic white-preferred candidates in each of four exemplary elections and specifies that Latinos were cohesive in each instance in their support for their preferred candidates who all lost due to the bloc voting of the non-Hispanic white majority. (FAC ¶¶ 2, 20-25, 30-32, 50). Defendant posits that *perhaps* there *could* be additional Latino-preferred candidates, other than those identified in the FAC – perhaps Latinos' second, third or fourth choices – and *maybe* they were elected. But besides asking this Court to assume voter behavior most favorable to *Defendant's* case without any evidence, much less anything in the FAC that could properly be considered at the pleading stage,

[6] It would have been nonsensical for the legislature to instruct courts to analyze historical elections and evidence (*see* Elec. Code § 14028(b), (e)) and, at the same time, preclude the courts from relying on such evidence that occurred before the CVRA became effective. Such a reading would have required minority voters, following the enactment of the CVRA, to endure a series of further dilutive election cycles while they muster evidence of continuing racially polarized voting after 2003 – something courts have uniformly rejected. *See, e.g., Williams v. City of Dallas* (N.D. Tex. 1990) 734 F.Supp. 1317 ("*In no way will this Court tell African-Americans and Hispanics that they must wait any longer for their voting rights . . ..*") (emphasis in original).

Defendant's suggestion also invites legal error. As the court in *Ruiz v. City of Santa Maria*, 160 F.3d 543 (9th Cir. 1998) held, the success of Latino voters' second or third choices does not undermine the existence of racially polarized voting, especially where there is only one Latino candidate, as in Defendant's elections in 1994, 2002, 2004 and 2016. *Id.* at 554.

3. Racially Polarized Voting Is Itself an Injury.

Further evading the straightforward analysis of racially polarized voting specified by the CVRA, Defendant seeks to raise the bar by imposing additional requirements on Plaintiffs. Specifically, Defendant argues that Plaintiffs must show an injury distinct from the racially polarized voting in Defendant's at-large elections, and that the injury was caused by the implementation of the at-large election system as opposed to some different election system. But those additional requirements are inconsistent with the plain text of the CVRA, and have been rejected by courts addressing cases under the FVRA, let alone the less-restrictive CVRA.

Both the text and legislative history of the CVRA undermine Defendant's argument, and confirm that Plaintiffs must only show racially polarized voting in the pertinent elections in order to prevail. The CVRA provides that "[a] violation of Section 14027 ***is established*** if it is shown that racially polarized voting occurs in elections for members of the governing body ...") *See* Elec. Code § 14028(a) (emphasis added). Moreover, while Defendant suggests that to establish a violation of the CVRA Plaintiffs must show that Latinos would have greater "voting power under an alternative system" (Demurrer, pp. 8-9), the legislative history of the CVRA reveals the exact opposite – that a violation is established by showing racially polarized voting, and only then is the choice of a remedy considered. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 ("Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)."). This plain language – that racially polarized voting establishes a violation of the CVRA – has also been confirmed by the appellate courts. *Rey v. Madera Unified School Dist.* (2012) 203 Cal. App. 4th 1223, 1229 ("To prove a CVRA violation, the plaintiffs must show that the voting was racially polarized. However, they do not need to either show that members of a protected class live in a geographically compact area or demonstrate a discriminatory intent on the part of voters or officials."). Showing racially polarized voting in the relevant elections is sufficient to establish liability under the CVRA because, as the California Legislature noted in enacting the CVRA, racially polarized voting is itself harmful. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg

Sess.) as amended Apr. 9, 2002, p. 2. (The CVRA "addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity.").

To confuse the issue, Defendant cites only a snippet from the U.S. Supreme Court's decision in *Gingles*, addressing the FVRA, which, unlike the CVRA, does not specify that ""[a] violation … ***is established*** if it is shown that racially polarized voting occurs ..." But even in that context, the U.S. Supreme Court has explained that racially polarized voting is an injury itself. *Gingles*, 478 U.S. at 51. As the Ninth Circuit Court of Appeals explained in *Gomez v. City of Watsonville* (1988) 863 F.2d 1407, racially polarized voting also demonstrates causation of that injury -- "[t]his showing of racial bloc voting establishes the required causal link between the use of a multimember district and the inability of the minority group 'to elect its chosen representatives.'" *Id.* at 1413, citing *Gingles* at 51. It is by showing majority bloc voting sufficient to "usually defeat the minority group's preferred candidate[s]" that the "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Gingles*, at 51.

In any event, though not necessary to do so, the FAC goes well beyond alleging racially polarized voting and alleges exactly the sort of additional injury and causation that Defendant (incorrectly) argues must be shown. (*See* FAC ¶¶ 1-2, 23-24, 31-34, 51). And, again, though not necessary to do so, the FAC even alleges that Latino-preferred candidates would likely have won had the elections been district-based. (*See, e.g.*, FAC ¶¶ 23-24).[7]

III. PLAINTIFFS STATE A CLAIM FOR INTENTIONAL DISCRIMINATION

A. When an Intentionally Discriminatory Law Is Adopted, It Is Invalid, and the Courts Have Broad Authority to Remedy the Harm Inflicted.

Particularly when voting rights are implicated, "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all …'. Thus, the proper remedy for a lega provision enacted with discriminatory intent is invalidation." *N. Carolina NAACP v. McCrory* 831 F.3d 204, 239 (4th Cir. 2016) (surveying Supreme Court cases). Once intentional discrimination is shown, "the 'racial discrimination must be eliminated root and branch'" by "a remedy that will fully correct past wrongs." *Id.*

[7] Defendant criticizes the FAC's discussion of precinct-level results from the Latino-concentrated Pico Neighborhood, claiming that the Pico Neighborhood is not large enough to comprise a district itself. But, besides relying on the wrong numbers – Defendant cites the number of registered voters and ballots cast rather than raw population as required by Elec. Code § 21620), Defendant's criticism ignores that it is not necessary at the pleading stage to propose a district map, even under the more onerous FVRA. *Luna*, at *5.

quoting *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-39 (1968) and *Smith v. Town of Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982). Neither the passage of time, nor the modification of the original enactment can save a provision enacted with discriminatory intent. *Id.*; *Hunter v. Underwood* (1985) 471 U.S. 222 (invalidating a provision of the 1901 Alabama Constitution because it was motivated by a desire to disenfranchise African Americans, even though its "more blatantly discriminatory" portions had since been removed).

B. Plaintiffs' FAC Alleges Intentional Discrimination in the Enactment of the Current At-Large Election System

As alleged in the FAC, the portion of Defendant's charter requiring that its city council be elected at-large was adopted in 1946, and has not been changed since. (FAC ¶ 35). The charter provision was adopted with the intent to prevent racial minorities from electing candidates of their choice to the city council. (FAC ¶¶ 35-43, 56-59). Indeed, the at-large elections have been successful in accomplishing that nefarious goal. (FAC ¶¶ 19-25, 41).

The FAC alleges that the current system of at-large elections was adopted in a caustic racial environment (FAC ¶¶ 39), proposed by an all-white Board of Freeholders who all lived in neighborhoods subject to "Caucasian Clauses" that prevented racial minorities from residing there (FAC ¶¶ 35), and supported by exactly the same voters who simultaneously voted against prohibiting racial discrimination in employment (FAC ¶¶ 42). Both the Freeholders and the electorate recognized that the at-large election system would deny racial minorities representation in their city government (FAC ¶¶ 36, 40) -- proponents lauded that fact (FAC ¶¶ 36), and opponents decried it (FAC ¶¶ 40). And, in the seventy-one years since its enactment in 1946, the at-large charter provision has had precisely the discriminatory impact that its proponents hoped for: when serious Latino candidates run for city council, they are preferred by Latino voters but they lose. (FAC ¶¶ 19-25, 41). Indeed, the at-large charter provision has been so successful in achieving its purpose that only one (1) of the seventy-one (71) council members since 1946 has been Latino, despite a Latino population of over 13%.[8] (FAC ¶¶ 15, 19, 41). That is not a coincidence; at-large elections have long been known to keep poorer minority communities from electing representatives to their local governments. *Gingles,* 478 U.S. at 47. Certainly, the allegations of the FAC are enough at the pleading stage to allow Plaintiffs to take discovery and prepare their case for trial.

[8] As alleged in the FAC, the Latino proportion of Santa Monica is 13.1%, based on the 2010 Census. (FAC 15). Judicially noticeable Census records show that proportion has remained fairly constant. (RJN Ex. 2).

While any one of these allegations, without anything more, might not be sufficient for a claim under the Equal Protection Clause of the California Constitution, taken together they demonstrate that preventing racial minorities from securing representation in city government motivated the adoption of the at-large charter provision. (FAC ¶ 43) So, it is no wonder that Defendant seeks to treat these allegations individually, and attacks some, but not all, of this evidence of racially discriminatory intent pled in the FAC. But Defendant's various attacks not only are inappropriate in a demurrer, when the allegations pled in the FAC must be accepted as true, but also defy the law concerning intentional discrimination.

1. The FAC Alleges the At-Large Election Charter Provision Has Had a Disparate Impact.

Defendant argues that the FAC does not allege a disparate impact. An allegation of any disparate impact is sufficient, and the FAC clearly alleges a disparate impact on Latino voters; it alleges that the at-large charter provision designed in 1946, in part to prevent minorities from electing their preferred candidates of choice, has in the 70 years since its adoption usually accomplished that goal. *See McCrory*, 831 F.3d at 231 ("Showing disproportionate impact, even if not overwhelming impact, suffices to establish one of the circumstances evidencing discriminatory intent."). The FAC alleges, through exemplary elections, that "the Latino electorate votes cohesively for [] Latino candidate[s]," yet only one (1) of the seventy-one (71) council members since the adoption of the current at-large system in 1946, has been Latino. (FAC ¶¶ 19-25, 41). While Defendant argues it is not enough to allege the lack of success of Latino candidates, the FAC links the ethnicity of those candidates to the preferences of the Latino electorate – the Latino electorate in Santa Monica has shown that it prefers Latino candidates. (*Id.*). So, it is not just that Latino candidates have almost uniformly lost, those same Latino candidates who have consistently lost are the preferred candidates of the Latino community. Moreover, the near complete lack of success by candidates of a minority group over a long period of time can *itself* establish a disparate impact. *See Bolden v. City of Mobile* (S.D. Ala. 1982) 542 F.Supp. 1070, 1076 (relying on the lack of success of black candidates over several decades to show disparate impact, even without a showing that black voters voted for each of the particular black candidates going back to 1874); *also see Jenkins,* 4 F.3d at 1126 ("experience does demonstrate that minority candidates will tend to be candidates of choice among the minority community").

2. The FAC Pleads a Discriminatory Purpose, Despite Defendant's Various Attacks.

Hoping to distract the Court from the confluence of the historical evidence of a discriminatory purpose in adopting at-large council elections, Defendant attempts to attack each piece of that evidence as if it were the only piece of evidence. But Defendant's attacks simply lack any basis in the law, and while any

one piece of evidence *might* not be sufficient alone, a discriminatory purpose can certainly be inferred from the exemplary evidence taken together. Moreover, the FAC need only allege facts that if true would be sufficient to support an inference of discriminatory intent, but need not present the whole of the plaintiffs' case; even more evidence will be presented at trial.

First, Defendant criticizes the FAC's reference to contemporaneous newspaper publications by proponents of at-large elections in the "principal local newspaper at the time" (FAC ¶ 36), claiming that the newspaper is not itself a "decisionmaker." But local newspapers are generally accepted by historians as reflecting, and also influential in shaping, local opinion, and so courts have had no problem relying on contemporaneous newspapers to show discriminatory intent. *See, e.g., Bolden.* 542 F.Supp. at 1063, 1066 (finding discriminatory intent where "Plaintiffs introduced other evidence of racial motives in the newspapers."). Defendant cites no authority to the contrary.

Next, Defendant argues that the FAC's allegations of the racially hostile climate of Santa Monica contemporaneous with the adoption of at-large council elections do not "by themselves, [] establish purposeful discrimination." (Demurrer, p. 13). While Plaintiffs would agree that a racially hostile climate is not, *by itself*, sufficient, there is no question that a racially hostile climate is nonetheless one more piece of evidence of discriminatory purpose, providing the proper light in which to view contemporaneous actions and statements. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 266-68 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. … [including] the historical background of the decision.")

While Defendant focuses on a few of the allegations of the FAC, Defendant fails to address the bulk of the allegations relating to the discriminatory intent in its adoption of an at-large city council in 1946. For example, Defendant's Demurrer says nothing about the exceptionally strong correlation between voters' selection of at-large council elections and permitting race discrimination in the workplace (FAC ¶ 42), or the understanding of both proponents and opponents[9] that at-large elections would prevent minorities from

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[9] Defendant reads this Court's February 3, 2017 Order as finding that statements by opponents of an enactment are entirely irrelevant to the discriminatory purpose inquiry. This Court's Order does not say that. Rather, this Court only ruled that a single statement by opponents of at-large elections is not enough, standing alone, to show at-large elections were chosen with the purpose of discriminating against racial minorities. (Order at p. 29). Indeed, courts have looked to statements by opponents, as well as proponents, to determine the intent of a law. *See McCrory*, 831 F.3d at 228 (noting that "several Democratic senators characterized the bill as voter suppression of minorities" in holding that the challenged law is invalid for

having representation on the council (FAC ¶¶ 36, 40). Taken together with the disparate impact at-large elections have had (FAC ¶¶ 19-25, 41), the direct statement of purpose by proponents that at-large elections are to make Santa Monica a racially homogeneous community (FAC ¶ 36), the racially hostile climate of Santa Monica at the time (FAC ¶ 39), all of this is more than enough at the pleading stage to put Defendant on notice of what Plaintiffs claim.

3. The Controlling Charter Provision Was Adopted in 1946, and Is Unchanged Since, So It is Not Necessary for Plaintiffs to Show That Any Other Decisions Were Intentionally Discriminatory.

Defendant would have this court require that Plaintiff prove that each and every decision to change, or not to change, its electoral system over the last 103 years was motivated by racial discrimination. But Defendant cites no authority supporting its view, because it is the discriminatory intent of the enactment in effect today that is relevant, and that enactment was in 1946. *See Hunter v. Underwood* (1985) 471 U.S. 222, 232-33 (declining to take into account later ameliorative changes to a discriminatory law when deciding whether the law at issue was passed with a discriminatory intent, and striking down the entire law, despite those amendments, where its "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect"); *see also Hayden v. Paterson* (2d Cir. 2010) 594 F.3d 150, 159 ("The issue we are confronted with here, though, is whether the enactment of the 1894 constitutional provision, albeit preceded by earlier provisions that plausibly admit of racist origins, can support an equal protection claim" because "the present constitutional provision that remains in force today [] was enacted in 1894.").

a. Defendant's 1914 Adoption of a Commission Form of Government Does Not Change the Fact That the 1946 Adoption of an At-Large Elected Council Was Intended to Discriminate.

Defendant argues, without citing any authority, that its intentionally discriminatory adoption of at-large council elections, rather than the district elections it previously employed when the city last had a council form of government, cannot be said to have had a disparate impact because under its commission form of government from 1914 to 1946 commissioners were likewise elected at-large. But, again, Defendant's argument defies settled law. In *Bolden v. Mobile* (S.D. Ala. 1982) 542 F.Supp. 1050, for example, the City of Mobile had at-large elections for its governing bodies in 1870 and 1872, and then the at-large elections were codified in 1874. *Id.* at 1060-61, 1074-75. The at-large election system being in place

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intentional discrimination). In any event, the FAC alleges contemporaneous statements by proponents of at-large elections as well, in addition to other evidence of discriminatory intent. (FAC ¶¶ 36, 40).

prior to 1874 did not prevent the court from finding that the 1874 enactment was intentionally discriminatory, and thus violated the Equal Protection Clause. *Id.* at 1075 ("The court concludes on the basis of this analysis and on the basis of the testimony of plaintiffs' expert historian that the 1874 statute reorganizing Mobile's municipal government was adopted with the invidious purpose of maintaining at-large general municipal elections, along with ward elections in the Democratic primaries, in order to foreclose the possibility of blacks being elected."). The *Bolden* court also found the 1911 adoption of an "at-large commission system" to also violate the Equal Protection Clause, despite the fact that "blacks [had already been] effectively disfranchised by the 1901 Constitution." *Id.* at 1076. So, whether Defendant's 1946 charter amendment is characterized as *adopting* an at-large elected council, or *maintaining* at-large elections, makes no difference – the fact remains that a purpose of that charter provision was to keep racial minorities from electing their preferred representatives, and that means it is invalid. As set forth in *Bolden*, disparate impact is measured by whether the current election system has been worse for a racial minority group than the majority group, not whether the current electoral system has been worse than the system before, which may itself have operated to dilute the minority vote. To rule otherwise, as Defendant requests, would only serve to reward past discrimination.

b. Defendant's Subsequent Rejection of Alternative Election Systems Does Not Validate the Intentionally Discriminatory Adoption of an At-Large Elected Council.

Lastly, Defendant argues, again without citing any authority, that its intentionally discriminatory selection of at-large elections in 1946 is cleansed because voters subsequently declined to adopt different election systems through ballot measures in 1975 and 2002. Voters' refusal to change the status quo (for whatever reason) does not impact the intent behind the adoption of the status quo. Even if those ballot measures simply proposed district-based elections (they did not), that would still have no bearing on the validity of Defendant's current electoral system that was adopted in 1946. Rather, the 1946 charter provisio is still in effect, unmodified, and governs Defendant's city council elections, and that 1946 charter provision is invalid because it was adopted with a racially discriminatory purpose. *See Hunter*, 471 U.S. 222 (invalidating a provision of the 1901 Alabama Constitution because it was motivated by a desire to disenfranchise African Americans, even though its "more blatantly discriminatory" portions had since been removed); *McCrory*, 831 F.3d at 239 ("The Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all …'. Thus, the proper remedy for a legal provision enacted with discriminatory intent is invalidation. … The 'racial discrimination must be eliminated root and branch'

by "a remedy that will fully correct past wrongs."). Indeed, Plaintiffs are unaware of any case, and Defendant certainly hasn't cited any, in which a court held that a law adopted with the purpose of discriminating against a racial minority became valid by virtue of a later rejection of an alternative to that law.

Moreover, Defendant mischaracterizes the ballot measures of 1975 and 2002 that proposed alternative forms of election and government. Those ballot measures did not simply propose a change to purely district elections, and there is no way to know whether voters' reactions to those measures were based on the at-large council structure or unrelated aspects of the proposals. The 2002 ballot measure, Measure HH, provided for: 1) "imposing term limits for Council members"; 2) "establishing a municipal primary election with runoffs in the fall"; and 3) most importantly, establishing a strong mayor elected at-large with "the power to veto Council actions, including emergency actions."[10] Measure HH might have even invalidated the concurrent council election of 2002 and required a costly special election – at least that was what its opponents argued. Likewise, Proposition No. 3 in 1975 included "five charter amendments" for such divergent proposals as changing the signature requirements for candidates and initiatives to get on the ballot, and requiring costly special elections rather than appointments to fill vacancies on the city council. (Defendant's RJN Ex. B, pp. 2-3). Never since 1946 have Santa Monica voters had the opportunity to simply choose: at-large versus district elections. Indeed, the one recent opportunity to "cleanse" itself of the heinous 1946 action was sabotaged when self-interested city council members rejected the near-unanimous recommendation of the Charter Review Commission to change the at-large election system because it disenfranchises minority voters. (FAC ¶¶ 45-46)

V. CONCLUSION

Plaintiffs adequately plead all essential elements of their claims for violation of the CVRA and intentional discrimination, in a manner that more than adequately satisfies California's liberal pleading standard. If this Court disagrees, Plaintiffs request leave to amend their Complaint.

DATED: May 9, 2017

Respectfully submitted:
SHENKMAN & HUGHES, PC

By: _____
Kevin Shenkman
Attorneys for Plaintiffs

[10] The description of Measure HH is left out of Exhibit B of Defendant's Request for Judicial Notice. Nonetheless, a description of Measure HH and related materials can be found at https://www.smgov.net/Departments/Clerk/elections/Election2002/index.htm

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 28905 Wight Rd., Malibu, California 90265.

On May 9, 2017, I served true copies of the following document(s) described as

OPPOSITION TO DEMURRER;

on the interested parties in this action as follows:

George Brown, William Thomson and Tiuania Bedell
Gibson Dunn & Crutcher LLP
333 S. Grand Ave.
50th Floor
Los Angeles, CA 90071

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shenkman & Hughes' practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on May 9, 2017 at Malibu, California.

Kevin Shenkman