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Gov. Code, § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA; and ADVOCATES FOR MALIBU PUBLIC SCHOOLS,

Plaintiffs,

v.

CITY OF SANTA MONICA; and DOES 1-100, inclusive,

Defendants.

CASE NO. BC616804

DEFENDANT CITY OF SANTA MONICA'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

[*Separate Statement of Undisputed Material Facts; Declaration of Peter Morrison; Declaration of Daniel Adler and Request for Judicial Notice filed concurrently*]

Complaint Filed: April 12, 2016
Hearing Date: June 14, 2018, 8:45 am
Reservation ID: 170614226861
Trial Date: July 30, 2018

Assigned to Judge Yvette Palazuelos, Dep't 28

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 14, 2018, at 8:45 a.m. or as soon thereafter as the matter may be heard in Department 28 of the Superior Court of the State of California for the County of Los Angeles, located at 111 N. Hill St., Los Angeles, California 90012, defendant City of Santa Monica will, and hereby does, move pursuant to California Code of Civil Procedure Section 437c, for an order granting summary judgment or, in the alternative, summary adjudication in its favor.

The City makes this motion because there are no triable issues of material fact on either of plaintiffs' causes of action.

To prevail on their California Voting Rights Act claim, plaintiffs must prove, among other things, that vote dilution caused by the City's at-large electoral system. Plaintiffs must therefore demonstrate that some permissible electoral scheme *other than* the City's current system would enhance Latino voting power. But expert demographic analysis confirms that plaintiffs cannot do so, because no constitutionally or statutorily permissible remedy could enhance Latino voting strength. Absent proof of vote dilution, there is no constitutional basis on which to supply any remedy at all, much less a race-conscious one. Governments are authorized to separate persons into voting districts predominantly on the basis of race only when they have a compelling interest in doing so, and only where their actions are specifically and narrowly tailored to further their legitimate purposes. Courts have assumed without deciding that curing vote dilution is a compelling state interest. Because Latinos' votes are not being diluted by Santa Monica's at-large electoral system, plaintiffs' claim presents no compelling interest. Further, the imposition of a remedy predominantly influenced by race would amount to impermissible racial gerrymandering reflecting the sort of invidious racial classifications that the Supreme Court has consistently held to violate the Equal Protection Clause. To the extent that the CVRA authorizes the imposition of a remedy predominantly influenced by race even absent a showing of a compelling state interest or the narrow tailoring of remedies to right wrongs, it is unconstitutional as applied to the facts of this case.

To prevail on their Equal Protection claim, plaintiffs must prove that in adopting the City's current electoral system in 1946, the relevant decisionmakers intentionally discriminated against members of a protected class. Such an Equal Protection claim can, in the abstract, be proven in one of three

ways—by showing that the challenged law is discriminatory on its face; that the law, although facially neutral, has been applied in a racially discriminatory way; or that the law, although facially neutral and applied evenhandedly, has had a disparate impact on members of a protected class that, as demonstrated by other evidence, was intended by the relevant decisionmakers. In this case, only the third method of proof is even potentially viable, as plaintiffs have never alleged that the relevant enactment is facially discriminatory or has been applied in a racially discriminatory way. Plaintiffs lack admissible evidence demonstrating any disparate impact or, for that matter, any causal link between an alleged disparate impact and Santa Monica's at-large electoral system. There is no admissible evidence that election outcomes would have been any different for members of a protected class under any other electoral system. And even if plaintiffs could demonstrate some disparate impact, they have no admissible evidence showing that impact was intended by the relevant decisionmakers in 1946, or at any other relevant time.

This motion is based upon this notice of motion and motion, the attached memorandum of points and authorities, the Declaration of Peter Morrison, the Declaration of Daniel Adler, the Request for Judicial Notice and the separate statement of undisputed materials facts filed concurrently, along with all other matters of which the Court may take judicial notice, the oral argument of counsel, pleadings already on file with the Court, and all other evidence that may be presented at the hearing on this matter.

DATED: March 29, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs seek to have the Court overturn the electoral system chosen by Santa Monica voters and draw districts along racial lines to replace the City's at-large elections. Such a dramatic remedy is required, plaintiffs allege, because the current system dilutes Latino voting power, which they claim is centered in the Pico neighborhood. The undisputed facts conclusively demonstrate otherwise. Objective demographic data, backed by expert analysis, confirms that districted elections would not enhance Latino voting strength. The City's at-large elections therefore have not caused any dilution of Latino voting strength. Because plaintiffs cannot dispute these basic facts, their case hinges on their claim that the California Voting Rights Act (CVRA) permits replacement of the City's at-large elections without a shred of evidence that they have caused any vote dilution. This is wrong. The CVRA is not properly interpreted, and cannot constitutionally be applied, to impose liability or a remedy without proof of vote dilution. Plaintiffs cannot prove all the elements of their claim, and the Court should grant summary judgment.

With respect to liability, Elections Code sections 14027 and 14028 require plaintiffs to establish that the at-large electoral system has impaired Latinos' ability to elect or influence elections by causing a dilution of their voting strength. Plaintiffs cannot prove this. Latinos account for roughly 13% of the City's citizen voting-age population. Not a single voting precinct is majority-Latino, and the City's Latino population is spread throughout the City. These small numbers and broad dispersion make it impossible to construct an equipopulous majority-Latino district. As a result, districted elections would not enhance Latino voters' ability to elect candidates of their choice. In fact, the undisputed record shows that districted elections would actually *dilute* Latino voting strength by submerging the vast majority of Latino voters in overwhelmingly white districts, while failing to create a Latino-majority district. Thus, even if it were true as plaintiffs claim that voting in the City is racially polarized (which the City vigorously disputes), districted elections would necessarily deprive Latino voters of their current ability to concentrate their citywide influence on particular candidates or issues.

The CVRA is modeled largely on section 2 of the Federal Voting Rights Act (FVRA). The impossibility of creating a majority-minority district is fatal to claims brought under the FVRA.

Although Section 2 itself does not say as much, the Supreme Court has held repeatedly that a majority-minority district is the *only* constitutional remedy for federal vote-dilution claims. If such a district cannot be formed, a plaintiff not only cannot prove entitlement to a remedy, but also cannot prove liability. In other words, liability is determined by examining whether a minority group would have more voting power under a different electoral system. If the answer is no, there is no vote dilution, no liability, and no entitlement to a remedy.

The CVRA was intended to be more expansive than its federal counterpart. Plaintiffs have referred to certain provisions of the CVRA to argue that the impossibility of drawing a majority-minority district is not fatal to a CVRA claim. (See Elec. Code, § 14028(c) [to prove liability, plaintiff need not show that minority group is "geographically compact or concentrated"].)[1] But the CVRA's departure from federal case law goes only so far. First, the plain text of the CVRA itself requires proof that an at-large electoral system has caused an injury in the form of minority vote dilution. (§ 14027.) Legislative intent cannot override statutory text. Second, the constitutional limitations underpinning the federal decisions—chiefly, a concern that judicially ordered redistricting not violate the Fourteenth Amendment's prohibition on invidious racial classifications—apply equally to the CVRA.

Plaintiffs have sought throughout this case to dodge the statute's plain language and these fundamental constitutional limitations, arguing that proof of racially polarized voting alone—which they define as a bare difference in voting patterns across racial lines—is enough to establish a violation of the CVRA. Not so. If that were true, CVRA liability—with the attendant award of attorneys' fees and overturning of legislatively chosen electoral systems—could be premised merely on a showing that a small minority group, consisting of hundreds, or even dozens, of voters in a city of more than 100,000, regularly voted as a bloc for candidates different from the preferred candidates of the racial majority. Courts, of course, must construe the CVRA to avoid such "absurd and unfair consequences" (*Stanton v. Panish* (1980) 28 Cal.3d 107, 115), by requiring proof that the at-large method of election has diluted a minority group's voting strength—which Plaintiffs cannot show here.

Without such proof, finding liability and imposing a remedy under the CVRA would also be unconstitutional, and the Court should construe the CVRA to avoid these constitutional infirmities.

[1] All subsequent statutory references are to the Elections Code, unless otherwise noted.

(See *People v. Chandler* (2014) 60 Cal.4th 508, 524.) The U.S. Supreme Court has consistently assumed without deciding that remedying vote dilution is a compelling state interest that can authorize a narrowly tailored racial classification of voters—for example, by separating voters into districts based predominately on race. But an order declaring a violation of the CVRA and mandating changes in voting procedures without proof of vote dilution would not advance any compelling state interest, much less be narrowly tailored to do so. Such an order would instead amount to a racial classification drawn without good cause—which would "pose the risk of lasting harm to our society," as such classifications "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." (*Shaw v. Reno* (1993) 509 U.S. 630, 657). As a result, they are "antithetical to the Fourteenth Amendment" and permitted only in the narrowest of circumstances—where a government is pursuing a compelling interest by means specifically and narrowly tailored to accomplish its purpose. (*Shaw v. Hunt* (1996) 517 U.S. 899, 907, 915).

In Santa Monica, the undisputed facts show that even if there were racially polarized voting, it could not have caused any vote dilution because no majority-minority district is possible. To avoid constitutional infirmity, the CVRA should be interpreted to require vote dilution and preclude a finding of liability on these facts. If it is not, and if section 14028 is interpreted to permit liability based on a showing of racially polarized voting alone, its application to mandate a change to Santa Monica's at-large elections would be unconstitutional.

An alternative basis for summary judgment on the CVRA claim is the constitutional unavailability of the districting remedy plaintiffs seek. The CVRA expressly allows consideration of geographic compactness and concentration "in determining an appropriate remedy." (§ 14028(c).) Because any court order implementing plaintiffs' requested change to districted elections would separate voters predominantly on the basis of on race, it would need to be narrowly tailored to accomplish a compelling state interest. Indisputable demographic facts preclude this standard from being met. Indeed, any district that is even 40% Latino would be so highly irregular in shape, so bizarre on its face, that it would plainly be impermissibly racially gerrymandered.

Summary judgment on plaintiffs' other claim—an alleged violation of the Equal Protection Clause—is required for similar reasons. Like a CVRA claim, an Equal Protection claim demands proof

of causation: a strong connection between the challenged action and a purportedly disparate impact on a protected class. Plaintiffs cannot draw a connection between the City's at-large electoral system and any impact on Latino voting power, because the indisputable demographic facts show that no alternative system could produce more favorable results. Plaintiffs also have no evidence that the relevant decisionmakers behind the 1946 Charter amendment that adopted the current electoral system, whoever they may have been, affirmatively intended to discriminate against ethnic minorities. Indeed, their decision made it mathematically *easier* for a cohesive minority group to elect candidates of its choice.

Because plaintiffs lack the evidence necessary to support their causes of action, and because plaintiffs' theory of the case is squarely contradicted by the undisputed demographic and historical record, this Court should enter summary judgment or adjudication in favor of the City.

II. STATEMENT OF FACTS

A. The parties

Defendant City of Santa Monica is a charter city. (FAC ¶ 48.) Incorporated in 1886, the City has operated under four systems of elections and governance. (Ex. H.) The first, under which five trustees were elected on an at-large basis, lasted until 1905. (*Ibid.*) For the vast majority of that time, the President of the Board of Trustees, often described in contemporaneous newspaper accounts as the Mayor of Santa Monica, was Judge Juan José Carrillo. (Adler Decl. ¶ 10.) The trustee form of government was succeeded by the City's first charter. In effect from 1906 through 1915, this charter marked the beginning of the City Council; it called for governance by seven councilmembers, each elected from a geographically distinct ward. (Ex. H.) In 1915, the City transitioned to a commission form of government. Under this system, which lasted until 1946, voters elected three commissioners—one for public safety, a second for finance, and a third for public works—on an at-large basis. (Sep. St. ¶ 1.) The three-commissioner system was widely perceived to be flawed, as it distributed authority and responsibility across the commissioners, none of whom was accountable to the others. In 1946, the City adopted its present form of government, under which seven councilmembers are elected every other year (four in one election, three in the next) on an at-large basis for four-year terms. (Exs. G, H.) Each year, councilmembers select a new mayor from their own ranks. (FAC ¶ 16.) The vast majority of California cities similarly employ an at-large mayor-council system of election and governance.

Santa Monica is characterized by a high level of civic engagement. Many residents run for elective office, and voter turnout is high. Given the large number of candidates, particularly in Council races, voting is extremely fragmented. Many candidates attract a substantial percentage of the vote; the last seven Council races attracted an average of 13 candidates; more than half of those candidates won at least 5% of the vote. (Adler ¶ 3(b).) Under the at-large system, therefore, victory can come even with relatively low levels of support. Since 2000, just over 13% of the vote has been required to win a Council seat, and candidates have been successful with as little as 10% of the vote. (*Ibid.*)

Latino candidates have been successful under the City's at-large voting system. Although Latinos account for just over one-eighth of the City's population (St. ¶ 4), they hold roughly one-fifth of the City's elective offices. Two sitting councilmembers, Tony Vazquez and Gleam Davis, are Latino. Vazquez was first elected in 1990 and is currently serving his third term; he also recently served a term as Mayor. (Adler ¶ 2(b).) Davis, who joined the Council in 2009, has won three elections; she currently serves as the Mayor Pro Tempore. (*Id.* Ex. A.) Latinos have also recently won at-large elections to the Santa Monica College Board of Trustees (Dr. Margaret Quinones-Perez), Santa Monica-Malibu Unified School District Board of Education (Maria Leon-Vazquez, Dr. Jose Escarce, and Oscar de la Torre, who is plaintiff PNA's representative), and Rent Control Board (Steve Duron). (*Id.* ¶ 2(a).)

Plaintiff Maria Loya is a Santa Monica resident who has twice run for local office, both times unsuccessfully. (FAC ¶ 8; Ex. B.) She ran for City Council in 2004, coming in seventh; she was one of twelve unsuccessful candidates that year. (Ex. B.) She also ran for a seat on the Santa Monica Community College Board of Trustees in 2014. (*Ibid.*) In that election, she placed sixth (last). (*Ibid.*)

Plaintiff Pico Neighborhood Association is an organization focused on neighborhood issues like crime and traffic. (Adler ¶ 11.) The Pico Neighborhood has no formal definition, but it is roughly the area within the City east of Lincoln Boulevard, south of Interstate 10, and north of Pico Boulevard.

B. The Operative Complaint

Plaintiffs filed the operative first amended complaint (FAC) in February 2017. The FAC asserts two causes of action, one under the CVRA and the other under the Equal Protection Clause of the California Constitution. Plaintiffs allege that "Santa Monica's at-large method of election violates the CVRA." (FAC ¶ 3.) Plaintiffs specifically allege that Ms. Loya and other unidentified "Latino

residents of the Pico Neighborhood" have run in "several recent elections for the Santa Monica City Council," also unidentified, and "though they have often drawn significant support from both voters in the Pico Neighborhood and by Latino voters generally," they have all been "defeated by the bloc voting of the non-Latino electorate against them." (*Id.* ¶ 2; see also ¶¶ 20–25 [reviewing four "exemplary" elections].) The FAC contains many allegations concerning the Pico Neighborhood, the boundaries of which the FAC does not define. (See, e.g., *id.* ¶¶ 2, 19, 22–24, 27.) Plaintiffs allege that 39% of the neighborhood's residents are Latino. (*Id.* ¶ 27.)

Plaintiffs seek to compel the City to adopt an "alternative method of election," and the only remedy the FAC requests is "district-based elections." (*Id.* ¶ 34; see also ¶¶ 3, 23–24, 28.)

The City demurred to the FAC, but the Court concluded that, as a matter of pleading, "Plaintiffs have properly alleged an injury and the fact that Latinos in Santa Monica may not be concentrated in a certain neighborhood or divisible 'district' does not mean the claim fails." (Ex. C.)

C. A Majority-Latino District Cannot Be Created Anywhere in the City.

Latinos are widely dispersed across the City, accounting for at least one in ten eligible voters in almost 60% of voting precincts. (Morrison Decl. ¶ 14.) In none of those 56 precincts do Latinos account for the majority of citizen voting-age residents. (*Ibid.*) Because Latinos are so few in number and so widely dispersed across the City's precincts, it is not possible to draw a contiguous, equipopulous, majority-Latino district anywhere in the City. (*Id.* ¶ 21–22.) The largest Latino citizen voting-age population in any hypothetical contiguous district is 31.6%. (*Id.* ¶ 23.) That district would contain only a third of Santa Monica's Latino citizen voting-age residents, leaving the vast majority of the Latino voting population scattered across the other six districts. (*Id.* ¶ 26.)

It is impossible to draw not just a contiguous majority-Latino district, but even a non-contiguous district. The largest the Latino citizen voting-age population that could be included in even an irregularly shaped noncontiguous district is 37.1%. (*Id.* ¶ 21.)

D. A "Coalition District" Also Cannot Be Created Anywhere in the City.

The City's African-American population, like its Latino population, is small and widely dispersed across the City. (*Id.* ¶ 29.) It is thus also impossible to draw a contiguous, equipopulous "coalition" district in which a majority of potential voters would be Africa-American or Latino. (*Id.*

¶ 33.) The largest the population of such voters could be in any hypothetical contiguous district is 41%. (*Ibid.*) That district would include only 28% of Latino voters and only 43% of African-American voters, such that the vast majority would be scattered across the remaining six districts. (*Id.* ¶ 34.)

III. LEGAL STANDARD

To prevail on summary judgment, a defendant must show that the "cause of action has no merit" by demonstrating "that one or more of the elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) A defendant may "point to the absence of evidence to support the plaintiff's case" (*Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 482, italics omitted), or present affirmative evidence negating an essential element of the plaintiff's claim. (See *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334–335.) A defendant need not conclusively negate an element of the plaintiff's cause of action, but must only "show that the plaintiff does not possess needed evidence . . . [and] that the plaintiff cannot reasonably obtain needed evidence." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854).

"[T]he burden [then] shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) To avoid summary judgment, the plaintiff must "set forth the specific facts showing that a triable issue of material fact exists." (*Ibid.*) "[T]he plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of the defendant's showing." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162–163.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Id.* at p. 163.) The complaint represents the "outer measure of materiality" for a summary-judgment motion, which may not be denied on issues not raised therein. (*FPI Dev., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) If the plaintiff cannot carry the burden of producing substantial admissible evidence to establish a triable issue of material fact, the defendant is entitled to judgment as a matter of law. (See *Saelzler v. Advanced Grp. 400* (2001) 25 Cal.4th 763, 780–781.)

A party may also move for summary adjudication "as to one or more causes of action" or "one or more claims for damages." (Code Civ. Proc., § 437c, subd. (f)(1).)

IV. ARGUMENT

A. There Is No Triable Issue of Material Fact on Plaintiffs' CVRA Claim.

1. The CVRA requires plaintiffs to prove that an at-large electoral system has caused vote dilution.

In construing the CVRA, as with any statute, the court's inquiry "begins with the statute's text, assigning the relevant terms their ordinary meaning." (*People v. Hubbard* (2016) 63 Cal.4th 378, 387.) An at-large electoral system violates the CVRA where it has "*impair[ed]* the ability of a protected class to elect candidates of its choice . . . *as a result of* the dilution . . . of the rights of voters who are members of a protected class"—in other words, where the at-large system has directly caused minority vote dilution. (§ 14027, italics added; see also § 14029 [authorizing the imposition of a remedy only if section 14027 is found to have been violated]; *Sanchez v. City of Modesto*, 145 Cal.App.4th at p. 686 [CVRA "liability . . . is imposed because of dilution of the plaintiffs' votes"]; see also Ex. E [plaintiffs' demand letter, contending that "voting within Santa Monica is racially polarized, resulting in minority vote dilution, and therefore . . . [a] violat[ion] of the California Voting Rights Act"].)

"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." (*Thornburg v. Gingles* (1978) 478 U.S. 30, 50, fn. 17.) Vote dilution is not assessed in a vacuum; it must be *measured* through a comparison. A minority group's voting strength must be compared against a benchmark of full or undiluted strength to determine whether it has been watered down by some voting practice or standard. (*Id.* at p. 88 (conc. opn. of O'Connor, J.).) Under the FVRA, courts identify vote dilution in only one way: by determining whether it is possible to create a contiguous, equipopulous, majority-minority district. (*Bartlett v. Strickland* (2009) 556 U.S. 1, 18–26 (plurality opn.).)

While the CVRA does not necessarily require compactness (§ 14028(c)), this does not eliminate the statute's requirement of a finding of vote dilution and causation. (§ 14027.) Nor, constitutionally speaking, could it, and the CVRA must be construed to avoid constitutional infirmities. (See Part IV.A.3, *infra.*) Moreover, if the CVRA were construed to permit a finding of liability (and the imposition of a remedy) without a showing that at-large elections caused vote dilution—that is, based on Plaintiffs' theory of racially polarized voting alone—it would lead to absurd and unfair consequences.

For instance, under this view, even a member of a protected class of one who voted for a different candidate than the racial majority could win a CVRA case, collect attorney's fees, and force a change in electoral systems, notwithstanding the obvious absence of any vote dilution. The Court should reject this irrational construction of the CVRA by applying section 14027's plain language to require proof that the at-large method of election has caused vote dilution. (*Stanton*, *supra*, 28 Cal.3d at p. 115.)

2. The City's electoral system indisputably has not diluted Latino votes.

Vote dilution purportedly caused by an electoral system cannot be shown without reference to an alternative system that would produce superior results. The only such postulated alternative that plaintiffs have pleaded is a districted electoral system, with one of the seven new districts to be located in the Pico Neighborhood. But indisputable facts, in the form of census and voting data broken out by every relevant geographic and political unit and analyzed by an expert, conclusively demonstrate the impossibility of constructing a Latino-majority district anywhere in the City.

Latinos are too few in number and too widely dispersed to comprise a contiguous, equipopulous, majority-Latino district. (See Morrison Decl. ¶¶ 16–25.) Latinos account for only 13.2% of the citizen voting-age population, and there is a substantial number of Latino voters—at least 10% of all voters—in almost 60% of all precincts. (*Id.* ¶ 14.) Thus, the ceiling on the size of the Latino citizen voting-age population in any contiguous, equipopulous district is 31.6%—a far cry from a majority. (*Id.* ¶ 23.) If white bloc voting were occurring, as plaintiffs allege (FAC ¶¶ 21–24) (and the City disputes), Latinos in such a district would not be able to overcome it to elect candidates of their choice.

Dividing the City into districts would, if anything, have the perverse effect of *weakening* Latino voting strength. Two of every three voters live outside any hypothetical district located in the Pico Neighborhood. (Morrison Decl. ¶ 26.) Drawing a district to capture a plurality of Latino voters—who within that hypothetical district would remain a minority of voters who could not elect candidates of their choice—would assign other Latino voters to districts containing an even higher percentage of whites. Were racially polarized voting occurring, such a districted system would therefore "impair[] the ability of a protected class to elect candidates of its choice." (§ 14027.)[2]

[2] In *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1414, the Ninth Circuit held that where two majority-Latino districts could be created, the district court erred in reasoning that the dis-

3. To the extent it permits liability premised on a showing of racially polarized voting alone, the CVRA is unconstitutional as applied to the facts of this case.

Plaintiffs previously have argued that the CVRA requires them to prove next to nothing—that it authorizes liability where there is racially polarized voting, plain and simple. As applied to Santa Monica, that argument is fundamentally incompatible with the United States Constitution.

The CVRA is a largely untested statute that has produced only three published decisions. (See *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781; *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223; *Sanchez, supra,* 145 Cal.App.4th 660.) None of those decisions addresses the argument this motion presents—namely, that the statute is unconstitutional as applied to the facts of *this case* if it authorizes the finding of liability and the imposition of a remedy notwithstanding the impossibility of demonstrating vote dilution caused by the City's at-large electoral system. *Sanchez* recognized the Legislature's intent to provide a broader cause of action for "vote dilution" than was available under the FVRA, but explicitly left unresolved, among other things, both the elements required to establish a CVRA violation and the "meaty constitutional issues" posed by an as-applied challenge to CVRA remedies in a particular case. (*Sanchez*, *supra*, 145 Cal. App. 4th at pp. 665, 690.)[3]

Because the constitutional limitations into which plaintiffs' claim runs headlong have been addressed principally in FVRA rather than CVRA cases, and because the CVRA expressly incorporates federal case law (§ 14026(d), (e)), federal cases are the appropriate guide to resolving the City's constitutional argument. Those cases explain that where race is the predominant factor motivating an action altering a voting system, that action violates the Fourteenth Amendment unless it satisfies strict

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tricting plan must be rejected because "approximately 60% of the Hispanics eligible to vote in Watsonville would reside in five districts outside the two" majority Latino districts." The court concluded that relegating even a substantial number of minority voters to overwhelmingly white districts is permissible where it is possible to draw "minority-controlled districts." (*Ibid.*) Here, by contrast, it is impossible to draw even one such district, and so it is appropriate to consider the potential vote-diluting effects of districting on Latinos outside the concentrated district.

[3] *Sanchez* rejected only the claim before it—namely, Modesto's contention that the CVRA is facially unconstitutional because its "use of race constitutes reverse racial discrimination and is a form of unconstitutional affirmative action benefiting only certain racial groups." (*Sanchez*, *supra*, 145 Cal.App.4th at p. 665.) The City does not contend that the CVRA is unconstitutional in every application, and instead contends that, on the facts of this case, to the extent it allows liability or the imposition of a remedy premised solely on a showing of racially polarized voting, it is unconstitutional as applied. As noted, *Sanchez* itself contemplated the validity of an as-applied challenge of this kind. (*Ibid.*)

scrutiny. (E.g., *Shaw*, *supra*, 517 U.S. at pp. 904–908.) The cases also impose certain preconditions on the recognition of liability in vote-dilution cases to avoid constitutional doubt. (E.g., *Bartlett*, *supra*, 556 U.S. at p. 21.) A finding of liability and the resulting imposition of a necessarily race-predominant remedy in this case would exceed those constitutional limitations.

a. Separating voters based predominantly on race triggers strict scrutiny.

The CVRA is modeled on Section 2 of the FVRA, which prohibits voting standards or practices that result in vote dilution "on account of race or color." (52 U.S.C. § 10301.) Identifying and remedying vote dilution thus requires the classification of citizens on the basis of their race, the very thing the Supreme Court has interpreted the Equal Protection Clause to forbid. Although some small degree of race-consciousness does not offend the Constitution (see *Sanchez*, *supra*, 145 Cal.App.4th at p. 681), substantial reliance on race does, except under sharply limited circumstances—namely, where a government has a compelling interest to take action *and* its action is narrowly tailored to resolve the problem. (See *Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463–1464; *Shaw v. Hunt* (1996) 517 U.S. 899, 907–908; *McLaughlin v. Florida* (1964) 379 U.S. 185, 192.) In particular, governments may not draw voting districts predominantly on the basis of race; racial gerrymandering is "constitutionally suspect . . . whether or not the reason for the racial classification is benign or the purpose remedial." (*Shaw*, *supra*, 517 U.S. at pp. 904–905; see also *Cooper*, *supra*, 137 S.Ct. at p. 1463; *Bethune-Hill v. Va. State Bd. of Electors* (2017) 137 S. Ct. 788, 797–799.) Such gerrymandering, whatever its intent, violates the principle "[a]t the heart of the Constitution's guarantee of equal protection"—"that the Government must treat its citizens as individuals, not as simply components of a racial . . . class. When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." (*Miller v. Johnson* (1995) 515 U.S. 900, 911–912.)

There is an inherent tension, then, between the anti-discrimination purpose of the Fourteenth Amendment and the racial classifications that are part and parcel of finding liability and imposing a remedy under statutes designed to cure vote dilution. The Supreme Court has observed that walking this tightrope "is a most delicate task." (*Id.* at p. 905.) Governments may not hold elections that violate voting rights laws, but they also may not separate voters on the basis of race to avoid liability under

those statutes unless their actions survive strict scrutiny—that is, unless any remedy is narrowly tailored to advance a compelling state interest. (*Bush v. Vera* (1996) 517 U.S. 952, 976–979.)

In this case, as is explained below, the constitutional limitations on excessively race-based governmental action prohibit either a finding of liability or the imposition of a remedy.

b. The *Gingles* preconditions ensure that an election system has caused vote dilution and that a government thus has a compelling interest in race-based corrective action.

Courts have developed a mechanism for ensuring that vote dilution is identified, and race-based remedies imposed, only in appropriate cases: the three *Gingles* preconditions, under which no vote-dilution claim is actionable unless (1) the minority group at issue is numerous and compact enough to form a majority in a district; (2) the minority group votes in a cohesive bloc; and (3) the majority also votes cohesively, such that it "usually" defeats the minority group's preferred candidates. (478 U.S. at pp. 50–51.) The Court "has made clear that unless each of the three *Gingles* prerequisites is established, there neither has been a wrong nor can be a remedy." (*Cooper*, *supra*, 137 S.Ct. at p. 1472; *see also Bartlett, supra,* 556 U.S. at p. 15; *Growe v. Emison* (1993) 507 U.S. 25, 40–41.)

The three *Gingles* preconditions serve as guardrails that keep Section 2 within constitutional limits. The preconditions ensure that the statute is the basis of liability if and only if a minority group's voting strength has been *diluted*—in other words, only where an injury truly has been suffered—and only where that dilution is *caused* by the challenged electoral system.

The Supreme Court has assumed without deciding that governments have a compelling interest in remedying actual vote dilution. (*Cooper*, *supra*, 137 S.Ct. at p. 1464.) Anything less—not vote dilution, but instead a failure to maximize a minority group's voting power—is not a cognizable injury and so not a constitutional basis for racial classifications. (See *Bartlett, supra,* 556 U.S. at pp. 14–15; *Johnson v. De Grandy* (1994) 512 U.S. 997, 1015–1016.) Attempting to maximize voting power, rather than aiming to ameliorate vote dilution, would improperly elevate race above all other considerations. (See *Shaw v. Reno* (1993) 509 U.S. 630, 657 ["Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions"].)

To separate potentially constitutional claims to remedy vote dilution from excessively race-based and plainly unconstitutional demands for maximum representation or even over-representation,

the Supreme Court has required evidence in the form of a comparison between a minority group's current, allegedly diluted voting strength and its voting strength under a hypothetical alternative system. (See *Gingles*, *supra*, 478 U.S. at p. 50, fn. 17; see also *id.* at p. 88 (conc. opn. of O'Connor, J.).)

The first and second *Gingles* preconditions provide that benchmark. They limit liability to those cases in which the members of a cohesive minority group, if concentrated within a single hypothetical district, could elect candidates of their choice. (*See Growe*, *supra*, 507 U.S. at p. 41.) They ensure that the minority group's inability to elect is a function of vote dilution caused by the challenged electoral system, not the group's small numbers or dispersion in a substantially integrated district. (*See Gingles*, supra, 478 U.S. at p. 50 & fn. 17). The preconditions thus avoid the constitutional peril of "unnecessarily infus[ing] race into virtually every redistricting." (*Bartlett*, *supra*, 556 U.S. at p. 21.)

c. Imposing liability on Santa Monica based on racially polarized voting alone would be an unconstitutional application of the CVRA.

The undisputed record shows it is impossible to construct a contiguous, majority-Latino district in the City. (See Morrison Decl. ¶ 25.) Plaintiffs therefore certainly could not pursue a Section 2 claim against the City. (*Bartlett*, *supra*, 556 U.S. at p. 26.) The question is whether it makes any difference that they brought their claim under the CVRA instead. As a constitutional matter, it does not.

Federal courts have imposed restrictions on vote-dilution claims to avoid conflicts with the Fourteenth Amendment. Those same restrictions necessarily apply to the CVRA. (U.S. Const., art. VI, cl. 2 [Supremacy Clause].) Invidious racial classifications and excessively race-conscious remedies for purported problems of vote dilution are no less unconstitutional when pursued to avoid liability under the CVRA than they are when pursued to avoid liability under the federal Voting Rights Act. Whatever its drafters' intent, the CVRA cannot authorize unconstitutional racial classification of persons or command public entities to engage in odious racial stereotyping. In some cases, like this one, the CVRA's departures from federal law, including its purported abandonment of the compactness requirement, render the statute unconstitutional, to the extent the CVRA is applied to allow a finding of liability and/or the imposition of remedies absent cognizable proof of vote dilution.

Here, Latinos are not numerous or compact enough to comprise the majority of a contiguous, equipopulous district—the only remedy the FAC expressly seeks. (See FAC ¶¶ 3, 34, 51.) That such

a district is impossible means "there neither has been a wrong nor can be a remedy." (*Growe*, *supra*, 507 U.S. at pp. 40–41; see also *Gomez*, *supra*, 863 F.2d at p. 1413 ["unless the minority group could constitute a majority in a single-member district, there is no sense in which 'the *multimember form* of the district' is responsible for any inability of the minority group to participate equally"].)

Although plaintiffs have previously contended that racially polarized voting, which they define as a bare difference in voting patterns across races, is itself a harm demanding a remedy, governments do not have a compelling interest in eradicating any and all discernible racial voting patterns. To the contrary, such patterns do not become harmful until they result in vote dilution. (See *League of United Latin Am. Citizens v. Perry* (2006) 548 U.S. 399, 433 (opn. of Kennedy, J.) (*LULAC*) ["Under § 2 . . . the injury is vote dilution"]; *Shaw*, *supra*, 517 U.S. at p. 917 [districts are drawn to remedy "vote-dilution injuries"].) If bare differences in voting were enough to require electoral change, even a protected "class" of one person who voted in demonstrably different ways from the racial majority could bring a voting-rights claim. But voting-rights statutes do not and cannot command perfectly racially proportional representation. (See, e.g., *Nipper v. Smith* (11th Cir. 1994) 39 F.3d 1494, 1516–1517, 1525 (en banc); see also 52 U.S.C. § 10301 ["nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"].)

Here, there is no triable issue of Latino vote dilution because plaintiffs cannot show that the districted elections scheme that they seek (FAC ¶¶ 3, 34, 51) would produce electoral outcomes more favorable to Latinos than the current system. (Morrison Decl. ¶ 25.) Without a showing of Latino vote dilution, there can be no compelling interest that would justify requiring the City to draw districts along predominantly racial lines; indeed, it is impossible to narrowly tailor a race-conscious remedy to cure a harm (vote dilution) that does not exist.[4] Thus, to the extent the CVRA would impose liability to

[4] It is not just Latinos' small numbers, but also their broad dispersion, that causes the constitutional difficulties in this case. Even if the Latino population were substantially larger, the distribution of Latino voters all throughout the City would make it impossible to create any district that would pass constitutional muster. (See Morrison Decl. ¶ 14 [Latinos account for at least one in ten adults in almost 60% of precincts].) Any effort to draw a district would produce not a contiguous shape that hews to traditional districting principles, but instead a plainly unconstitutional Rorschach blot whose contours are defined predominantly—and therefore unlawfully—by race. (See *id.* Fig. 5 [contiguous district with largest possible Latino citizen voting-age population is unconstitutionally irregular]; see also, e.g., *Shaw*, *supra*, 517 U.S. at p. 906; *Miller*, *supra*, 515 U.S. at p. 916; *Stabler v. Cty. of Thurston* (8th Cir. 1997) 129 F.3d 1015, 1025; *Reed v. Town of Babylon* (E.D.N.Y. 1996) 914 F.Supp. 843, 871–874.)

authorize necessarily race-predominant remedies based solely on a showing of racially polarized voting, it is unconstitutional as applied to the facts of this case.

4. Alternatively, summary judgment is appropriate because the districting remedy plaintiffs seek is constitutionally unavailable.

Alternatively, the court need not reach the as-applied unconstitutionality of the CVRA, and may instead grant summary judgment on the independent basis of the constitutional unavailability of the districting remedy that Plaintiffs seek. With respect to remedy, the CVRA expressly allows consideration of the "fact that members of a protected class are not geographically compact or concentrated." (§ 14028(c).) Thus, in addressing remedies, the CVRA does not purport to prohibit, and instead encourages, consideration of the first *Gingles* requirement. CVRA remedies, moreover, must conform to the Supreme Court's vote-dilution-remedy cases. (*See Sanchez, supra*, 145 Cal.App.4th at pp. 668–669, 690 [recognizing constitutional limitations on remedies for vote dilution].) For all the reasons discussed above, because plaintiffs cannot present evidence to satisfy the first *Gingles* requirement, they cannot demonstrate that the current at-large system has caused Latino vote dilution, and so they cannot demonstrate that a switch to districted elections would serve, much less be narrowly tailored to serve, any compelling interest. To the contrary, based on the undisputed demographics of Santa Monica, any switch to districted elections is likely to *dilute* Latino voting power. (Morrison Decl. ¶ 26; see *Shaw*, *supra*, 517 U.S. at 915–916 [remedial action must "at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored"].)

Plaintiffs may contend that summary judgment is inappropriate because the remedies theoretically available under the CVRA might be more expansive than under the FVRA. (See § 14029 [upon finding liability, "the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation"].) Even though it is impossible to create a majority-Latino district in Santa Monica, plaintiffs might suggest various alternatives, including a Latino "influence" district, a "coalition" district containing a majority of Latinos and voters of another protected class, or even some variation on an at-large scheme, such as ranked-choice voting. But plaintiffs cannot prove entitlement to any hypothetical alternative potential arrangement.

First, hypothetical alternative remedies are not authorized under California law. Elections in

this State are, by statute, held on either an at-large or districted basis. (See Gov. Code, § 34871 [authorizing cities to adopt district elections in lieu of at-large elections]; Educ. Code, §§ 5027, 5028, 5030 [authorizing at-large or district elections for school boards]; Elec. Code, § 10508 [same for special districts].) Nothing in the relevant statutes authorizes variations either on traditional at-large schemes, such as ranked-choice voting, or on traditional districted schemes, such as "influence districts."[5]

Second, plaintiffs have neither pleaded hypothetical alternative remedies nor supported any such remedies in their discovery responses. And they cannot justify them with admissible evidence in opposition to summary judgment. Though plaintiffs have occasionally noted the abstract possibility of other remedies, from the very outset of the case they have demanded district elections alone. (See FAC ¶¶ 3, 34, 51.) "[T]he pleadings delimit the scope of the issues on a summary judgment motion," and "[a] party may not oppose a summary judgment motion based on a claim, theory, or defense . . . not alleged in the pleadings." (*Cal. Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3.)[6]

Third, alternative hypothetical remedies would in any event be unconstitutional, at least under the circumstances presented by this case. It is no accident that the only remedy available under the FVRA is a majority-minority district. As is explained below, federal courts have considered and rejected, on constitutional grounds, a wide array of alternatives, holding that the only remedy consistent

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[5] Some of these remedies, such as cumulative voting, have been squarely rejected in vote-dilution cases. (See, e.g., *Aldasoro v. Kennerson* (S.D.Cal. 1995) 922 F. Supp. 339, 355, fn. 4 [noting that cumulative voting "is rarely used in this country . . . and it is not legally authorized by the California Legislature as a method of electing School Board trustees"]; Ex. D [Los Angeles Superior Court finding that "a California City may not adopt a cumulative voting method pursuant to a settlement of a lawsuit alleging violations of the California Voting Rights Act"]; see *ibid.* [letter from California Secretary of State explaining that there is no "express statutory authority for the use of cumulative voting in California by a general law city," nor has the Secretary ever certified such a system]; see also *Cousin v. Sundquist* (6th Cir. 1998) 145 F.3d 818, 822, 829–831.) Courts have been similarly hostile to other potential remedies in Section 2 cases, including single-transferable-vote schemes (see *Brantley v. Brown* (S.D.Ga. 1982) 550 F.Supp. 490, 493, fn. 2), and increasing the size of the governing board (*Holder v. Hall* (1994) 512 U.S. 874, 880–885). Such alternative remedies not only were not pleaded by plaintiffs, but also raise much the same constitutional difficulties as influence and coalition districts discussed below. Then, too, these alternatives are all at-large systems, and would thereby leave the City vulnerable to further challenges under the CVRA. (See § 14027.).)

[6] Neither the FAC nor plaintiffs' interrogatory responses support any other remedy. Plaintiffs' years-long near-silence on these alternative remedies precludes them from relying on them now to stave off summary judgment. (See *Government Emps. Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98 & fn. 4 ["the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers"].) And plaintiffs have no admissible evidence creating triable issues of fact regarding any other remedies, anyway.

with the Equal Protection Clause is a majority-minority district narrowly tailored to cure a demonstrable problem of vote dilution. (See *Bartlett*, *supra*, 556 U.S. at p. 21 ["To the extent there is any doubt whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause."].)

Although the CVRA may have been intended to allow for the creation of "influence" districts, federal courts have rejected such districts as standardless and beset by constitutional perils. "Influence districts" are unconstitutional because they reflect a lack of injury—and thus a lack of any compelling state interest to classify persons on the basis of race. If Section 2 protected mere "influence," "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." (*LULAC*, *supra*, 548 U.S. at p. 446.) Influence claims are inherently unmanageable, as there is no reasonable lower bound for the number of voters who could be said to "influence" the outcome of an election: "A single voter is the logical limit." (*Illinois Legislative Redist. Comm'n v. LaPaille* (N.D.Ill. 1992) 786 F.Supp. 704, 716.) Federal courts therefore reject influence districts in favor of an objective, constitutionally sound marker of injury: legally cognizable vote dilution, as shown by the possibility of a majority-minority district. "[A] minority group cannot be awarded relief on a vote dilution claim unless it can demonstrate that a challenged structure or practice impedes its ability to determine the outcome of elections." (*Dillard v. Baldwin Cty. Comm'rs* (11th Cir. 2004) 376 F.3d 1260, 1267 [rejecting influence districts as viable remedy and collecting cases showing "'influence dilution' concept . . . has been consistently rejected by other federal courts"].)

Even if influence districts were lawful remedies, they would nevertheless pose insuperable problems in this case. As an initial matter, such districts would threaten to disenfranchise the bulk of Latino voters. No more than 31.6% of the citizen voting-age population of any hypothetical contiguous district could consist of Latinos. (Morrison Decl. ¶ 23.) If it were assumed for the sake of argument that "there is racially polarized voting" in the City, then "the more [Latino] voters that are packed into a single legislative district, *short of a majority*, the less the [Latino] voting power or influence in the [City] as a whole." (*Turner v. Arkansas* (E.D.Ark. 1991) 784 F.Supp. 533, 571.) An influence district, far from enhancing Latino voting strength, would likely depress it by submerging the bulk of Latino votes into largely white districts—in contrast to the current system, where Latino-preferred candidates

can draw strength from Latino voters citywide. This adverse effect of an influence district is yet another reason why constitutional principles preclude their use as a remedy. Indeed, the fracturing of minority votes across multiple districts is often itself the basis of vote-dilution claims. (E.g., *Bartlett*, *supra*, 556 U.S. at pp. 18–19 ["where a majority-minority district is cracked by assigning some voters elsewhere, then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect a candidate of choice is a present and discernible wrong"]; *Voinovich v. Quilter* (1993) 507 U.S. 146, 153 ["Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice"].)

Moreover, the demographic evidence demonstrates beyond doubt that any district whose citizen voting-age population is above even 30% Latino would have to be "so bizarre on its face that it is unexplainable on grounds other than race." (*Shaw*, *supra*, 509 U.S. at p. 644, internal quotation marks omitted; see Morrison Decl. Fig. 4 [showing bizarre district].) Such a district, designed to include "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." (*Shaw*, *supra*, 509 U.S. at p. 647.)

Other district-based remedies, such as a "coalition" district of Latino and African-American voters, would fare no better. For one thing, plaintiffs did not plead anything of the sort, as they have not alleged, even in a conclusory way, that African-Americans and Latinos vote cohesively. For another, federal courts have conclusively rejected coalition districts, which demand unlawful maximization of voting strength and threaten to "transform the Voting Rights Act from a law that removes disadvantages based on race into one that creates advantages for political coalitions." (*Hall v. Virginia* (4th Cir. 2004) 385 F.3d 421, 431.) But perhaps the biggest problem with a coalition-district proposal is that, as with a Latino-majority district, it is impossible to create a Latino-and-African-American-majority district anywhere in the City. (See Morrison Decl. ¶¶ 28–34.) And any hypothetical district containing even close to a majority of Latino and African-American voters would be so highly irregular in shape as to be plainly, and unconstitutionally, racially gerrymandered. (*Id.* ¶¶ 30–34.)

Because no constitutional electoral alternative could enhance Latino voting strength, Latino voters have not suffered any vote dilution that could serve as a compelling interest in making otherwise

invidious racial classifications. Plaintiffs therefore cannot demand any remedy at all, much less one unconstitutionally dependent on race. Thus, whether on liability or the unavailability of remedy, the Court should grant summary judgment on plaintiffs' CVRA claim.[7]

B. There Is No Triable Issue of Material Fact on the Equal Protection Claim

To survive summary judgment on their Equal Protection claim, plaintiffs must adduce evidence that the relevant decisionmakers in 1946 enacted the City's current at-large electoral system for the purpose of discriminating against ethnic minorities, and that the City Charter has had a disparate impact on them. (*Personnel Adm'r of Mass. v. Feeney* (1979) 442 U.S. 256, 279; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 266.) Plaintiffs have no such evidence.

1. There is no admissible evidence of disparate impact.

Plaintiffs have no admissible evidence of disparate impact for much the same reason that they have no evidence of vote dilution: They cannot prove that the City's at-large electoral system is responsible for any purported racial discrepancies in electoral outcomes. Plaintiffs cannot make even a prima facie case for discrimination without showing a causal link between the challenged at-large electoral system and purportedly adverse impacts on ethnic minorities. (*Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 994.) This "robust causality requirement ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create." (*Texas Dept. of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.* (2015) 135 S.Ct. 2507, 2523, internal quotation marks omitted.)

Plaintiffs cannot satisfy this causality requirement, as no evidence suggests that now or at any other time an alternative electoral system would have produced results more favorable to Latino voters. (See Part IV.A.2, *supra.*) That absence of evidence is fatal to a disparate-impact claim. (See, e.g.,

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[7] The Ninth Circuit's decision in *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543 (per curiam) does not preclude a grant of summary judgment premised on the unavailability of any constitutionally permissible remedy. There, considering allegations of a VRA violation, the Court found "premature" the district court's grant of summary judgment based on its "determination that any relief provided to plaintiffs would not survive strict scrutiny." (*Id.* at pp. 558–559.) In so holding, the court recognized the Supreme Court's assumption that FVRA compliance can be a compelling state interest, meaning that the remedy inquiry would reduce to an analysis of narrow tailoring. Here, to the contrary, plaintiffs cannot establish any minority vote dilution, the harm that justifies treating FVRA compliance as a compelling state interest. As a result, summary judgment based on Plaintiff's inability to demonstrate an entitlement to any necessarily race-based remedy remains appropriate.

Elston v. Talladega Cty. Bd. of Educ. (11th Cir. 1993) 997 F.2d 1394, 1407, 1415.)

2. There is no admissible evidence of discriminatory intent.

In addition, plaintiffs have no evidence that the relevant decisionmakers *intended* a disparate impact. (See *Feeney*, *supra*, 442 U.S. at p. 279 [decisionmakers must have decided to amend the City Charter in 1946 "because of, not merely in spite of, [the amendment's] adverse effect upon an identifiable group"].) Although plaintiffs have never identified who, exactly, the relevant decisionmakers were (FAC ¶¶ 35, 42 [suggesting they may have been the Board of Freeholders or, alternatively, the voting public]), plaintiffs also have failed to identify admissible evidence demonstrating that *anyone* who could have been a decisionmaker was not only aware that the City's current electoral system could disadvantage ethnic minorities, but affirmatively wanted it to do so. Nor is this even a plausible theory given undisputed facts about what the challenged 1946 Charter amendment accomplished. From 1915 until 1946, City residents elected the three members of the governing board on an at-large basis. (St. ¶ 1.) Candidates could run for only one of three distinct commissioner positions, and so a majority of the vote was required to ensure victory. With the Charter amendment in 1946, the size of the board was expanded from three to seven seats, and candidates no longer ran for a single seat, but one of three or four seats. (*Id.* ¶¶ 1, 2.) As now only one-third or one-fourth of the vote could guarantee victory, the changes wrought in 1946 could only have made it easier for relatively small but cohesive voting groups to succeed in electing candidates of their choice. If the relevant decisionmakers wished to discriminate against ethnic minorities, they picked an illogical and ineffective way to do it.

V. CONCLUSION

There is no triable issue of material fact regarding plaintiffs' claims, which contradict the undisputed demographic facts. Accordingly, the Court should grant summary judgment, or, at a minimum, summary adjudication, including on plaintiffs' district-elections theory of liability and remedy.

DATED: March 29, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 

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PROOF OF SERVICE

I, Cynthia Britt, declare:

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

On March 29, 2018, I served the City of Santa Monica's Motion for Summary Judgment or, in the Alternative, Summary Adjudication on the interested parties in this action by causing the service delivery of the above document as follows:

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

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

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

Executed on March 29, 2018, in Los Angeles, California.

Cynthia Britt