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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **FOR THE COUNTY OF LOS ANGELES**

18

19 PICO NEIGHBORHOOD
   ASSOCIATION; and MARIA
20 LOYA,

21   Plaintiffs,

22 v.

23 CITY OF SANTA MONICA, and
   DOES 1 through 100, inclusive,
24

25   Defendants.

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27

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Case No.: BC616804

DECLARATION OF KEVIN SHENKMAN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Date: June 14, 2018
Time: 8:45 a.m.
Dept.: 28

Assigned for all purposes to the Honorable Yvette Palazuelos

1

SHENKMAN DECLARATION

I, Kevin I. Shenkman, declare as follows:

1.   I am an attorney duly licensed to practice law before all courts of the State of California and I am a partner with Shenkman & Hughes PC, attorneys of record for Plaintiffs in the above-captioned case. The facts set forth in this declaration are within my personal knowledge and, if called as a witness, I could and would competently testify as follows:

2.   A true and correct copy of the June 2016 report of the Santa Monica Planning Commission is attached hereto as **Exhibit A**. In that report, the Planning Commission acknowledges that the Pico Neighborhood has a much higher proportion of Latinos and African Americans than the rest of Santa Monica:

> The Pico Neighborhood has one of the most diverse makeups of any
> neighborhood in Santa Monica. Over 39% of residents in Pico identify
> as Hispanic, compared to 13% citywide. African Americans constitute
> 12% of the Pico population (compared to 3.9% citywide).

While these numbers appear to be based on the 2010 Census, and the more recent US Census American Community Survey indicates a higher proportion of Latinos, the point is still true – Santa Monica's Latino and African American communities are concentrated in the Pico Neighborhood.

3.   A true and correct copy of the judgment in *Garrett v. City of Highland*, San Bernardino Superior Court Case No. CIVDS1410696, is attached hereto as **Exhibit B**. At paragraph 6 of that judgment, the court acknowledges reviewing a letter from the Secretary of State to Judge Terry Green of the Los Angeles Superior Court, the letter which Defendant City of Santa Monica shows that the Secretary of State believes cumulative voting is unlawful in California. The San Bernardino Court came to the opposite view:

> The Secretary of State's letter does not express a view that cumulative
> voting is either unlawful or unavailable as a remedy under the CVRA,
> and, in any event, this Court is not bound by the views of the Secretary of

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SHENKMAN DECLARATION

State. Regardless of the Secretary of State's letter, this Court finds that cumulative voting is a legally permissible method of electing the governing board of a political subdvision of the State of California, and is an available remedy under the CVRA.

4.   A true and correct copy of the Santa Clara Superior Court's May 15, 2018 Proposed Statement of Decision in *Yumori Kaku v. City of Santa Clara*, Case No. 17CV319862 is attached hereto as **Exhibit C**. Among other things, the court describes the City of Santa Clara's current numbered-post at-large election system. Other California cities, such as Elk Grove, also have numbered-post at-large elections.

5.   A true and correct copy of the face page and relevant pages of the transcript of the deposition of Tony Vazquez is attached hereto as **Exhibit D**. In that portion of the deposition, Mr. Vazquez described the racial appeals in one of his elections for the Santa Monica City Council.

Executed this 30th day of May, 2018, in Los Angeles, California.

_____
Kevin Shenkman

SHENKMAN DECLARATION

To: Planning Commission

From: Jing Yeo, Planning Manager

Subject: Study Session on Pico Neighborhood Plan

Recommended Action

It is recommended that the Planning Commission review the baseline data presented and provide feedback regarding the concepts and topics to be addressed in the proposed Pico Neighborhood Plan.

Executive Summary

City Council adopted the Zoning Ordinance Update on May 12 23, 2015. In adopting the ordinance, Council gave direction on certain work efforts to be undertaken in light of changes in the City's physical environment that have occurred since the LUCE was adopted and to recognize evolving priorities and policies. One of the items was to review and establish zoning standards for Pico Boulevard and for the largely residential Pico Neighborhood.

This report identifies the baseline zoning protections already in place to protect neighborhood character and presents demographic data from the 2010 Census and City of Santa Monica Wellbeing Index as an introduction to the socioeconomic issues affecting Pico Neighborhood. This report also includes a discussion on themes that have emerged from early outreach and engagement with the Pico community, including the Pico Neighborhood Association and the Pico Improvement Organization.

Discussion

Boundaries of the Proposed Pico Neighborhood Plan

A logical starting point for a discussion on the proposed Pico Neighborhood Plan is its boundaries, which were established by the Zoning Ordinance Update, which became effective July 24, 2015. Zoning Ordinance Figure 9.40 020.A identified the Pico Neighborhood Area as the geographic area encompassed by Pico Boulevard to the I-10 Freeway, and one block east of Lincoln Boulevard to Centinela Avenue. An additional portion of land area was also included north of the I-10 Freeway to Exposition Boulevard, and from Stewart Avenue to Centinela. The area defined by the Zoning Ordinance encompasses approximately 375 acres of R1 (Single-Family Residential), R2 (Low Density Residential), NC (Neighborhood Commercial), MUBL (Mixed-Use Boulevard Low), and OS (Parks and Open Space).

Ex. D – 1

It is important to note that the boundaries of the proposed Pico Neighborhood Plan are distinct from the political boundaries of the Pico Neighborhood Association (PNA), which encompass a much larger area including portions of the Downtown and Mid-City. Within the greater context of the PNA's political boundaries a number of highly detailed planning efforts have been undertaken in coordination with the rezoning of the City's former industrial lands and planning for the Expo Light Rail. These efforts include:

- The Bergamot Area Plan (adopted 2013)
- The Memorial Park Neighborhood Plan (in progress)
- The Downtown Community Plan (in progress)
- The Civic Center Specific Plan (adopted 2005)
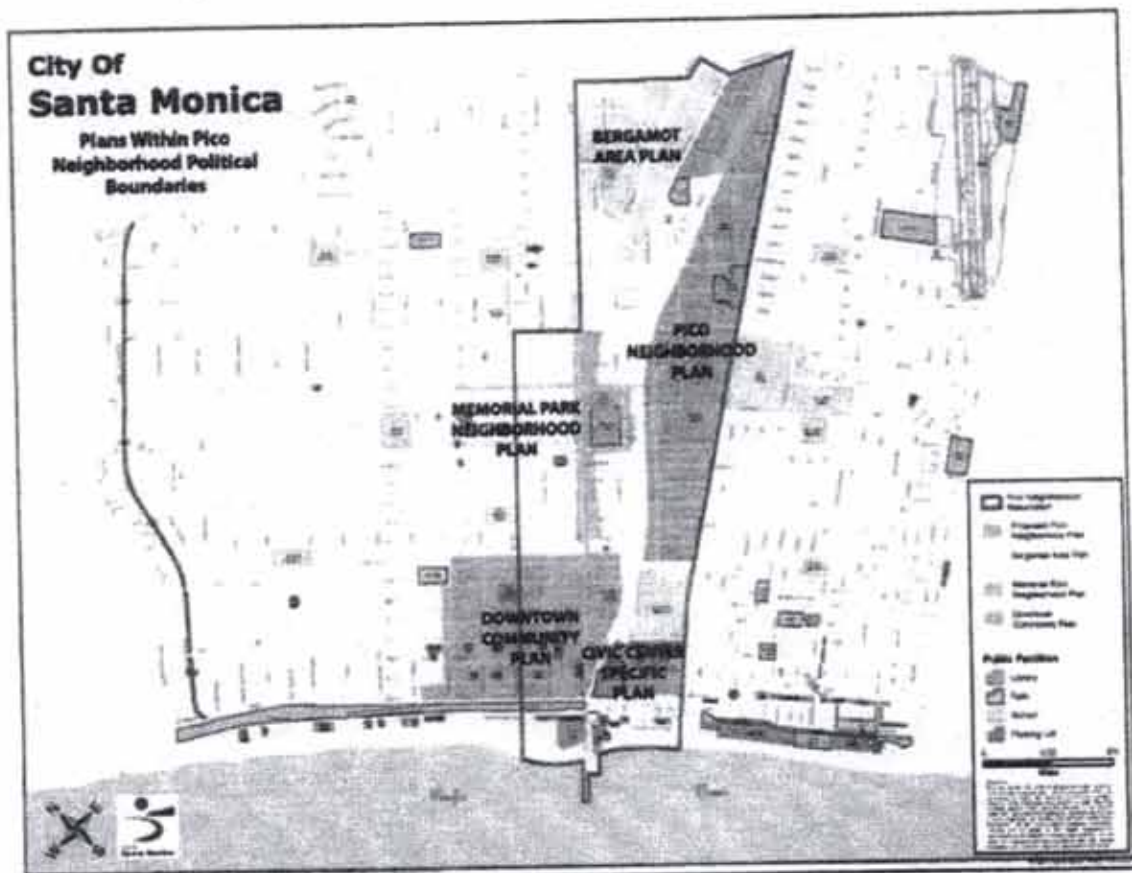
The boundaries of the proposed Pico Neighborhood Plan address the largely residential portion of Pico, which lies south of the I-10 Freeway, save for a 37 acre portion of single-family homes and some multi-family buildings north of the Freeway between Stewart and Centinela. The boundaries also include the commercial properties on Pico Boulevard, as well as on 14th Street, which is the province of the Pico Improvement Organization (PIO),

a local Business Improvement District (BID) that oversees beautification efforts, as well as marketing and communications.

Emerging Themes from the Community

Like much of Santa Monica, the Pico area has experienced a variety of changes over the years that have impacted the traditional neighborhood fabric and Pico's multi-cultural landscape, which is the centerpiece of the Pico community. The following emerging themes have been identified through conversations with Pico residents and neighbors.

Real Estate Pressure: Escalating land values across the city have decreased rental and ownership opportunities for many Pico residents, who collectively have less household income than other areas of Santa Monica. Despite the recent addition of several affordable housing projects in the area over the past few years, some Pico residents cite a concern over gentrification and the lack of a stable housing stock that is within the affordability range of many families, as Pico has perhaps the highest average household size of any neighborhood within the City (1.93 average household size).
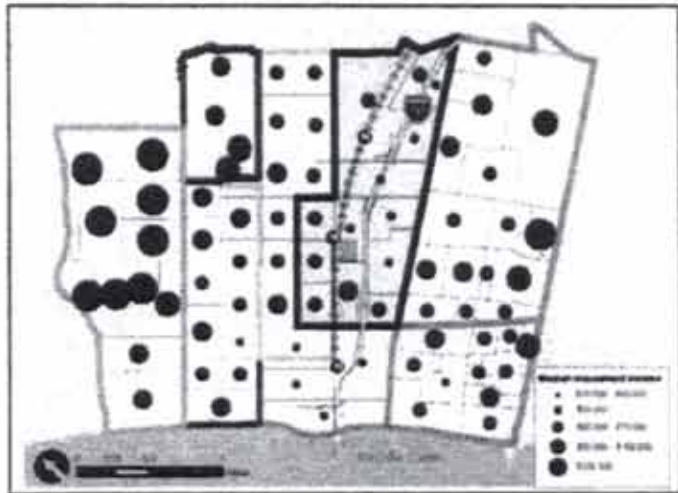
Access to Local Services: Pico Boulevard runs for approximately 2 miles through the Pico Neighborhood, and serves as the southern boundary of the PNA. Traditionally a service and retail street featuring a variety of auto repair shops, small restaurants and fast food, a few markets and coffee shops, as well as general office, the economic landscape of Pico Boulevard is evolving. Recent additions to the Boulevard within the past 10 years include a Trader Joes, several new upscale restaurants, and a Starbucks, which replaced a Kentucky Fried Chicken. A Whole Foods 365 is under development at the corner of Pico and Cloverfield, directly across from Virginia Avenue Park.

While these changes symbolize reinvestment in Pico Boulevard's economic future, many within the community are concerned about the ability for existing businesses to mature in place, particularly those who have had a presence on the Boulevard for several generations and which provide valuable local services to the neighborhood.

Maintaining Cultural Diversity: The Pico Neighborhood has one of the most diverse ethnic makeups of any neighborhood in Santa Monica. Over 39% of residents in Pico identify as Hispanic, compared to 13% citywide. African Americans constitute 12% of the Pico population (compared to 3.9% citywide). Asian residents are greater in numbers in

Pico, as well, which is a testament to the community of Japanese that occupied the area prior to the Second World War. 54% of Pico residents are White.

Because of the two factors described above regarding real estate pressure and the changing retail environment, some residents are concerned about the preservation of beloved cultural spaces, where generations of Pico residents have shopped, dined, gathered, and shared experiences.

The proposed Pico Neighborhood Plan will need to address these factors in a variety of ways that will be explored during the Plan development. Pending further consultation with the community, including the PNA, PIO, and area stakeholders, staff will devise a scope of work that will evaluate what tools may be available. Ongoing planning and economic development efforts, such as the Buy Local program and the Lincoln Neighborhood Corridor Plan (LiNC), may help shed some light on the City's ability to assist local businesses. Existing zoning protections established by the Zoning Ordinance Update will be analyzed to ensure that community concerns are adequately addressed.

<u>Existing Zoning Protections</u>

In order to reduce development pressure on existing housing stock, Interim Zoning Ordinance 2466 (CCS), adopted by Council in August 2014, established interim development standards applicable to portions of the multi-family residential districts (R2, R3, R4) in the Pico Neighborhood and Mid-City Neighborhood. More specifically, the Interim Zoning Ordinance established four regulations for the purposes of:

- Reducing the Development Permit Review Permit threshold to require Planning Commission review for a greater number of residential projects;

- Reducing the maximum unit density for the R2, R3, and R4 Zoning Districts;

- Restricting residential lot consolidation to remove incentives for assembly of larger residential building sites; and

- Restricting the use of ½ the rear alley dimension for the purpose of establishing parcel area and calculating residential density in order to reduce maximum unit density.

As outlined below, these four neighborhood conservation tools that were originally approved on an interim basis for portions of the Pico Neighborhood and Mid-City Neighborhood have all been incorporated in the new Zoning Ordinance that was adopted in July 2015. Moreover, three of these regulations have been expanded to apply to residentially-zoned properties Citywide. These zoning protections represent a baseline for further discussion on other tools that may be available to alleviate development pressure on Pico's residential neighborhoods.

2. All new construction and new additions to existing buildings of more than 10,000 square feet of floor area located in Residential Districts or more than 7,500 square feet of floor area in Neighborhood Commercial and Oceanfront Districts;

3. All new construction and new additions to existing buildings of more than 15,000 square feet of floor area located in Nonresidential Districts not specified in subsection (A)(2);

4. Notwithstanding subsection (A)(3) above, all new construction of more than 30,000 square feet of floor area of a development project containing no more than 15% commercial floor area located in Nonresidential Districts not specified in subsection (A)(2);

5. Notwithstanding subsections (A)(2)—(4) above and until the adoption of a Pico Neighborhood Plan, all new construction and new additions to existing buildings of more than 7,500 square feet of floor area located in the Pico Neighborhood Area.

(B) The following types of projects are exempt from Development Permit Review requirements:

1. Single unit dwellings; and

2. 100% Affordable Housing Projects of 50 units or less.

2) *Maximum Unit Density in Multiple-Unit Residential Districts – Citywide*

Maximum unit density has been limited in the Multiple-Unit Residential Districts. Note that in the Pico Neighborhood east of Lincoln Boulevard, all residentially-zoned parcels are designated either R1 (Single-Unit Residential) or R2 (Low Density Residential).

Excerpt of SMMC Section 9.04 Table 9.08.030: Development Standards—Multi-Unit Residential Districts				
Standard *For development standards within specified areas, see Section 9.08.030(A)	R2*	R3*	R4	Additional Regulations
Parcel and Density Standards				
Minimum Parcel Size (sq. ft.)	5,000	5,000	5,000	
Maximum Parcel Size (sq. ft.)	See 9.21.030(B)(C)	See 9.21.030(B)(C)	See 9.21.030(B)(C)	

Excerpt of SMMC Section 9.08 Table 9.08.030: Development Standards—Multi-Unit Residential Districts				
Standard *For development standards within specified areas, see Section 9.08.030(A)	R2*	R3*	R4	Additional Regulations
Minimum Parcel Width (ft.)	50	50	50	
Minimum Parcel Depth (ft.)	100	100	100	
Minimum Parcel Area (sq. ft.) per Unit				
Tier 1—Base Standard	2,000 (or 4 total units, whichever is less)	1,500 (or 5 total units, whichever is less)	1,250 (or 6 total units, whichever is less)	For parcels consolidated to provide courtyards, the maximum allowable number of units shall be based on the total maximum number of units allowed on each of the parcels prior to consolidation.
Tier 2—With Provision of Community Benefits	NA	1,250	900	Chapter 9.23, Community Benefits
100% Affordable Housing Projects	1,500	1,250	900	

3) *Restriction on Residential Lot Consolidation – Citywide*

Lot consolidation to create larger residential project sites has been restricted on residentially-zoned parcels.

SMMC Section 9.21.030 – Development on Multiple Parcels:

B.   Except for 100% Affordable Housing projects, no residentially zoned parcels shall be combined in ownership, or enlarged in size in any manner, so that:

1. The combined parcels contain an area greater than 7,500 square feet or greater than 125% of the average parcel area of parcels located within a 500 foot radius of the combined parcel within the same Zoning District, whichever is less. In the Ocean Park neighborhood districts, the combined parcels contain an area greater than 5,000 square feet or greater than 125% of the average parcel area of parcels located within a 500 foot radius of the combined parcel within the same Zoning District, whichever is less. Any legally-created parcel

existing prior to the effective date of this Zoning Ordinance that exceeds these consolidation limits shall be considered a legal, conforming parcel.

2. The parcel fails to comply with any other requirement of this Chapter

C.   Notwithstanding subsection (B), residentially zoned parcels may be combined in ownership or enlarged in size to provide courtyard housing subject to the following:

1. The combined parcels shall not exceed 100 feet in width.

2. The courtyard housing shall be developed in accordance with Section 9.08.030(F).

4)   *Determining Residential Density in Multiple-Unit Residential Districts – Citywide*

A restriction has been established to limit using one-half the alley to determine parcel area and residential density in Multiple-Unit Residential Districts. Note that in the Pico Neighborhood east of Lincoln Boulevard, all residentially-zoned parcels are designated either R1 (Single-Unit Residential) or R2 (Low Density Residential).

SMMC Section 9.04.120 – Determining Residential Density:

The maximum number of dwelling units allowed on any site shall be determined by dividing the area of the site, including ½ of the area of an abutting rear alley, by the minimum number of square feet for each dwelling unit as required in the Zoning District in which the site is located. However, in the R2, R3, and R4 districts, no portion of the rear alley shall be used to calculate the area of the site except for 100% Affordable Housing Projects.
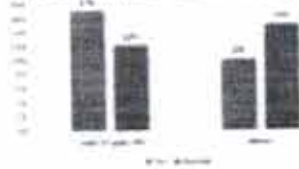
[Intentionally Left Blank]

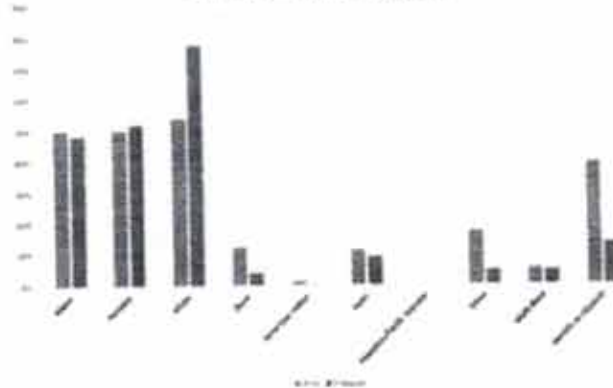## Census 2010 Demographic Data

EST. 2010 POPULATION WITHIN STUDY AREA

8265

Kids and Seniors - Pico vs. Citywide

Ethnicity - Pico vs. Citywide

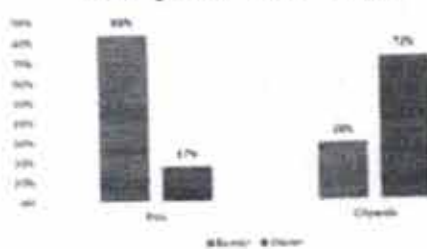**3778 Housing Units**
3584 Households

39% of Pico Residents identify as Hispanic

Average Household Size: 1.93
Santa Monica City: 1.87
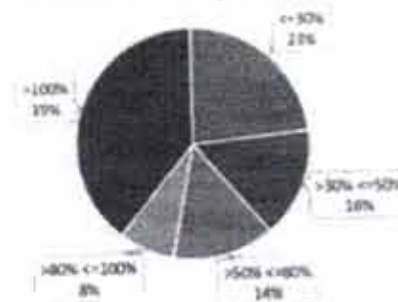Los Angeles County: 2.98

Average Age - Pico vs. Citywide

Housing Tenure - Pico vs. Citywide

Households By Income

Wellbeing Index for Pico Neighborhood

The Wellbeing Project is a groundbreaking new model for city governments, and was the City's winning entry in the 2013 Bloomberg Philanthropies Mayors Challenge. It is a public initiative that uses the science of wellbeing to better understand the community by looking beyond traditional performance measures or economic indicators and using a new method to gain an understanding of how all of these factors interact and affect residents' quality of life. The core of the project is the Wellbeing Index, which provides the City with a snapshot of its current wellbeing strengths and needs by analyzing data collected from residents, City departments and social media to gain a robust understanding of how the people of Santa Monica are doing across multiple measures known to influence wellbeing. This first wellbeing index marks the start of a long-term foundational shift in how the city works – and works together – to use wellbeing measurement to inform policy making, priority setting and resource allocation.

The Pico-area neighborhood (generally identified as zip code 90404 in the Project) fared poorly in more areas measured in the wellbeing index than any other neighborhood. The findings below represent a preliminary look at the strengths and needs found through The Wellbeing Project in 90404.

Outlook/Personal Wellbeing
Over 2200 Santa Monicans took the Wellbeing Survey in winter of 2014, which included questions about personal wellbeing as a means of quantifying residents' individual experience. This included rankings of how satisfied people were with their lives, day to day emotions, and sense of accomplishment. Santa Monicans in general report high life satisfaction, with some variation by location. The survey results showed that 90404 ties with 90401 (Downtown) as the area with the lowest personal wellbeing scores, with 90404 reporting the lowest rates of:

- Life Satisfaction
- Flourishing
- Having time to do things they enjoy

On a positive note, residents of 90404 also reported the second lowest rate of people working very long hours.

Community
The Wellbeing Project measured community in Santa Monica by looking at measures that indicated strong local networks, levels of civic engagement, and a sense of community identity. 90404 and neighboring zip code 90401, have the lowest scores in Community.
- According to the Wellbeing Survey, 90404 has:

Adults in 90404, in contrast, have the highest rates of engagement with opportunities for adult education and lifetime learning, with:

- Highest rates of attendance in basic education classes, adult secondary education, and ESL classes
- Second highest usage of ActiveNet classes
- Second highest ranking on confidence carrying out repair jobs

Educational Attainment Overview		
Pre-k- 6th Grade:328	7th-8th Grade: 291	9th-12th Grade: 823
High School Diploma: 2104	GED: 183	Some college: 3017
Associates Degree: 811	Bachelor's Degree: 4933	Master's Degree: 2124
Professional Degree: 527	Doctorate: 367	

Health

The measurement of health included factors such as physical activity, healthy eating, sleep, and positive access to health facilities or amenities, and also looked at rates of chronic health conditions and poor health behaviors. While Santa Monica as a whole reports better health than Los Angeles County, 90404 has the lowest health score in Santa Monica. This is driven by:

- The lowest levels of fruit and vegetable consumption (16% in 90404 vs SM average of 25%, and US average of 50%)
- Lower rates of physical activity than all other zip codes
- Lower rates of energy than all other zip codes

These problems may be affecting the adult population in particular, as SMMUSD fitness data for 5th, 7th and 9th graders shows students from 90404 are second only to 90402 in rates of passing the health fitness exam in 2013.

Economic Opportunity

Economic opportunity included measures such as worries about paying rent or credit card; worry about losing job; and concern that children won't be able to afford to live in Santa Monica as adults, along with census data detailing income and employment levels. Economic opportunity is low for the residents of 90404 in particular, reflected by:
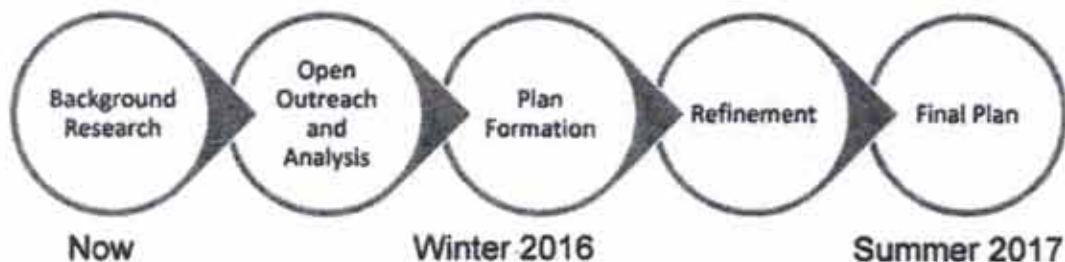
- Highest unemployment rate (11.3% vs SM average of 9.2%)
- Lowest median household income ($57,500 vs SM average of $72,271)
- Highest rate (along with 90401) of economic worry (43% report at least 1 worry vs. 11% in 90402, 23% in 90403, and 30% in 90405)

Employment Status by Educational Attainment Level				
	Total	In labor force	Employed	Unemployment rate
Population 25 to 64 years 10.1%	12,824	84.1%	75.7%	
Less than high school graduate 26.5%	756	57.0%	41.9%	
High school graduate (includes GED) 18.1%	1,739	78.3%	64.2%	
Some college or associate's degree 11.7%	3,187	81.5%	71.9%	
Bachelor's degree or higher 6.6%	7,142	89.6%	83.7%	

Public Outreach

Staff held an introductory meeting with members of the PNA Board in April 2016 to begin the outreach effort and to explore the range of issues viewed as problematic within the neighborhood. On May 12, 2016, at a scheduled neighborhood meeting, staff participated in a conversation with PNA membership about possible components of a Pico Neighborhood Plan. A capital concern is to establish a unique set of zoning standards for Pico Neighborhood to address the issues raised in this report.

At the neighborhood meeting, staff and the PNA established a partnership in moving forward with outreach and consultant engagement, and identified the need to work closely with a variety of constituents, including the bi-lingual Hispanic community. It is anticipated that the project team and the PNA will co-author and design outreach activities that incentivize participation from the diverse community, and will share the responsibility for addressing challenges that arise through the planning process, which is outlined below. Outreach will likely include stakeholder interviews, regular check-ins with local neighborhood groups, public workshops and creative partnerships with Pico events and festivals.

Background Research → Open Outreach and Analysis → Plan Formation → Refinement → Final Plan

Now   Winter 2016   Summer 2017

Next Steps

Feedback from the Planning Commission will inform the scope of work on the Pico Plan. Staff anticipates drafting a Request for Proposals over the next three months in consultation with local stakeholders like the PNA. Broader outreach will likely begin at the beginning of Winter 2016.

Prepared by: Peter D. James, Principal Planner
                       Roxanne Tanemori, Principal Planner

EXHIBIT B

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Attorneys for Plaintiff

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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COUNTY OF SAN BERNARDINO

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LISA GARRETT	CASE NO. CIVDS 1410696
Plaintiff,	**CORRECTED ~~[PROPOSED]~~ JUDGMENT**
v.	
CITY OF HIGHLAND, CALIFORNIA; . and Does 1-100, Inclusive.	
Defendants.	

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This cause came on for trial pursuant to notice and order of the Court on January 13, 2016,

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in Department S-26 of the San Bernardino Superior Court, Hon. David S. Cohn, judge presiding.

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The trial concluded on January 19, 2016. Plaintiff Lisa Garrett appeared through her attorneys of

26

record: Kevin Shenkman of Shenkman & Hughes PC; R. Rex Parris and Kitty Szeto of the R. Rex

27

Parris Law Firm; and Milton Grimes of the Law Offices of Milton C. Grimes. Defendant, City of

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1418-1002 / 1386474

PROPOSED JUDGMENT

1 Highland, California, appeared through its attorneys of record: Patrick Bobko and Youstina Aziz of

2 Richards, Watson & Gershon LLP.

3   At the conclusion of the trial on January 19, 2016, following the closing arguments of the

4 parties the parties did not request a written statement of decision, and so the Court issued its ruling

5 and explained its rationale for its findings and ruling orally. The Court directed Plaintiff's counsel

6 to prepare a proposed judgment.

7   After hearing and considering all of the testimony, evidence and arguments presented, the

8 Court now enters its Judgment in the above-captioned case.

9   The Court finds as follows:

10   1.   Defendant is a political subdivision as that term is defined in California Elections

11 Code Section 14026. The governing body of Defendant is the City Council of Highland,

12 California. The City Council of Highland, California is elected by an "at large method of election"

13 as that term is defined in California Elections Code Section 14026, as it has been since

14 incorporation of the City of Highland.

15   2.   Defendant admitted, and the Court agrees, that elections in Highland are

16 characterized by "racially-polarized voting" as that term is defined in California Elections Code

17 Section 14026, and that its at-large elections violate the California Voting Rights Act (Cal. Elec.

18 Code §14025, et seq., hereinafter "CVRA").

19   3.   Though not necessary to show a CVRA violation, Plaintiff has also demonstrated

20 that at least one majority-Latino district (by citizen-voting-age-population), out of five districts,

21 may be drawn in a compact and contiguous fashion, with equal populations in each district, in the

22 City of Highland. The Court has considered this in determining an appropriate remedy, pursuant to

23 Elections Code section 14028(c).

24   4.   In the face of racially polarized voting patterns of the Highland electorate,

25 Defendant has imposed an at-large method of election in a manner that impairs the ability of

26 Latinos to elect candidates of their choice and their ability to influence the outcome of an election,

27 as a result of the dilution or the abridgment of the rights of Latino voters.

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1416-1002 / 138847 4

-2-

PROPOSED JUDGMENT

5.   In July 2014, the City of Highland adopted Ordinance No. 393. Ordinance No. 393

provided for the implementation of district-based elections for the Highland City Council and

included a description of the boundaries of five equal-population districts. Pursuant to the

provisions of the Government Code at that time, Ordinance No. 393 was required to be approved

by an at-large vote of the electorate of the City of Highland. In November 2014, the electorate of

the City of Highland rejected Ordinance No. 393, though a significant majority of Latino voters,

and a majority of voters in the Western portion of the City of Highland, voted in favor of the

district-based elections of Ordinance No. 393.

6.   The CVRA does not require the imposition of district-based elections. Rather, both

the statutory language and legislative history of the CVRA support the conclusion that the Court

has broad authority to implement an array of appropriate remedies. In circumstances different than

those presented in this case, at-large remedies, such as cumulative voting, might be appropriate.

That cumulative voting has not previously been implemented in the election of the governing board

of any political subdivision of the State of California is irrelevant to the availability of cumulative

voting as a remedy under the CVRA. The Court was presented with a letter from Secretary of State

Alex Padilla dated September 1, 2015, directed to Hon. Terry Green, Judge of the Los Angeles

Superior Court, regarding implementation of cumulative voting. In that letter, Secretary of State

Padilla notes that there is no express statutory authority for cumulative voting in elections for

governing boards of political subdivisions of the State of California. The Secretary of State's letter

does not express a view that cumulative voting is either unlawful or unavailable as a remedy under

the CVRA, and, in any event, this Court is not bound by the views of the Secretary of State.

Regardless of the Secretary of State's letter, this Court finds that cumulative voting is a legally

permissible method of electing the governing board of a political subdivision of the State of

California, and is an available remedy under the CVRA.

7.   In November 2015, the Highland City Council approved Resolution No. 2015-042.

Defendant argued that this Court must defer to Defendant's selection of remedies set forth in

Resolution No. 2015-042. However, this Court need not defer to Resolution No. 2015-042 for

several reasons. First, the CVRA commands this Court, not Defendant, to implement appropriate

1 | remedies. Second, Resolution No. 2015-042 is not a legislative plan. Specifically, Resolution No.

2 | 2015-042 is not a legislative act at all because it does not serve to adopt any remedies; rather, it

3 | merely states that "[i]f directed by a court to implement a cumulative voting system" it will do so.

4 | The Highland City Council could have adopted cumulative voting on its own, but it chose not to

5 | actually adopt any change in its elections. Moreover, Resolution No. 2015-042 provides no details

6 | regarding the remedies referenced therein, or their implementation. For example, Resolution No.

7 | 2015-042 references "changing its staggered elections so that three members of [the City] Council

8 | are elected during presidential election years and two members are elected during gubernatorial

9 | election years." but provides no specifics about that change – e.g. how it is to be determined which

10 | of the three current members of the Highland City Council whose terms were set to expire only in

11 | 2018 is to be cut short. Third, as explained more fully below, Defendant's proposed remedial plan

12 | would not effectively and completely remedy the established violation of the CVRA and dilution of

13 | Latino votes in the City of Highland.

14 | 8.   The "threshold of exclusion" is useful in evaluating whether cumulative voting

15 | would be an effective remedy. The threshold of exclusion is equal to $1/(1+N)$, where N is the

16 | number of seats up for election at the same time. In a two-seat election, the threshold of exclusion

17 | is 33.3%. In a three-seat election, the threshold of exclusion is 25%. The parties presented

18 | evidence of various measures of the Latino proportion of the Highland electorate for comparison to

19 | the applicable thresholds of exclusion: the Latino proportion of the citizen-voting-age-population

20 | ("LCVAP"); the Latino proportion of the registered voters; and the Latino proportion of the voters

21 | who actually cast ballots in recent elections. The Court finds that the appropriate measure for

22 | comparison to the threshold of exclusion is the Latino proportion of the voters who actually cast

23 | ballots in recent elections. The historical evidence of the Latino proportion of the voters who

24 | actually cast ballots is the best measure of what will be the Latino proportion of the electorate in

25 | upcoming elections. To instead compare LCVAP or the Latino proportion of registered voters to

26 | the threshold of exclusion ignores the depressed voter turnout of the Latino community in

27 | Highland, which may be a symptom of the electoral futility that the CVRA is intended to remedy.

28 |

1416-1002 / 138647 4

-4-
PROPOSED JUDGMENT

1   9.   To estimate the Latino proportion of the voters who cast ballots in recent elections in

2 Highland, experts offered by both Plaintiff and Defendant started with matching the names of

3 voters with the U.S. Census Department's list of Spanish surnames. This is an accepted method of

4 estimating the proportion of Latinos in a large group. While the parties agree that this method of

5 Spanish surname matching tends to underestimate the Latino proportion of a group, they disagree

6 on the amount of that underestimation. Defendant's expert, Douglas Johnson, increased his

7 estimates of the Latino proportion of voters by approximately 11% based on the 1990 Colby-

8 Perkins study that investigated the error rates of Spanish surname matching in each State.

9 Plaintiff's expert, David Ely, criticized that 11% adjustment because it is based on an outdated

10 study that was not focused on the City of Highland, and the demographics of Highland in 2016 are

11 significantly different than those of California, or any other State, in 1990, in ways that impact the

12 accuracy of Spanish surname matching. The Court agrees with Mr. Ely. Adjusting the estimates

13 from Spanish surname matching, for the purpose of comparing those estimates to the thresholds of

14 exclusion is inappropriate. Nonetheless, even if the Spanish surname matching estimates of the

15 Latino proportion of the electorate were increased as suggested by Mr. Johnson, the conclusions of

16 this Court would be the same.

17   10.   In the most recent four elections in the City of Highland – 2008, 2010, 2012 and

18 2014 – the Latino proportion of the electorate varied between 20.1% and 25.2% (between 22% and

19 28% if adjusted, as suggested by Defendant's expert, based on the Colby-Perkins study). In each

20 instance, the Latino proportion of the electorate was significantly less than the threshold of

21 exclusion for a two-seat election (33.3%). In fact, in three out of the four most recent elections, the

22 Latino proportion of the electorate in Highland was even lower than the threshold of exclusion for a

23 three-seat election (25%). Therefore, this Court finds that cumulative voting is not likely to be an

24 effective remedy, and thus it is not an "appropriate remedy" under the CVRA in the particular

25 circumstances of the City of Highland. While unstaggering the elections for the Highland City

26 Council, i.e. having all five council seats elected at the same time rather than two or three at a time

27 every two years, would reduce the threshold of exclusion, the Court was not presented with such a

28 proposal.

1416-1002/ 138847 4

-5-
PROPOSED JUDGMENT

1   11.   In contrast to cumulative voting, competent evidence demonstrates that the

2 implementation of district-based elections, consistent with the district boundaries specified in

3 Ordinance No. 393, will be effective at remedying Defendant's violation of the CVRA and the

4 dilution of the Latino vote in the City of Highland. One of the five districts includes a Latino

5 majority of eligible voters, while Latinos in another district have a strong plurality of eligible

6 voters. Even more compelling are the results of the 2014 election in the City of Highland. In that

7 election, the clear preference of Latinos was to implement district-based elections – "Yes" on

8 Ballot Measure T. While Ballot Measure T did not gain a majority of votes in the city as a whole,

9 the Latino preference in that election did receive a majority of the votes cast in two of the five

10 districts – the districts with the highest proportion of Latinos. Defendant's argument that Latinos in

11 the Easternmost portion of the City would be disenfranchised by district-based elections, misses the

12 point; in any district-based election system voters are afforded a voice in the selection of the

13 representative for the district in which they reside. The Court therefore finds that the imposition of

14 district-based elections is an appropriate remedy to address the effects of the admitted history of

15 racially-polarized voting.

16   12.   Districts drawn to remedy a violation of the CVRA should be nearly equal in

17 population, and should not be drawn in a manner that may violate the federal Voting Rights Act.

18 Other factors may also be considered -- the topography, geography and communities of interest of

19 the city should be respected, and the districts should be cohesive, contiguous and compact. *See*

20 Elections Code Section 21600, et seq. The Western portion of the City of Highland is less affluent

21 and has a significantly greater proportion of Latinos than the Eastern portion of the City of

22 Highland. The districts specified in Ordinance No. 393 are appropriately compact, cohesive and of

23 nearly equal population. Moreover, that district plan properly takes into consideration the factors

24 of topography, geography, cohesiveness, contiguity and compactness of territory, and community

25 of interest of the districts.

26   13.   The current members of the Highland City Council were elected through unlawful

27 elections. The citizens of the City of Highland deserve to have a lawfully elected city council as

28 soon as is practical. The citizens of the City of Highland are entitled to have a council that truly

1416-1002 / 138847.4

-6-

PROPOSED JUDGMENT

1 represents all members of the community. Latino citizens of Highland, like all other citizens of

2 Highland, deserve to have their voices heard in the operation of their city. This can only be

3 accomplished if all members of the city council are lawfully elected. To permit some members of

4 the council to remain who obtained their office through an unlawful election may be a necessary

5 and appropriate interim remedy but will not cure the admitted violation of the CVRA.

6

7 **THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that

8 Defendant has violated the California Voting Rights Act (California Elections Code Sections 14025

9 – 14032).

10 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant's at-large

11 elections for its City Council violate Elections Code Sections 14027 and 14028.

12 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant is

13 permanently enjoined from imposing, applying, holding, tabulating, and/or certifying any further

14 at-large elections, and/or the results thereof, for any positions on its City Council.

15 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant is

16 permanently enjoined from imposing, applying, holding, tabulating, and/or certifying any elections,

17 and/or the results thereof, for any positions on its City Council, except an election in conformity

18 with this judgment.

19 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that all further elections,

20 from the date of entry of this judgment to the next decennial redistricting cycle in 2021, for any

21 seats on the Highland City Council, shall be district-based elections, as defined by the California

22 Voting Rights Act, in accordance with the maps attached hereto as Exhibit A, taken from

23 Ordinance No. 393.

24 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant shall hold

25 a district-based special election, consistent with the district map described above and depicted in

26 Exhibit A on November 8, 2016 for each of the five seats on the Highland City Council, and the

27 results of said election shall be tabulated and certified in compliance with applicable sections of the

28 Elections Code.

1416-1002 / 138947.4
-7-
PROPOSED JUDGMENT

1   **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that any person, other

2   than a person who has been duly elected to the Highland City Council through a district-based

3   election in conformity with this judgment, is prohibited from serving on the Highland City Council

4   after December 31, 2016.

5   **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the districts used for

6   elections of Highland's City Council shall be adjusted upon each decennial redistricting cycle

7   beginning in 2021, in compliance with Elections Code Sections 21600, et seq., the California

8   Voting Rights Act of 2001 and the federal Voting Rights Act.

9   **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that this Court retains

10   jurisdiction to interpret and enforce this judgment and to adjudicate any disputes regarding

11   implementation or interpretation of this judgment.

12   **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that, pursuant to Elections

13   Code Section 14030, Plaintiff is the prevailing and successful party and is entitled to recover

14   reasonable attorneys' fees and costs, including expert witness fees and expenses, in an amount to be

15   determined by this Court through a post-judgment motion.

16

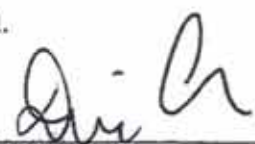17   The Clerk is directed to enter this Judgment.

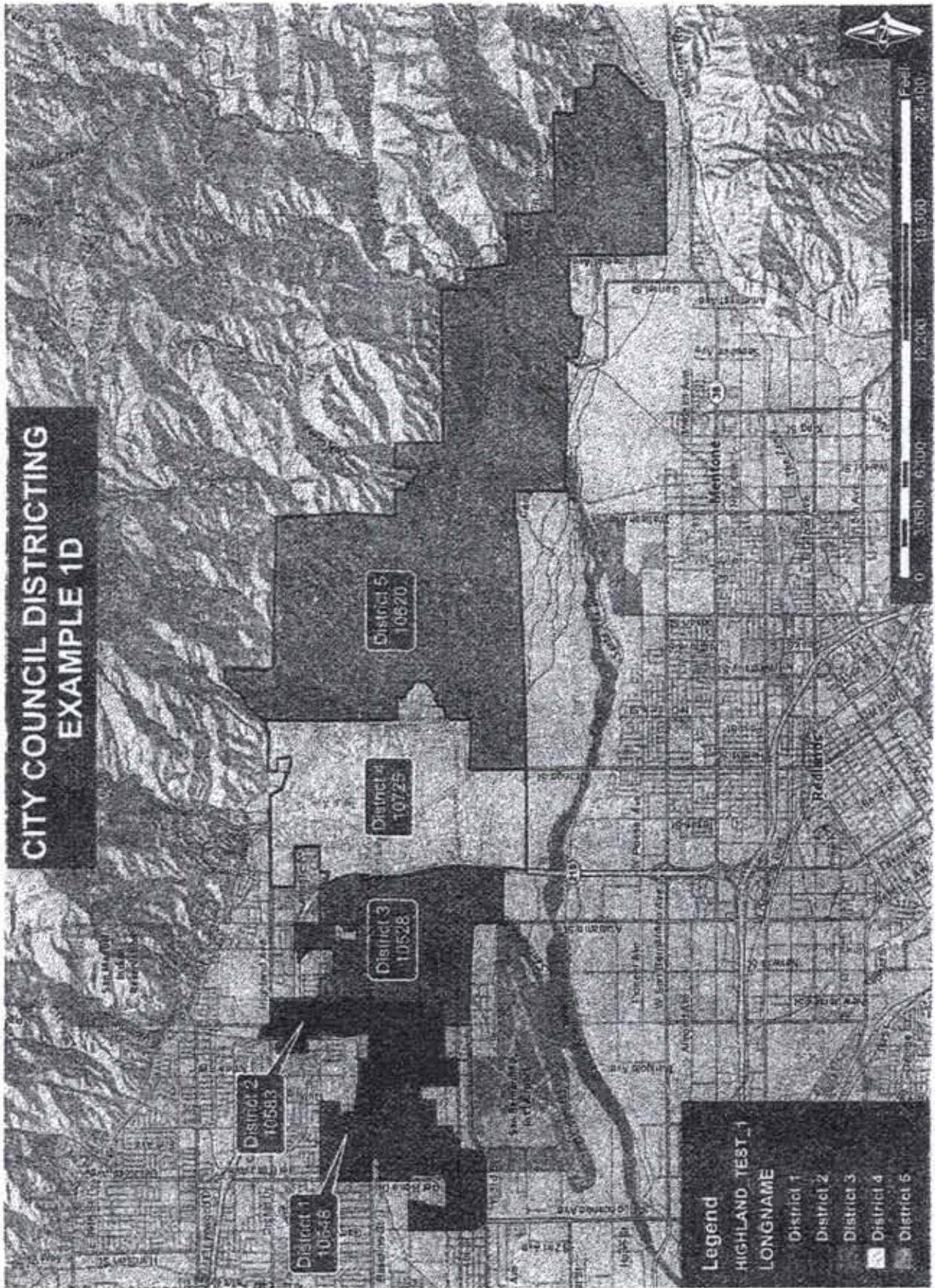18   Dated: _____4/6/14_____

19   _____

20   Hon. David S. Cohn
     Judge of the San Bernardino Superior Court

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1416-1002 / 1388474

-8-
PROPOSED JUDGMENT

EXHIBIT A

CITY COUNCIL DISTRICTING
EXAMPLE 1D

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106720

District 4
10725

District 3
10528
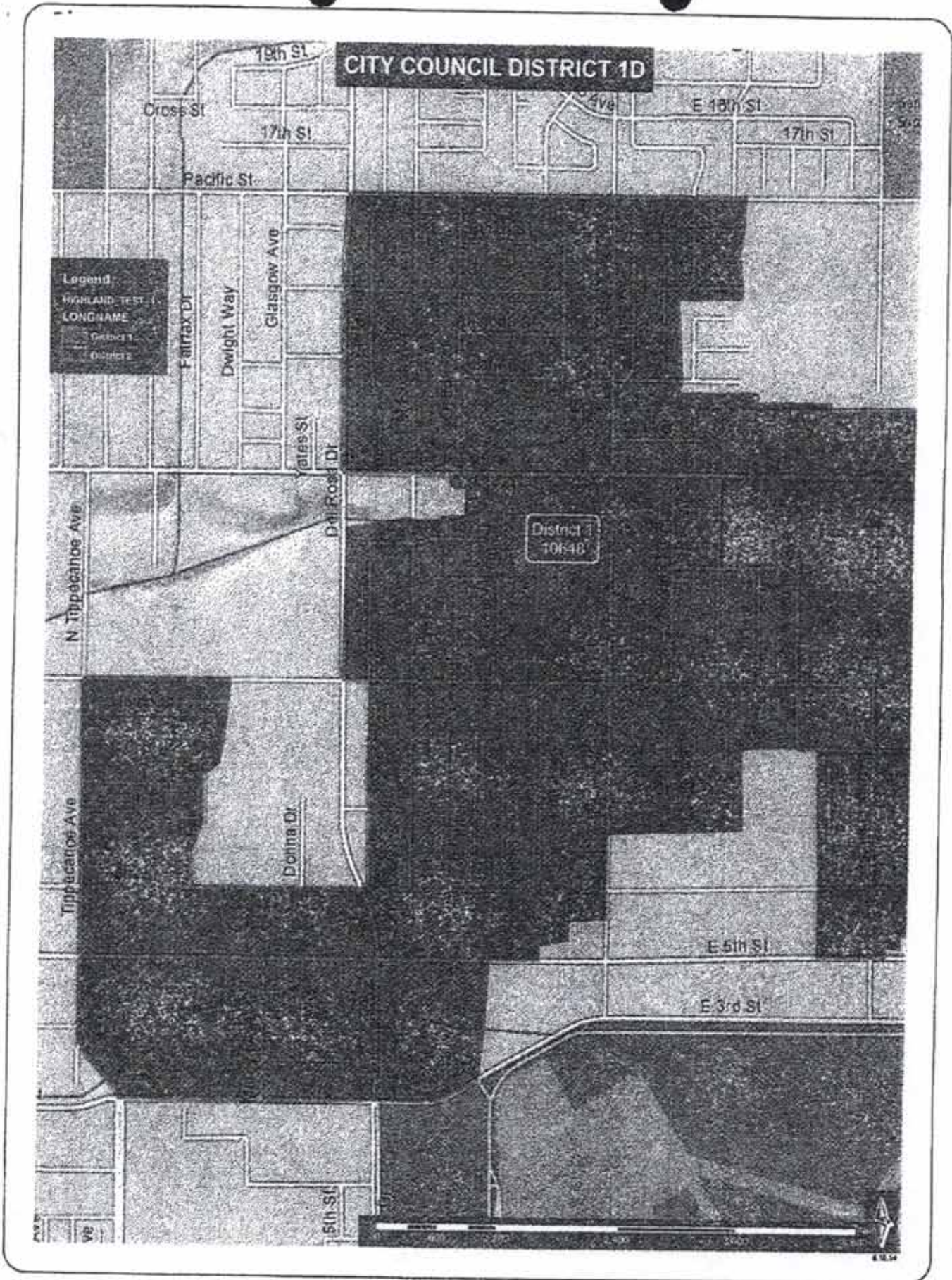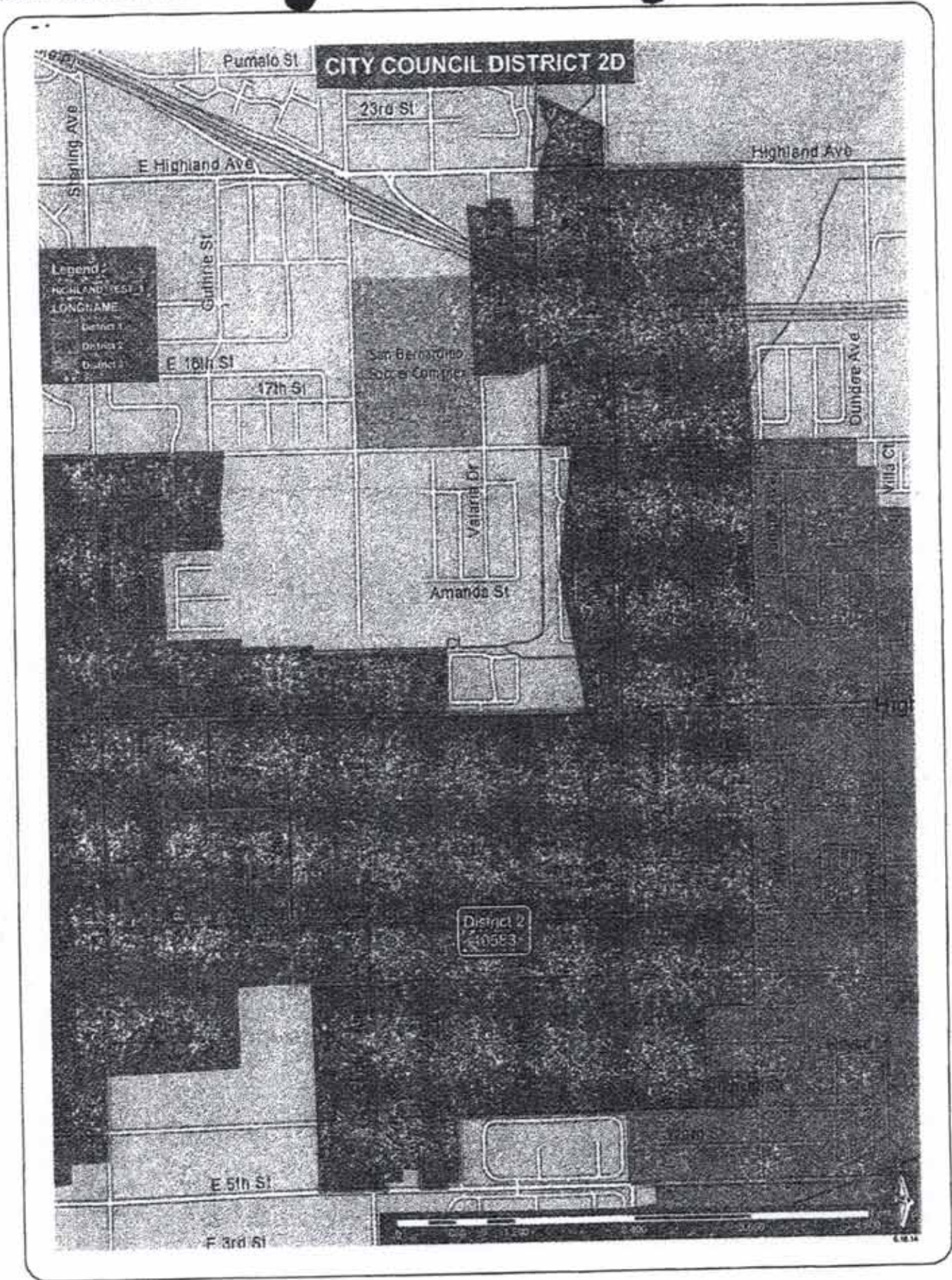
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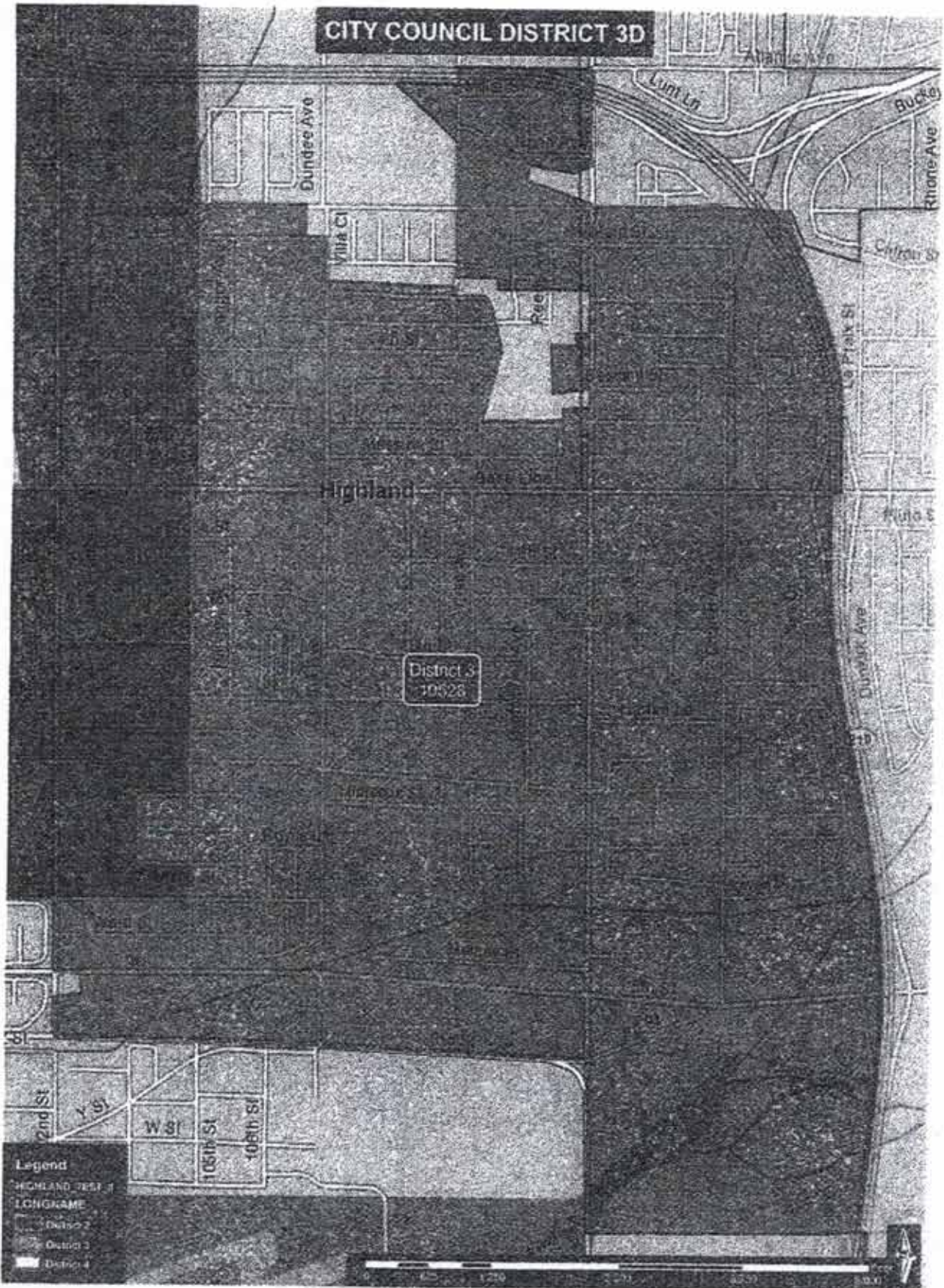
District 1
10545

Legend
HIGHLAND_TEST_1
LONGNAME

District 1
District 2
District 3
District 4
District 5

CITY COUNCIL DISTRICT 1D

CITY COUNCIL DISTRICT 2D

CITY COUNCIL DISTRICT 3D

CITY COUNCIL DISTRICT 4D

CITY COUNCIL DISTRICT 5D
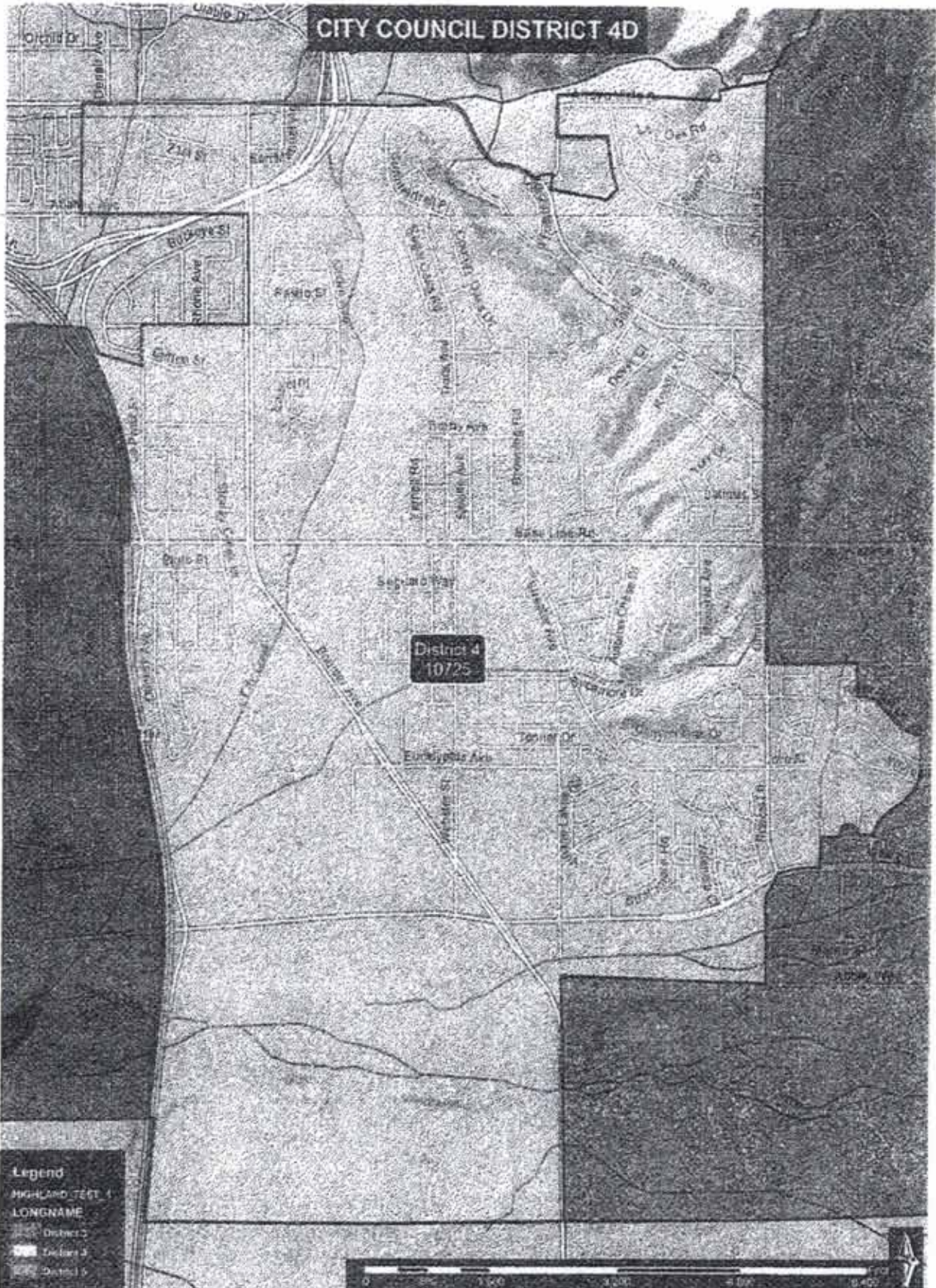
EXHIBIT C

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

LADONNA YUMORI KAKU, et al.,	Case No. 17CV319862
Plaintiffs,	**PROPOSED STATEMENT OF DECISION**
vs.	
CITY OF SANTA CLARA, and DOES 1 to 50,	
Defendants.	

Plaintiffs Ladonna Yumori Kaku, Wesley Kazuo Mukoyama, Umar Kamal, Michael Kaku, and Herminio Hernando (collectively, "Plaintiffs") allege Defendant City of Santa Clara's at-large elections for City Council seats violate the California Voting Rights Act ("CVRA"). The City of Santa Clara denies any violation. Trial of this matter was bifurcated. The liability-phase trial commenced on April 23, 2018 in Department 5. At the conclusion of trial the parties agreed the Court could issue a Proposed Statement of Decision ("PSOD") without first announcing a tentative decision. Pursuant to Code of Civil Procedure 632, and Rule 3.1590 of the California Rules of Court, the Court now issues this proposed statement of decision. The parties may file objections to this PSOD within 15 days of service. (Cal. Rule Ct. 3.1590, subd. (g).) The Court is hopeful the parties' objections will improve the Court's analysis of these important issues and correct any errors.

I.   INTRODUCTION

Members of Santa Clara's City Council are elected at-large for numbered seats and serve staggered four-year terms. The CVRA provides that "[a]n at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates. . . ." (Elec. Code § 14028, subd. (a).)[1] Asian Americans ("Asians") are a protected class. Voters in Santa Clara have never elected an Asian to the City Council. Plaintiffs argue that while Asian voters have overwhelmingly supported Asian candidates in local elections, the will of those voters has been impaired by a voting majority comprising of non-Hispanic white and black voters.[2] The liability phase of trial determines if the City's at-large, numbered seat method of selecting City Council members violates the CVRA. If liability is found, a trial to determine an appropriate remedy will follow.

II.   BACKGROUND

A.   Santa Clara Demographics

The 2010 U.S. Census reported the City had approximately 115,000 residents. At present approximately 125,000 people reside there. As described in more detail below, the expert witnesses relied on surnames as a proxy for race/ethnicity classifications. This enabled them to separate the City's population into three groups: non-Hispanic whites and blacks ("NHWB"), Asian, and Latino. The table below displays the percentage of City residents, eligible voters and actual voters that fall into each group in the 2012-2016 time period.

	NHWB	Asian	Latino
Residents	46.3	39.5	16.9
Eligible Voters	51.0	30.5	15.0
Actual Voters	64.1	21.2	14.7

---

[1] All references herein are to the Elections Code unless otherwise noted.

[2] The United States Census officially recognizes six racial categories: White American, Black or African American, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander. It also classifies Americans as "Hispanic or Latino" and "Not Hispanic or Latino," which identifies Hispanic and Latino Americans as an ethnicity (not a race) distinct from others. The FVRA has adopted these classifications and consequently they are referenced herein.

1   (Kousser Direct at 27.) The table shows the percentage of City *residents* who are NHWB and
2   AA are not all that different – 46.3 percent versus 39.5 percent. It shows the percentage of
3   *actual voters* is dramatically different – 64.1 percent versus 21.2 percent. This raises the
4   possibility that NHWB bloc voting could impair the ability of Asians to elect their preferred
5   candidates.

6   **B.   Santa Clara City Council Elections**

7   The City is a municipal corporation of the state of California established under Article
8   XI, Section 5, of the California Constitution. It operates as a Council Manager form of
9   government under the laws of the State of California and its City Charter. (Charter of the City of
10   Santa Clara (the "Charter"), §§ 400 and 500.) The City adopted its Charter in 1951. Its Charter,
11   and not California state statutes, governs its "municipal affairs" through approval of ordinances
12   and resolutions.

13   The Charter provides for a seven-member City Council, including a separately elected
14   Mayor. (Charter § 600.) Council members, including the Mayor, are elected from the entire
15   City to four-year terms. (*Id.*) Each City Council office is designated by a seat number (e.g.,
16   Council Member Seat No. 1) (Charter § 700.01.) Any change to the City's election system
17   requires a change to the City Charter, which can only occur by a vote of the majority of the
18   City's voters. (Gov. Code, § 34458.)

19   **C.   Santa Clara's Consideration of Changes to its Election System**

20   Plaintiffs' attorney sent a letter to the City dated June 2, 2011. (EX. 7). Among other
21   things, it stated: "[T]he city's at-large election system for its City Council appears to violate the
22   California Voting Rights Act." (*Id.*) After receiving the letter, the City Council formed a
23   Charter Review Committee to consider changes to its electoral system. (EX. 9 at
24   YUMORI_00636-37.) As part of that effort, a company named Lapkoff & Gobalet
25   Demographic Research, Inc. ("L&G") provided reports to the City titled "Report on
26   Demographic Characteristics and Voting Patterns of Residents of the City of Santa Clara."
27   (EXS. 22, 23.) On November 17, 2011, by an 11-4 vote, the Charter Review Committee
28

recommended the City abandon its numbered posts system and move to a pure at-large system. (EX. 10 at YUMORI_00713-16.) The City Council failed to adopt that recommendation.

On October 27, 2015, the City Council again authorized a Charter Review Committee to consider changes to the procedures for electing members to the City Council. (EX. 11 at YUMORI_00731-32.) Once again L&G provided information to a City Charter Committee, including a presentation dated May 5, 2016. (EX 26.) While the Charter Review Committee recommended changes to Council member compensation, term limits, procedures for calling special meetings of the City Council, and other issues, it did not suggest any changes to the way City Council members are elected. (EX. 12.)

On February 21, 2017, the City Council convened a new Charter Review Committee. (Amended Joint Trial Stipulation for Liability Phase of Trial ("Trial Stipulation") at ¶ 20.) On July 18, 2017, the City Council adopted the recommendations of the Charter Review Committee. (Id. at ¶ 22.) On December 5, 2017, the City Council approved proposed amendments to the City's Charter. (Id. at ¶ 23.) On January 30, 2018, and again on March 6, 2018, the City Council formally agreed to submit the proposed changes to the electorate at the primary election on June 5, 2018. (Id. at ¶¶ 23-24.) The proposed changes would split the City into two voting districts with three City Council seats in each. (EXS. 16, 19) The changes would also allow voters to rank their preferences. (Id.)

D. No Asian Has Ever Won a City Council Election

It is undisputed that no Asian candidate has ever won a City Council election. From 2002 to 2016 Asians ran in ten elections. Every time they lost.

E. Asian Political and Civic Participation

Plaintiffs called Dr. S. Karthick Ramakrishnan as a witness. He is an expert on immigrant political and civic participation. Dr. Ramakrishnan's testimony focused on three areas: (1) historical patterns of discrimination and political exclusion of Asians in California that inform present-day disparities in political outreach and participation; (2) the extent to which Asians of different national origins hold similar policy and political preferences; and (3) the barriers Asians face with respect to local political participation, including language barriers and a

lack of outreach by political campaigns. As discussed below, his testimony is relevant to a number of issues the CVRA allows the Court to consider.

III. EXPERT OPINIONS OF STATISTICAL EXPERTS

Two prominent statistics experts testified at trial. Dr. Morgan Kousser testified for the Plaintiffs and Dr. Jeffrey B. Lewis testified for the City. Both testified about their analyses of City election results.

A. Overview of Inference Methods

Precinct-level voting results are a matter of public record. The State of California collects the names of voters in each precinct. Nobody knows, however, how a particular person has voted. To determine the ethnicity of voters in a particular precinct, the State of California has a database of surnames that are likely to correspond to a particular ethnicity. This allows experts to know for each precinct: (1) the number of votes cast for each candidate, and (2) the percentage of voters who fall into a particular ethnicity. What the experts do not have, however, is actual, precinct-wide data showing the percentage of voters within each ethnic group who voted for a particular candidate. This is where the complicated statistical analyses come in.

Many earlier voting rights cases relied on a statistical method named "ecological regression" ("ER") that takes precinct-level election results and correlates those figures with the racial or ethnic composition of the broader electorate. Later, a related, more sophisticated "weighted ecological regression" ("WER") model was developed. More recently, an improved version of ER named "ecological inference" ("EI") was developed. EI is viewed as the most reliable of the three methods, and is used regularly by experts, including Drs. Kousser and Lewis. (TR1 76:8-12, 134:15-22;[3] Lewis Direct at 31.)

Output from the EI models used by Drs. Kousser and Lewis include the most likely "point estimate" along with a "standard error" associated with the point estimate. The standard error is a measure of the accuracy of the point estimate. Standard errors, in turn, can be converted into "confidence intervals" that represent a range within which a scientist has a certain

---

[3] "TR1" refers to the trial transcript from April 23, 2018, i.e., the first day of trial. Transcripts from subsequent days of trial follow the same form.

degree of confidence. For example, a model might generate a point estimate of 34 percent along with a confidence interval from 27 to 41 percent.

B. Dr. Kousser's Direct Testimony

Dr. Kousser examined results of ten City Council elections from 2002 to 2016 (so-called "Endogenous" elections) in which an Asian candidate appeared on the ballot. Dr. Kousser also examined voting by City residents in nine County School Board and SCUSD elections (so-called "Exogenous" elections) from 2000 to 2016 in which an Asian appeared on the ballot. His methodology grouped the population into (1) NHWBs; (2) Latinos; and (3) Asians. Dr. Kousser focused on the voting patterns of the NHWBs and the Asians. Dr. Kousser then analyzed all nineteen elections using the three standard statistical models.

Dr. Kousser's EI analysis showed that in five of the ten City Council elections voting was polarized and the Asian candidate lost. He also found that in each of the elections where voting was not polarized, the Asian candidates also lost. Dr. Kousser's EI analysis showed that in six of the nine County School Board and SCUSD elections voting was polarized and the Asian candidate lost. He also showed that in the three elections where voting was not polarized the Asian candidate won. Dr. Kousser also provided qualitative information about each of the nineteen elections.

C. Dr. Lewis's Direct Testimony

Dr. Lewis's direct testimony focused on the methodological shortcomings of using EI to analyze City Council elections. He raised four key issues.

First, Dr. Lewis testified that the reliability of EI depends on the degree of racial and/or ethnic homogeneity of precincts. Unlike jurisdictions analyzed in most other FVRA and CVRA actions, Asians residing in the City at most constitute 42 percent of the population in any particular precinct. Dr. Lewis concluded that the relatively high level of homogeneity in the City "precludes reliable inferences about the support for various candidates for City Council among Asian voters." (Lewis Direct at 5.)

Second, Dr. Lewis tested the outcome of the EI results by calculating Democratic Party registration among Asians and non-Asians in the City. Dr. Lewis found that the predictions

1   using EI were substantially different from the actual registration data, thus casting doubt on

2   whether EI could provide any useful output on polarized voting in the City.

3   Third, Dr. Lewis concluded that the problems inherent in applying EI where there is a

4   high degree of homogeneity make it difficult to establish there is "cohesion in voting across the

5   diverse national-origin communities that exist within the City of Santa Clara's broader Asian

6   community." (Lewis Direct at 5.)

7   Fourth, while Dr. Lewis applied EI to the 2016 City Council elections only as a "proof of

8   concept," he concluded that evidence of polarized voting was weak at best.

9   IV.   **LEGAL FRAMEWORK**

10   A.   **At-Large Elections and Polarized Voting**

11   The City currently employs an at-large method for electing City Council members.

12 At-large voting systems are disfavored under both federal and California voting rights laws

13 because it is well-understood that such election systems dilute the votes of racial minority

14 groups. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 47 ("*Gingles*"); *Sanchez v. City of Modesto*

15 (2006) 145 Cal.App.4th 660, 667-68) ("*Sanchez*").) To protect against voter dilution, the CVRA

16 provides:

17   An at-large method of election may not be imposed or applied in a manner that
            impairs the ability of a protected class to elect candidates of its choice or its
18   ability to influence the outcome of an election, as a result of the dilution or the
            abridgment of the rights of voters who are members of a protected class, as
19   defined pursuant to Section 14026.

20

21 (§ 14027.) The term "protected class" means "a class of voters who are members of a race,

22 color, or language minority group, as this class is referenced and defined in the federal Voting

23 Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.)." (§ 14026, subd. (d).) Asians are a protected

24 class.[4]

25

26 _____

27 [4] Federal courts follow census definitions of race. (See, e.g., *Georgia v. Ashcroft* (2003) 539 U.S. 461,473 n.l,
    superseded by statute on other grounds.) The Asian racial category used by the census is set out in guidance from
28 the Office of Management & Budget and comprises those persons "having origins in any of the original peoples of
    the Far East, Southeast Asian, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan,
    Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam." (Office of Management & Budget,

A violation of the CVRA is established if it is shown that racially polarized voting occurs in an election. (§ 14028, subd. (a).) The phrase "racially polarized voting" means:

> [V]oting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by ~~voters in a protected class, and in the choice of candidates and electoral choices~~ that are preferred by voters in the rest of the electorate.

(*Id.* § 14026, subd. (e).)

B.   The *Gingles* Preconditions

The reference to "case law regarding enforcement of the federal Voting Rights Act of 1965" (the "FVRA") in the definition of "racially polarized voting" implicates the U.S. Supreme Court opinion referenced above – *Gingles*. To determine if the FVRA is violated, *Gingles* instructs courts to first determine if three "preconditions" are met. If that showing is made, *Gingles* requires courts to consider the "totality of the circumstances" in determining if the challenged electoral process impermissibly impairs the minority group's ability to elect representatives of its choice. (*Gingles, supra,* 478 U.S. at 44-45.)

The CVRA is patterned after the FVRA and incorporates federal case law interpreting provisions in the FVRA. Under the CVRA, however, the first *Gingles* precondition – if there is a compact majority-minority district – is not considered until the remedy phase. (§ 14028, subd. (e).) In addition, *Gingles's* "totality of the circumstances" analysis is replaced with express circumstances and factors spelled out in the CVRA. (§§ 14028, subds. (b), (e).) During this liability phase of trial, therefore, the focus was on the second and third *Gingles* preconditions.

The second and third *Gingles* preconditions are: (1) "the minority group must be able to show it is politically cohesive"; and (2) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – to defeat the minority's preferred candidate." (*Gingles, supra,* 478 U.S. at 51.) In other words, *Gingles* states that racially polarized voting is

Revisions to the Standards for the Classification of Federal Data on Race & Ethnicity, 62 Fed. Reg. 58782, 58789 (Oct. 30, 1997).)

shown where "there is a consistent relationship between the race of the voter and the way in which the voter votes, or to put it differently, where [minority] voters and [nonminority] voters vote differently." (*Id.* at 53, n.21 [internal citation and editing omitted].) This "consistent relationship" between race and voting may be established by evidence of statistically significant differences between the voting patterns of a minority and nonminority group. (*Id.* at 53.)

Under the FVRA courts are required to conduct "a searching practical evaluation of the past and present reality" to determine whether minority groups can participate equally in the political process and elect candidates of their choice. (*Gingles, supra,* 478 U.S. at 79-80 [internal quotations omitted].) Individual elections can be given more or less weight depending on the circumstances, including "the absence of an opponent, incumbency, or the utilization of bullet voting." (*Id.* at 51.)

C.   **Evidence of Racially Polarized Voting**

Complicated statistical methods are frequently used to prove FVRA violations. The CVRA states: "The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting." (§ 14026, subd. (e).)

In addition to statistical methods, the CVRA instructs courts to consider other evidence:

> 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 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. ...

(§ 14028, subd. (b).) The CVRA also instructs courts to consider:

> [T]he history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class 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, and the use of overt or subtle racial appeals in political campaigns. ...

1 (§ 14028, subd. (e).)

2   The CVRA was enacted with California's racial/ethnic diversity in mind and the fact that

3 California has multiple minority groups. (*Sanchez, supra,* 145 Cal.App.4th at 669.) In

4 particular, the author of the bill stated:

5   In California we face a unique situation where we are all minorities. We need
        statutes to ensure that our electoral system is fair and open. This measure gives us
6   a tool to move us in that direction. . . .

7

8 (*Id.* at 669 [citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2001 Reg.

9 Sess.) as amended Apr. 9, 2002, at 2].) Consequently, the lens through which voting patterns are

10 evaluated under the CVRA may, under certain circumstances, be wider than what would be

11 evaluated under the FVRA.

12   One factor the CVRA does not require a court to consider is "proof of an intent on the

13 part of the voters or elected officials to discriminate against a protected class. . . ." (§ 14028,

14 subd. (d).) The CVRA also states: "The fact that members of a protected class are not

15 geographically compact or concentrated may not preclude a finding of racially polarized voting,

16 or a violation of Section 14027 and this section, but may be a factor in determining an

17 appropriate remedy." (§ 14028, subd. (c).) These differences are consistent with the legislative

18 intent for the CVRA to "provide a broader cause of action for vote dilution than was provided for

19 by federal law." (*Sanchez, supra,* 145 Cal.App.4th at 669.)

20   **D.   Burden of Proof**

21   Cases interpreting the FVRA hold that plaintiffs must prove all three *Gingles*

22 preconditions by a preponderance of the evidence. (*League of United Latin Am. Citizens v.*

23 *Perry* (2006) 548 U.S. 399, 425-26.) *Gingles* itself states that showing a significant number of

24 minority group members "usually" vote for the same candidate can prove political cohesiveness.

25 (*Gingles, supra,* 478 U.S. at 56.) Likewise, *Gingles* states it is sufficient to show a white bloc

26 vote will "normally" defeat the combined strength of minority support plus white crossover

27. votes. (*Id.*) However, *Gingles* recognized that "the degree of racial bloc voting that is

28 cognizable as an element of a [] vote dilution claim will vary according to a variety of factual

1 circumstances." (*Id.* at 57-58.) In part because a variety of factual circumstance must be

2 considered, the FVRA does not require mathematical certainty. (*United States v. City of Euclid*

3 (2008) 580 F.Supp.2d 584, 602 ("[A]n approach might yield an inexact result for purposes of a

4 hypothetical mathematical challenge, but could still be correlative, probative, and sufficiently

5 accurate to bear on the ultimate issue of racially bloc voting.").

6   **E.**   **Lack of Precedent**

7   The CRVA was enacted in 2002. It has been amended several times since then. But

8 while more than fifteen years has passed, there are only three published cases interpreting its

9 provisions: *Sanchez, supra,* 145 Cal.App.4th 660, *Rey v. Madera Unified School Dist.* (2012)

10 203 Cal.App.4th 1223, and *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781. *Sanchez*

11 provides useful background information about the CVRA, but none of these cases resolved

12 issues disputed here.

13 **V.**   **ANALYSIS**

14   Plaintiffs argue there is ample evidence to find that at-large elections for City Council

15 violate the CVRA. Plaintiffs argue Dr. Kousser applied standard statistical methods to relevant

16 election results, and those results show racially-polarized voting. Plaintiffs add that the CVRA

17 allows consideration of other factors, including historic discrimination against Asians and the

18 City's recalcitrance in addressing at-large voting. Plaintiffs argue that one effect of racially-

19 polarized voting is that no Asian has ever been elected to Santa Clara's City Council.

20   The City responds by arguing that Plaintiffs have failed, by a wide margin, to carry their

21 burden of proving any CVRA violation. The City starts by explaining that the usual statistical

22 methods used in these types of cases cannot produce reliable results here because there is not a

23 high enough concentration of Asians in any precinct. Even if statistical methods have some

24 probative value, the City argues they show an absence of racially polarized voting. The City

25 further argues that other factors on which the Plaintiffs rely have little probative value.

26   **A.**   **Bivariate v. Trivariate Analysis**

27   A threshold issue is the meaning of the phrase "voters in the rest of the electorate" as it is

28 used in the definition of "racially polarized voting." This issue arises because Dr. Kousser

1 divided the electorate into three groups: (1) Asians; (2) Non-Hispanic Whites and Blacks; and
2 (3) Latinos. He then compared the voting patterns of Asians to the voting patterns of Non-
3 Hispanic whites and blacks. The City argues that since Dr. Kousser did not compare Asian
4 voting with all "voters in the rest of the electorate," his analysis is irrelevant to proving a
5 violation of the CVRA and should therefore be ignored.

6   The definition of "racially polarized voting" in the CVRA requires showing a difference
7 in voting patterns for candidates who are preferred by voters in a protected class versus those that
8 are preferred by *voters in the rest of the electorate*. (*Id.* § 14026, subd. (e) [emphasis added].)
9 The City argues that in adopting this particular language the California Legislature recognized
10 that California "face[s] a unique situation where we are all minorities." (*Sanchez, supra,*
11 145 Cal.App.4th at 669.) Consequently, "[the] CVRA is race neutral. It does not favor any race
12 over others or allocate burdens or benefits to any groups on the basis of race." (*Id.* at 666.)

13   In response, Plaintiffs argue that the plain language in section 14026, subdivision (e),
14 does not require a comparison of candidates preferred by Asians versus candidates preferred by
15 *all* other voters. Plaintiffs state that the CVRA requires only a comparison of the voting patterns
16 of Asians versus "voters in the rest of the electorate." Plaintiffs emphasize that the CVRA does
17 not say "all of the voters" or just "the rest of the electorate." Instead, it says "voters in the rest of
18 the electorate." Plaintiffs also argue that methodologies approved in FVRA case law, which is
19 referenced in the definition of "racially polarized voting," include "trivariate" analyses just like
20 the one performed by Dr. Kousser. (See *Rodriguez v. Harris County* (2013), 964 F.Supp.2d 686,
21 768; *Aldasoro v. Kennington* (1995) 922 F.Supp. 339, 375.) Plaintiffs further argue that because
22 Latinos vote more often for Asian-preferred candidates than do white voters, combining Latinos
23 and other voters into a single "non-Asian" group would mask the differences in voting patterns.
24 (TR1 98:18-102:1; TR3 156:2-11.) Dr. Kousser stated that his "trivariate" analysis is consistent
25 with professional practices and that it produces more accurate results. (TR1 99:132-24; TR3
26 142:11-16, 154:26-28.)

27   The Court finds that the language in section 14026, subdivision (e), permits the use of
28 trivariate analysis in assessing whether there is racially polarized voting. First, the plain

1 language – "voters in the rest of the electorate" – includes all or part of the group of other voters.

2 The language does not require a comparison to "all" voters in the rest of the electorate. Second,

3 the CVRA seeks to overcome bloc voting. To fulfill the purposes of the CVRA, Plaintiffs should

4 be able to compare voting differences between Asians and an NHWB bloc because that

5 difference is what is causing dilution. The Court agrees that requiring a comparison of Asians on

6 the one hand, and NHWB and Latinos on the other hand, will hide the very thing the CVRA

7 seeks to expose. Third, section 14026, subdivision (e) expressly references the FVRA, and cases

8 under that law have endorsed trivariate analyses. For example, in *Aldasoro*:

9   Plaintiffs' experts then developed a multivariate analysis that divided the
      electorate into three groups: (1) Hispanics, (2) Blacks and (3) Anglos and all
10   others (Asians, Native Americans—everyone not Hispanic or Black). Plaintiffs'
      experts regarded multivariate analysis as more accurate than bivariate analysis for
11   El Centro elections. Defense expert Dr. Klein also agreed that, if one relies on
12   ecological regression, multivariate is better than bivariate.

13 (*Aldasoro v. Kennington, supra*, 922 F.Supp. at 345.) Indeed, under the FVRA, unless the City

14 shows that NHWBs and Latinos together voted cohesively, it would be improper to include them

15 together in the majority bloc. (*Id.* at 375.)

16   For all of these reasons, the Court does not agree with the City that Dr. Kousser's

17 trivariate analysis inconsistent with the CVRA and should be thrown out.

18 **B.   Methodological Disputes on Measuring Political Cohesion**

19   The second and third *Gingles* preconditions are: (1) the minority group must be

20 politically cohesive; and (2) the minority must be able to demonstrate that the white majority

21 votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. Political

22 cohesion may be established by "showing that a significant number of minority group members

23 usually vote for the same candidates. . . ." (*Gingles, supra*, 478 U.S. at 56.)

24   "Statistical proof of political cohesion is likely to be the most persuasive form of

25 evidence, although other evidence may also establish this phenomenon." (*Monroe v. City of*

26 *Woodville* (1989) 881 F.2d 1327, 1331.) The parties agree that EI is now considered the best

27 practice for modeling candidate support among voters of a racial group. (Lewis Direct at 31;

28 TR1 134:15-22.) But while EI may be the best method for analyzing election results, the parties

1 sharply disagree on whether it is useful for assessing political cohesion under the circumstances
2 presented in this case. Issues the parties debated at trial include: (1) surname error; (2) effects of
3 homogeneity; (3) aggregation bias; and (4) confidence intervals. These issues are discussed
4 below.[5]

1.   Surname Error

6 EI relies on a correlation of surnames with ethnicity. Both sides agreed there are
7 instances where there is a mismatch. The current Vice Mayor of Santa Clara is Kathy Watanabe.
8 Her name would likely identify her as of Japanese descent, but her photo on the City's website
9 suggests that may be inaccurate. The City argues that surname errors undermine the reliability of
10 Dr. Kousser's EI analysis.

2.   Effects of Homogeneity

12 The City argues that an even more serious problem in applying EI to this case is that no
13 City precinct has a population of Asians greater than 42 percent. Dr. Lewis noted that the level
14 of support for a particular candidate within homogeneous precincts can provide tight,
15 informative bounds. (TR3 18:14-27.) The interplay of homogeneous precincts and level of
16 candidate support works as a sliding scale – the higher the support the more accurate estimate of
17 voting patterns. (TR3 18:7-27.) However, if there is both a lack of homogeneous precincts and
18 low levels of candidate support, Dr. Lewis states the statistical models will lack tight,
19 informative bounds and produce unreliable estimates. (TR3 17:7-10.) Indeed, he testified that
20 the lack of a relatively homogeneous Asian precinct in Santa Clara *precludes* an analysis with
21 informative bounds to estimate the level of support for particular candidates among Asian voters.
22 (Lewis Direct at 5.)

23 Dr. Kousser, on the other hand, testified that using EI in the absence of highly racially
24 homogenous precincts is consistent with academic standards and professional practice. (Kousser
25 Direct at 19-20; TR1 108:21-23.) Dr. Kousser testified that the use of EI to assess the City's
26 election results is in line with cases involving other jurisdictions with comparable levels of

27 _____

28 [5] The Court does not address every methodological issue discussed at trial. For example, the City argued that removing the abstention choice caused inaccurate results. Plaintiffs disagreed. When this issue came up at trial, the discussion did not seem to warrant further analysis. (TR3 74:25-76:25.)

homogeneity, including Palmdale and Kern County. (TR1 112:7-13, 129:10-15, 215:24-216:3.)

Dr. Kousser concluded that the City's precincts were "sufficiently homogeneous for Asians to permit reliable analysis using ecological inference techniques." (TR1 106:23-107:4)

Despite these disagreements, there was some common ground. Both experts acknowledged there is no fixed standard or "bright line" to apply in determining what level of homogeneity is sufficient to permit reliable analysis. (TR1 107:4-11; TR3 102:4-17.) Dr. Kousser acknowledged that the relatively homogeneous precincts in Santa Clara creates greater uncertainty which is reflected in the larger confidence intervals for his estimates of Asian voting. (TR1 106:5-22.) Dr. Lewis agreed, though his testimony was a little stronger. He said that EI will produce results with low levels of reliability, greater uncertainty, and the possibility for significant bias. (TR3 56:1-6, 103:19-21.)

3. Aggregation Bias

The experts also discussed "aggregation bias." Dr. Lewis noted that EI models combine aggregate level data, and apply assumptions about how the support for candidates among members of each ethnic group will vary across precincts at the individual level. (Lewis Direct at 17.) Dr. Lewis stated that this process creates the long-known problem of EI models: "aggregation bias." This problem is created by the fact that the relationship observed at the aggregate, group-wide level may not be representative of the individual level, e.g., there may be deviations from the aggregate mean at the individual level. (TR3 13:5-10; Lewis Direct at 22.)

To illustrate how aggregation bias may warp the results of an EI model, Dr. Lewis estimated Democratic registration among Asians and non-Asians in the City. His EI model estimated those percentages to be 15 and 59 percent, respectively. The actual numbers are 44 and 51 percent, respectively. (Lewis Direct at 32.) Dr. Lewis testified that this discrepancy doesn't necessarily mean that same thing would be true in the context of the city council elections or other elections that one might look at. (3TR 39:14-16.) And on cross-examination Dr. Lewis stated he was unaware of how voting behavior in the City's non-partisan elections would be affected by the political party registration of Asians or any other race or ethnicity. (3TR 112:11-16.) He also stated he did not run the EI model to determine registration figures for

1   any groups of Republicans. (*Id.* 113:23-27.) It appeared that those estimates would have been

2   more accurate than the estimates for Asians who are registered Democrats. (*Id.* 122:5-10.)

3   Dr. Kousser testified that Dr. Lewis's analysis of the Democratic registration of Asians in

4   the City was flawed for a number of reasons. (See TR3 137:12-140:25.) One point he made was

5   that a significant number of Asians express no party preference. Dr. Kousser stated that any

6   party-affiliation analysis is fraught with error when the group of interest often has no party

7   preference, and the elections analyzed are non-partisan. (*Id.* 140:2-19).

8   **4.   Confidence Intervals**

9   During the cross-examination of Dr. Kousser, the City confronted him with tables from

10 his own report that show the support Asian voters gave to various candidates. Below the tables

11 the City inserted graphs which illustrated the confidence intervals in Dr. Kousser's voting

12 results. (See EXS. 527-41.) While the point estimates indicated discrete levels of support by

13 Asians for a given candidate, in some instances the confidence intervals did not. The City

14 argued that because in some instances the confidence intervals overlapped, Dr. Kousser's own

15 data show the Asian-preferred candidate could not be determined. Without an Asian-preferred

16 candidate, the City argued, Plaintiffs could not meet the requirement for minority voter cohesion.

17   The point made by the City was explored many other times. Both sides educated the

18 Court about confidence intervals. The Court learned, for example, that a 95 percent confidence

19 level technically "means that if the null hypothesis is that there is no difference between one

20 point estimate and the other point estimate, that five times out of 100 we would say that there

21 was a difference at some level." (TR1 130:10-14.) There was even a discussion about statistical

22 theory and the differing views of traditionalists and Bayesians.

23   In its post-trial brief, Plaintiffs cited numerous cases that addressed the use of point

24 estimates and confidence intervals. Plaintiffs pointed out that courts deciding FVRA cases

25 regularly exercise some flexibility in reviewing statistical evidence. (See, e.g., *Fabela v. City of*

26 *Farmers Branch*, 2012 WL 3135545 at *11 & n.33 [relying on point estimates to find cohesion

27 because the broad confidence intervals were the unavoidable results of the absence of highly

28 concentrated Hispanic precincts and it was "undisputed that a point estimate is the 'best estimate'

for the data"]; *Benavidez v. City of Irving* (2009) 638 F.Supp.2d 709, 724-25 [finding cohesion notwithstanding large confidence intervals because "the figures produced by an accurate calculation of ER and EI both suggest Hispanic political cohesion"].)

The Plaintiffs also cited cases addressing the meaning of "preponderance of the evidence" in the context of statistical analyses. Plaintiffs argued that statistical significance should not be conflated with Plaintiffs' burden to show politically cohesive voting. Courts and commentators have highlighted this error and warned against the dangers of this conflation. (See, e.g., *Turpin v. Merrell Dow Pharms., Inc.* (1992) 959 F.2d 1349, 1357 n. 2 ["While scientists' use of confidence intervals is as a common-sense device to give professional weight to their results, such confidence intervals are not the same as the preponderance of the evidence standard of proof. This requires proving one's case by the greater weight of the evidence."].)

Plaintiffs cited the Federal Judicial Center's *Reference Manual on Scientific Evidence* (3d ed. 2011) ("*Reference Manual*"), which cautions against equating levels of statistical significance, measured by "p-values" of 0.05, 0.10 and the like, and plaintiffs' burden of proof. (See *Reference Manual* at 271 n.138 ["In some cases, the p-value has been interpreted as the probability that defendants are innocent of discrimination. However, as noted earlier, such an interpretation is wrong."].) Plaintiffs note the *Reference Manual* describes this as a "common error made by lawyers, judges, and academics" and explains why a p-value is an inappropriate stand-in for the burden of proof.

5. Usefulness of Dr. Kousser's EI Results

After listening to the arguments made by each side on each of the four issues, the Court offers the following assessments that frame its consideration of Dr. Kousser's EI results.

First, the problem of using surnames as proxies for ethnicity is readily apparent. However, in most instances the correlation between name and ethnicity will be correct. The City did not offer any study or analysis that has measured the level of error or suggested surname error should disqualify the use of EI. The Court concludes that it should be mindful of this source of potential unreliability, but it is not a basis for rejecting Dr. Kousser's EI results.

1   Second, the Court understands the City's point that the relative homogeneity of Asians in

2 City precincts makes the EI results less reliable. Indeed, Plaintiffs concede this point, and

3 explain it is the reason the confidence intervals are often quite large. Dr. Lewis opined that the

4 lack of reliability "precludes" their use in this case, yet he also agreed: (1) there is no bright line

5 at which EI results must be tossed (TR3 102:4-17); (2) there are no better statistical methods for

6 determining the voting behavior of different racial groups within Santa Clara (TR3 54:27-

7 56:23.); and (3) some information is better than none. (TR3 59:13-22.) The Court concludes

8 that the EI results presented by Dr. Kousser are less reliable than those generated in more

9 segregated communities, but his EI results are nonetheless probative. (See *Luna v. County of*

10 *Kern* (2018) 291 F.Supp.3d 1088, 1124-25 ["The court need not insist on mathematical

11 exactitude in assessing racial polarization."] ("*Luna*"); *Rodriguez v. Harris County, supra,* 964

12 F.Supp.2d at 768 ["The Court finds the ecological inference data imprecise. . . but the data is

13 nevertheless probative on the question of racial bloc voting]; *Fabela v. City of Farmers Branch,*

14 *supra,* 2012 WL 3135545 at *10-11 & nn. 25, 33; *Perez v. Pasadena Indep. Sch. Dist.* (1997)

15 958 F.Supp. 1196, 1220-22, aff'd 165 F.3d 368; *Benavidez v. City of Irving, supra,* 638

16 F.Supp.2d at 724-25; *Aldasoro v. Kennington, supra,* 922 F.Supp. at 347.)

17   Third, like the methodological difficulties posed by homogeneity, the Court understands

18 the City's concerns that aggregation bias may infect the EI results to such a degree they cannot

19 be relied upon. The illustration of this bias by Dr. Lewis's analysis of party registration,

20 however, is fraught with both uncertainties and inconsistencies. The Court reaches the same

21 conclusion as another Court to which this argument was presented:

22   The court acknowledges the disparity between the estimates produced by ER and
      EI in Dr. Katz's analysis of Latino Democratic registration compared to the
23   known values, but is not persuaded as to the implications that defendants would
      have the court draw therefrom. Notably, Dr. Katz was unable to explain the
24   relationship between registration and voting – only to say that they are "related" –
25   while also acknowledging that they are different and may have different
      geographical distributions. The court has no reason to believe that the cause of
26   the inflated estimates of Latino Democratic registration is due to insufficient
      homogeneous precincts as suggested by Dr. Katz, rather than to accept
27   Dr. Kousser's rational explanation – that in heavily Latino precincts, non-Latinos
28   tend to register as Democrats at a higher rate than non-Latinos in other precincts.

Luna, supra, 291 F.Supp.3d at 1125 [internal citations omitted].)

Fourth, the Court agrees with the arguments made by Plaintiffs regarding confidence intervals. While a 95 percent (or even higher) confidence intervals often make sense for social scientists, meeting a "preponderance of the evidence" standard does not require that level of certainty. As noted below, the Court is comfortable applying 80 percent confidence intervals in assessing whether or not a candidate is preferred by Asians. Given surname error and the other sources of potential unreliability identified by the City, however, the Court does not believe it would be appropriate to use a lower confidence interval.

In sum, the City raised many arguments about why EI results may be inaccurate. Under the circumstances in this case, it is true that Dr. Kousser's EI results may not be entirely accurate. Nonetheless, the Court finds that the EI results are probative, and like other Courts, this Court will consider them along with other factors. (See, e.g., *United States v. Euclid, supra,* 580 F.Supp.2d at 602 ["[T]he Court is to employ statistical analysis in aid of its own fact-finding, not to adhere slavishly to it."].)

C.   **Plaintiffs' Evidence of Asian Cohesion and Majority Block Voting**

Dr. Kousser examined City Council elections from 2002 to 2016 in which there was an Asian candidate. This is consistent with CVRA requirements: in single seat elections, "[T]he 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." (§ 14028, subd. (b).) Dr. Kousser's analysis over a fourteen year period is also important because "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." (*Gingles, supra,* 478 U.S. at 57.)[6]

In addition to the City Council elections, Dr. Kousser also examined Santa Clara County School Board of Education ("County School Board") and Santa Clara Unified School District ("SCUSD") Board elections. So-called "exogenous" elections may be considered in assessing

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[6] Dr. Kousser used three models to generate his results: ER, WER and EI. Because both Dr. Kousser and Dr. Lewis agreed EI was the superior method, the Court has considered only the EI results.

racial polarization, though they are not as probative as endogenous elections as to whether the minority group is politically cohesive. (*Luna, supra,* 291 F.Supp.3d at 1120.) The two candidates who receive the most votes in School elections win. The CVRA provides that in multiseat elections "the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis." (§ 14028, subd. (b).)

1. City Council Elections

Dr. Kousser analyzed ten City Council elections between 2002 and 2016. The parties agree there was RPV in three of those elections: Seat 2 in 2002; Seat 3 in 2004; and Seat 5 in 2014. (EXS. 527, 528, 531.) The parties also agree there was no RPV in five of those elections: Seat 4 in 2004; Seat 2 in 2010; Seat 3 in 2012; Seat 2 in 2014; and Seat 6 in 2016. (EXS. 528, 529, 530, 531, 532.)

The parties dispute whether there was RPV in two elections: Seat 4 in 2016 and Seat 7 in 2016. (EX. 532.) The primary argument made by the City is that the 95th percentile confidence intervals overlap among Asian-supported candidates, and therefore Plaintiffs cannot show there was any candidate who was preferred by Asian voters. (§ 14026, subd. (e).) At the 80th percentile confidence interval, however, there is an Asian preferred candidate in both contests, and for the reasons noted above, the Court believes an 80th percentile confidence interval is sufficient.[7] Because there was an Asian preferred candidate, because NHWBs voted differently than Asians, and because the NHWB candidate won, the Court finds that there was RPV in these two elections.

The Court therefore finds, based on Dr. Kousser's analysis of the City Council elections, that in five elections there was RVP, and in five elections there was no RPV.

2. School Elections

Dr. Kousser analyzed nine County School Board and SCUSD (together, "School") elections between 2000 and 2016. He considered only the votes cast by City residents. The

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[7] To calculate the 80 percent confidence interval, the Court started with the point estimate and the standard error. It then multiplied the standard error by 1.28. That product was then added to, and subtracted from, the point estimate. For example, if the point estimate is 45 percent and the standard error is 5.6, the 80 percent confidence interval would be from 37.8 percent to 52.2 percent.

parties agree there was RPV in two School elections: the School elections in 2004 (SCUSD) and 2016 (County School Board). (EXS. 536, 541.) The parties agree there was no RPV in three elections: 2000 (County School Board), 2008 (County School Board), and 2012 (County School Board). (EXS. 533-535.)

The parties dispute whether there was RPV in four School elections: 2008, 2010, 2012 and 2014. Once again the City notes that the 95th percentile confidence intervals overlap among Asian-supported candidates, and therefore Plaintiffs cannot show there were any candidates who were preferred by Asian voters. (§ 14026, subd. (e).) There was, however, an Asian preferred candidate in the 2008 and 2012 County School Board elections at the 80 percent confidence level. NHWBs voted differently than Asians, and because the NHWB candidate won, the Court finds that there was RPV in those two elections (2008 and 2012 SCUSD). There was not, however, an Asian-preferred candidate in the two other elections (2010 SCUSD and 2014 SCUSD), and thus RPV was not shown.

Overall, the Court finds there was RPV in four School elections and no RPV in five School elections.

3. Special Circumstances and Weighting of Elections

Gingles states there can be "special circumstances" that affect the weight given to any particular election result. (478 U.S. at 51.) *Gingles* gives as an example of a special circumstance a minority candidate running unopposed. (*Id.*) *Gingles* also counsels that individual elections can be given more or less weight depending on the circumstances, including "the absence of an opponent, incumbency, or the utilization of bullet voting." (*Id.* at 57.)

Dr. Kousser suggests that the four City Council elections in which Dr. Mohammed Nadeem, an Asian, ran and lost might be considered "special circumstances" such that the Court might disregard, or give less weight to, the results of those elections. Dr. Nadeem lost the elections in 2010, 2012, 2014 and 2016. The parties agree that in none of those elections was there RPV. Dr. Kousser notes that in 2011 Dr. Nadeem served on the Charter Review Committee and rejected proposals to modify election rules after the City received a letter stating

1 there was RPV. Dr. Kousser notes further that Dr. Nadeem later flip-flopped on various issues

2 concerning the San Francisco 49ers football team.

3   The Court does not believe Dr. Kousser's speculation rises to the level of "special

4 circumstances" that warrant disregarding Dr. Nadeem's election losses. However, the Court

5 does believe that the election results in 2012, 2014 and 2016 should be given less weight.

6 Dr. Nadeem's attractiveness as a candidate dimmed in those years among Asians and all other

7 voters. In 2010 he received 46 percent of the votes. In the elections that followed he received

8 38 percent, then 29 percent, and finally 20 percent of the vote. Dr. Nadeem's poor track record

9 as a candidate is a more credible explanation for a lack of Asian support than the absence of

10 racially polarized voting.

11   **D.   Statutory Factors**

12   The CVRA specifically calls out factors that go beyond statistical analyses that the Court

13 may consider. In this case, the City argues the statistics developed by Dr. Kousser are unreliable.

14 As noted above, the Court believes those statistics are probative, but not definitive. The Court

15 agrees with the City that one of the challenges of applying statistical methods to this dispute is

16 the homogeneity of the City's precincts. Under the CVRA, however, that homogeneity "may not

17 preclude a finding of racially polarized voting. . . ." (§ 14028, subd. (c).) This should not be

18 surprising. As noted by the City, the CVRA was enacted with the fact that "we are all

19 minorities" in mind. Because homogeneity cannot stand in the way of finding racially polarized

20 voting, other factors must necessary be given more weight. This is in line with the legislative

21 goal "to provide a broader cause of action for vote dilution than was provided for by federal

22 law." (*Sanchez, supra,* 145 Cal.App.4th at 669.) Relevant factors set forth in the CVRA are

23 discussed below.

24   **1.   City Election Outcomes**

25   The CVRA states that "[o]ne circumstance that may be considered in determining a

26 violation of Section 14027 is the extent to which candidates who are members of a protected

27 class and who are preferred by voters of the protected class . . . have been elected to the

28 governing body of a political subdivision that is the subject of an action. . . ." (§ 14028, subd.

1   (b).) It is undisputed that no Asian candidate has ever won a City Council election. In the City

2   Council elections from 2002 and 2016 Asian candidates ran ten times. Every time they lost.

3   2.   **Practices that Enhance Vote Dilution**

4   The Court may consider the City's use of "electoral devices or other voting practices or

5   procedures that may enhance the dilutive effects of at-large elections." The City uses a

6   "numbered posts" form of at-large elections, in which candidates run for designated seats and

7   voters from the entire city participate in the election for each seat. (Kousser Direct at 25-26.)

8   Numbered posts disadvantage minority voters by preventing them from concentrating their votes

9   behind a single minority-preferred candidate and withholding votes from less preferred

10   candidates, a so-called "single-shot" strategy. (*Id.*) Numerous cases have recognized this

11   potential for discriminatory impact. (See, e.g., *City of Rome v. United States* (1980) 446 U.S.

12   156, 185, 187 & n. 21; *League of United Latin Am. Citizens, Council No. 4434 v. Clements*

13   (1993) 986 F.2d 728, 749-50 (en banc).)

14   The failure to address the source of voting dilution, such as numbered posts, is a factor

15   that should be considered. (*Gingles, supra,* 478 U.S. at 37.) The City was put on notice in 2011

16   that its at-large, numbered posts were diluting Asian voting rights. Instead of candidly

17   addressing the issue, the City's interim general counsel asked that a demographer's report be

18   "stripped" of "the information about the council election history and the charts . . . showing

19   racial polarization" before it was distributed to members of the City Council and the Charter

20   Review Committee. (EX. 43 at CITY000138.) The City did not make any changes to its

21   "electoral devices or other voting practices or procedures" despite having two Charter Review

22   Committees examine the issue, first in 2011 and then in 2015. (EX. 12 at YUMORI_00743.)

23   Indeed, it was not until 2017 that it once again appointed a Charter Review Committee to

24   examine its voting procedures. This only started after the City received newly-drafted demand

25   letters from the Plaintiffs. (EX. 10 at YUMORI_00706-07; EX. 14 at YUMORI_00785.)

26   3.   **Past Discrimination**

27   The CVRA provides a long, non-exclusive list of other factors that are probative "to

28   establish a violation of Section 14027. . . ." (§ 14028, subd. (e).) They include "the extent to

1   which members of a protected class bear the effects of past discrimination in areas such as

2   education, employment, and health which hinder their ability to participate effectively in the

3   political process." (*Id.*) Dr. Ramakrishnan testified that Asians endured continuous, overt and

4   painful discrimination from the 1850s until at least 1965. (Ramakrishnan Direct at 2.) The past

5   discrimination included curtailment of basic rights, nationality-based immigration quotas,

6   internment of citizens of Japanese descent during World War II, and limitations on renting

7   housing and owning land. Dr. Ramakrishnan also reviewed documents related to the failed

8   attempt in 2007 to name a business district in Santa Clara "Korea Town" which included

9   inflammatory, nationality-based public comments.

10   The Court agrees that the dark chapters of our country's history, and overt public

11 comments exhibiting great prejudice, hinder the ability of Asians to participate effectively in the

12 political process. Some effects, however, are attenuated. Dr. Ramakrishnan testified that

13 between two-thirds and three-quarters of the Asian residents in Santa Clara are first generation

14 immigrants. Most were not directly affected by the discriminatory policies that largely ended in

15 1965. The City's evidence showing that Asians have higher levels of education and higher job

16 earnings (EX. 505 at 45, 77, 85) run counter to the argument that the past history of education

17 and employment "hinder their ability to participate effectively in the political process." Indeed,

18 Dr. Ramakrishnan testified that "in the last 20 years . . . California is very welcoming and

19 integrating towards its immigrant populations." (TR2 14:1-7.)

20   The weight given to Dr. Ramakrishnan's testimony is also affected by his failure to tie

21 the history and the detrimental effects to people actually living in the City. Other than his

22 summary of the Korea Town events in 2007, Dr. Ramakrishnan did not try to connect that

23 history specifically to City residents. (TR2 46:27-47:10.) And while the Korea Town events

24 were troubling, Dr. Ramakrishnan did not say whether Asians from other national origins (China,

25 Japan, India, Vietnam, Philippines, etc.) felt the same hostility or were even supporters of the

26 designation.

27

28

E.   Evaluating the Evidence

The Court puts the evidence admitted at trial into four categories: (1) statistical analyses of election results; (2) City election outcomes; (3) practices that enhance vote dilution; and (4) past discrimination.

First, the Court finds that Dr. Kousser's analysis of election results support a finding that racially polarized voting took place in City Council elections from 2002 to 2016. He examined ten elections "in which at least one candidate is a member of a protected class." (§ 14028, subd. (b).) The Court finds, as noted above, that the results of five City Council elections show racially polarized voting and the results of five City Council elections do not. However, Dr. Nadeem ran in four elections in which there was not any racially-polarized voting, and for the reasons set forth above, less weight should be given to those elections. The Court finds there was racially polarized voting in four of the nine School elections that Dr. Kousser analyzed. However, these exogenous elections are not as probative as City Council elections.

Second, it is undisputed that no Asians have been elected to the City Council. Since 2002 there have been ten elections in which Asians have run. Every time they lost. The CVRA requires the Court to consider the extent to which candidates who are members 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. (§ 14028, subd. (b).) Here, the answer is none.

Third, the Court finds the use of numbered seats in City Council elections are "electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections." (§ 14028, subd. (e).) It is widely recognized that numbered posts or seats increase the difficulty that minority groups face in winning at-large elections by preventing them from concentrating their votes. (*Gingles*, 478 U.S. at 36-39 & nn. 5, 6.) In 2011 an overwhelming majority of the City Charter Committee voted in favor of abandoning numbered seats. The City Council has never adopted that recommendation.

Fourth, other probative factors include the history of discrimination and the extent to which members of a protected class bear the effects of past discrimination in areas such as

Fourth, other probative factors include the history of discrimination and the extent to which members of a protected class 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. Dr. Ramakrishnan's testimony highlighted historical discrimination against Asians and its enduring effects. The Court finds this factor has some probative value, but should not be weighted heavily.

* * * * * *

Based on the evidence presented at trial, the Court finds that Plaintiffs have proven by a preponderance of the evidence that the at-large method of election used by the City impairs the ability of Asians to elect candidates as a result of the dilution and abridgment of their rights as voters. Having found the City liable for violating the CVRA, this action will now proceed to the remedies phase.

Dated: May 15, 2018

Thomas E. Kuhnle
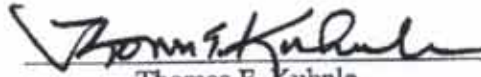Judge of the Superior Court

EXHIBIT D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION MARIA LOYA; and ADVOCATES FOR MALIBU PUBLIC SCHOOL,	)))))
Plaintiffs,	))
vs.	) No. BC616804)
CITY OF SANTA MONICA, and DOES 1 through 100, inclusive,	))))
Defendants.	)))

Deposition of TONY VAZQUEZ, VOLUME I,

taken on behalf of the Plaintiffs, at

43364 10th Street West, Lancaster,

California, commencing at 10:45 a.m., on

Tuesday, September 20, 2016, before

Jennifer J. Angelov, CSR No. 12287, a

Certified Shorthand Reporter in and for the

County of Los Angeles, State of California.

1

1   Q.   And what is it?

2   A.   It's an article by the "L.A. Times" --

3   Q.   Do you recall --

4   A.   -- talking about my election.

5   Q.   Yeah.

6   Do you recall being interviewed for this

7 article?

8   A.   Yes.

9   Q.   Okay. About midway down the first page, it

10 says: "Vazquez blamed his loss on 'the racism that

11 still exists in our city. The racism that came out in

12 this campaign was just unbelievable,' he said."

13   What sort of racism came out in that campaign?

14   MR. BROWN: I'm going to object. The term

15 "racism" is vague.

16   THE WITNESS: I guess -- well, let me ask you

17 what's your definition of "racism"?

18 BY MR. SHENKMAN:

19   Q.   Well, it's -- it's a word that --

20   A.   But --

21   Q.   -- that you used.

22   A.   I used, yeah.

23   Q.   Right?

24   So you -- you obviously have some

25 understanding of what racism is, right?

163

1   A.   Yes.

2   Q.   Okay. So what is your understanding --

3   A.   So you want my -- yeah. In my opinion, I took

4   it, I guess, more from being attacked by the police in

5   varying racist cartoon literature.

6   Q.   Uh-huh. So there was a cartoon that the

7   police union sent in a mailer?

8   A.   I think it was in the newspaper.

9   Q.   Oh, they published it in "The Outlook," was

10   it, at the time?

11   A.   I -- I believe "The Outlook" was still around.

12   Q.   Yeah. So the police union published a -- a

13   racist --

14   A.   Took an ad.

15   Q.   -- a racist cartoon in "The Outlook."

16   A.   Yes.

17   Q.   And can you describe the substance of that

18   cartoon?

19   A.   I can't tell you exactly what the caricature

20   was based -- but it was basically -- the theme was

21   that -- that I was kind of lumped into the gang element

22   and was not the kind of person you want running your

23   city.

24   Q.   Uh-huh. And when you say "lumped into the

25   gang element," are we talking about Latino gangs?

                                                        164

1   A.   Yes.

2   Q.   Do you recall if the cartoon had a particular

3   look or description that would lead readers to believe

4   that this was referring to a Latino gang?

5   (Whereupon, Mr. Rubin re-enters the deposition

6   proceeding.)

7   THE WITNESS: Not per se. Like -- and I -- I

8   mean it didn't have me tatted up, for example, yeah.

9   But just the image, yeah.

10   MR. SHENKMAN: Yeah.

11   Q.   But you -- you understood it --

12   A.   I understood it.

13   Q.   -- to be racist, right?

14   A.   Yes.

15   Q.   Okay. Do you have any copies of that cartoon

16   today?

17   A.   You know, I thought I did. And I -- because

18   it's -- in the -- you know, we did a major renovation

19   in the home, and I haven't been able to locate that

20   file. But it may be somewhere in my garage somewhere.

21   Q.   Okay. And do you think that cartoon had a --

22   an effect on voters?

23   A.   I believe so.

24   Q.   How much -- how much money did you spend in

25   the 1994 campaign?

                                                    165