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Gov. Code, § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

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

Plaintiffs,

v.

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

Defendants.

CASE NO. BC616804

DEFENDANT CITY OF SANTA MONICA'S TRIAL BRIEF

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

Assigned to Judge Yvette Palazuelos, Dep't 28

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I. INTRODUCTION

Plaintiffs in this case cannot prove with evidence either that Santa Monica's at-large election system has resulted in either legally significant racially polarized voting (that is, minority-preferred candidates usually being defeated as the result of white-bloc voting) or vote dilution (that is, that the ability of Latino voters to elect or influence the election of their candidates of choice has suffered by comparison to any alternative election system). As a result, both their California Voting Rights Act ("CVRA") and Equal Protection claims fail.

Latinos make up 13.6 percent of Santa Monica's voting population, and live throughout Santa Monica. The evidence will show that since 2002, 77 percent of Latino-preferred candidates have won seats on the City Council, and 86 percent of Latino-preferred candidates have won seats on the City's other governing boards. That record is fatal to plaintiffs' claims. There is no legally significant pattern of racially polarized voting, and Latino votes have not been diluted, because Latino-preferred candidates *usually win* and no permissible alternative electoral system could improve on Latino voters' impressive record of success. Furthermore, Plaintiffs have no evidence that in adopting Santa Monica's at-large system of elections, the relevant decisionmakers acted with an intent to discriminate. Plaintiffs have threatened and cajoled dozens of cities and other political subdivisions throughout the state to change their election systems, but here, in Santa Monica, plaintiffs sued the wrong city.

Santa Monica's demographics and election results are so unfavorable for plaintiffs that they launched a strategy of scorched-earth discovery into irrelevant collateral issues that they have made clear they will seek to parlay into a series of time-consuming distractions at trial.

Because Santa Monica's demographics and its election results for Latino-preferred candidates are so unfavorable to them, plaintiffs know that to win they must convince this Court that the only candidates who can, *as a matter of law*, be counted as preferred by Latino voters are those who are themselves Latino. As the Court will see, even accepting this premise, when the correct legal standards are applied to Latino candidates, plaintiffs remain unable to prove either racially polarized voting or vote dilution. More importantly, a focus on Latino candidates alone contradicts the terms of the CVRA, the relevant case law, and common sense. The CVRA is concerned with ensuring equality of opportunity in the electoral process for voters of protected classes—and in fact for all California voters. The

Court should embrace the CVRA's language and focus on the preference of Latino voters, rather than plaintiffs' self-serving and unsupported position that only the race or ethnicity of candidates matters.

The assumption that only Latinos can be Latino-preferred candidates runs throughout plaintiffs' case. For example, their expert, Dr. J. Morgan Kousser, opines that voting is "racially polarized" by selectively analyzing only Latino-surnamed candidates, without taking into account Latino votes for *non*-Latino-surnamed candidates. Dr. Kousser also fails to analyze whether white bloc voting has *caused* the defeat of purportedly minority-preferred candidates, which has been a foundation of voting rights law at least since *Thornburg v. Gingles* (1978) 478 U.S. 30. Other courts have rejected this very same flawed "racial polarization" analysis, and this Court should do the same. As Dr. Kousser admitted in his deposition, even if the focus is strictly on Latino-surnamed candidates, when Santa Monica's elections are analyzed under the proper standard, those Latino-surnamed candidates do not usually lose, but rather usually win. The same is true when Latino-preferred (and not just Latino) candidates are examined – they usually win. This is all that the Court needs to decide against plaintiffs on both of their claims.

Because the relevant facts are so adverse to them, plaintiffs have striven mightily to create a distorted and self-serving narrative about of the Pico Neighborhood, which plaintiffs use as a proxy for Santa Monica's Latino residents. That premise is baseless. The Pico Neighborhood is, and always has been, majority-white, and the vast majority of the City's Latino residents live elsewhere. Further, the CVRA is not a neighborhood statute or a judicial substitute for the coalition-building and give-and-take of local politics. The Court should resist plaintiffs' efforts to inject a wide array of irrelevant issues into this vote-dilution case, and demand a clear statement of a direct connection between each of the purported problems plaintiffs raise and the City's use of at-large elections, which dates back more than a century. Without a clear causal connection between the City's at-large electoral system and, say, methane emissions from a landfill that pre-dates the area's current residential character, any such "evidence" should be excluded.

In sum, the actual, relevant evidence will show that Santa Monica's *Latino*-preferred candidates have won, and that therefore it does not matter if the *plaintiffs'* preferred candidates (themselves) sometimes have not. Every election has winners and losers—in fact that is both the nature of elections and

their purpose. The fact that some candidates have lost does not make the electoral system unfair or warrant race-based measures designed to promote different outcomes. The question here is whether candidates preferred by Latino voters have been able to win in Santa Monica, or would be able to do so but for the at-large system of elections. Because Latino voters currently are able to elect candidates of their choice in Santa Monica, the City should prevail.

This case started out as just one of dozens of cookie-cutter CVRA cases that plaintiffs' counsel have threatened or filed throughout California, reaping handsome financial windfalls in the process.[1] But it cannot end as such. The CVRA is an important statute that must be sensibly interpreted and applied to ensure the meaningful exercise of one of our most precious rights—not used as a weapon for private parties to wield indiscriminately for personal political or financial gain. Indeed, anything less would pose serious constitutional issues. It is, moreover, unworthy of the aspirations animating the CVRA and Equal Protection Clause. The Court should enter judgment in Santa Monica's favor.

II. Factual background

A. Santa Monica today

Santa Monica is a small but world-famous beachfront city. Just over eight square miles, with 3.5 miles of coastline, Santa Monica is roughly one-sixtieth the size of the City of Los Angeles.

Santa Monica is known almost as well for its progressive politics as its natural beauty. The City is on the forefront of social and environmental policy. It is, for example, firmly committed to maintaining affordable housing. Barely a quarter of all housing units in Santa Monica are owner-occupied, and 78 percent of the City's apartments are subject to its extensive rent-control ordinances. The City has also taken the extraordinary step, through its groundbreaking Wellbeing Index, to measure the welfare of its residents across a wide array of dimensions. Relying on the results of the Index, the City will direct significant resources to improve everyday life in Santa Monica in the coming years. The City is also implementing a cutting-edge strategic environmental plan to reduce greenhouse gas emissions, operate a fleet of vehicles running only on alternative fuels, and expand public transit.

[1] In fact, plaintiffs' initial discovery requests demanded that Santa Monica "[a]dmit that 'racially polarized voting' . . . has occurred . . . in at least one election for the city counsel of the City of *Santa Clarita*, California." (See Plaintiff Loya's First Set of Requests For Admission, RFA No. 7, italics added.)

The City's natural beauty and well-developed hospitality sector attract legions of tourists from around the world. The City has also become home to a wide range of innovative companies and research institutions, including Activision Blizzard, Treyarch, Lionsgate Entertainment, Universal Music Publishing Group, Hulu, TrueCar, Bitium, ZipRecruiter, and the RAND Corporation. These and other major employers have been drawn to Santa Monica in no small part because of its diverse and highly credentialed workforce. Over two-thirds of Santa Monicans over the age of 25 hold at least a bachelor's degree, and over 95 percent have at least graduated from high school.

Santa Monica is also notable for its residents' remarkable degree of civic engagement. Voter turnout is strong, and competition for local offices vigorous. Candidates come from all over the community, from a diverse array of backgrounds, and their ideas and qualifications are vetted by numerous local newspapers and blogs. This admirable civic discourse—and a correspondingly high degree of candidate and representative electoral accountability—depends primarily on the City's at-large election system, under which every voter has a say on every candidate, not just on the few candidates running in his or her particular precinct.

Santa Monica's Latino residents are actively engaged—and have achieved remarkable success—in that electoral process. Latino-preferred candidates have won the vast majority of the races they have entered since 2002, and currently occupy several of the City's most important local offices.

The City is home to approximately 90,000 residents, 16 percent of whom are Latino. Because Latino residents are less likely to be citizens and more likely to be minors than residents of other races and ethnicities, the Latino share of the citizen-voting-age population is significantly lower than the Latino share of the total population—13.6 percent. (Ex. 1214.)

B. A brief history of Santa Monica's government and methods of election

Defendant City of Santa Monica is a charter city. Incorporated in 1886, the City has operated under four systems of elections and governance. The first, under which five trustees were elected on an at-large basis, lasted until 1905. For much of that time, the President of the Board of Trustees, described in contemporaneous newspaper accounts as the Mayor of Santa Monica, was Judge Juan José Carrillo, who was also the first Chief of Police of Los Angeles.

The trustee form of government was succeeded by the City's first charter. In effect from 1906

until 1915, this charter marked the beginning of the City Council; it called for governance by seven councilmembers, each elected from a geographically distinct ward. In 1915, the City transitioned to a commission form of government. The reasons for the shift are not entirely clear, but the parties agree that there is no evidence that it was motivated by any racial animus. (Ex. 1206, ¶ 78.)

Under the commission government, which lasted until 1946, voters elected three commissioners—one for public safety, one for finance, and one for public works—on an at-large basis. The three-commissioner system was widely perceived to be flawed, as it distributed authority and responsibility across the commissioners, none of whom was accountable to the others. Frustrations with this ineffective system mounted until the City elected a Board of Freeholders to draft a new charter. The Board's recommendation won over seventy percent of voters, including many prominent members of minority groups. Under the City's third charter, which continues to govern its affairs today, seven councilmembers are elected every other year (four in presidential-election years, three in midterm years) on an at-large basis for four-year terms. After each such election, councilmembers select a new mayor from their own ranks.

Voters have twice overwhelmingly rejected proposals to adopt districted elections. In 1975, 69 percent of voters rejected Proposition 3,[2] and in 2002, 64 percent of voters rejected Measure HH.[3]

In 1992, the City hired Dr. J. Morgan Kousser, a historian, to help evaluate whether a plaintiff "could make a plausible prima facie legal case that the at-large election system in Santa Monica was adopted and/or maintained with a racially discriminatory purpose." (Ex. 1315 at p. 1.) Dr. Kousser concluded that "if someone brought a case, the city would have to defend itself." (*Ibid.*) He emphasized that "the time for [his] investigation was very short, [his] research has not been exhaustive by any

[2] Proposition 3 also contained four other proposed Charter amendments, none of which was nearly as significant as the proposed turn to districts: (1) an amendment requiring any candidate to have been a City resident for at least 60 days before filing nomination papers; (2) an amendment calling for special elections for vacated Council seats except under certain circumstances; (3) an amendment concerning the timing of elections; and (4) an amendment authorizing a recall vote under certain circumstances.

[3] Like Proposition 3, Measure HH, also known as "Voters Election Reform Initiative for a True Accountability System," or "VERITAS," called for more than just a turn to districts. Its other proposals were: (1) election of the Mayor; (2) Council term limits; (3) a primary system to ensure that the winner of the general election would win more than half the votes; (4) and a veto power for the Mayor, subject to a subsequent supermajority veto by the Council.

means, and [his] conclusions should be regarded as quite tentative"; he also noted that "[f]urther research might uncover more corroborative or more contradictory evidence." (*Id.* at pp. 2–3.) Dr. Kousser reviewed both the City's adoption of its current election system in 1946 and the electorate's rejection of a districted-voting proposal in 1975. He concluded that "it seems dubious . . . that a case for discriminatory intent could be made for the 1974–75 events." (*Id.* at p. 23.) The only sources cited by Dr. Kousser were articles published in a local newspaper, the *Santa Monica Evening Outlook.* (*Id.* at p. 24.) The City's 15-member Charter Review Commission, to which Dr. Kousser submitted his report, recommended a change to the election system and indicated as their first preference single transferable voting, a form of proportional voting, and, as their second preference, a form of district elections. (Ex. 1343.)

The City Council ultimately voted against recommending a change to the electoral system.

C. Plaintiffs Maria Loya and Pico Neighborhood Association

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

Plaintiff Pico Neighborhood Association (the PNA) is an organization focused on neighborhood issues like crime and traffic. The Pico Neighborhood has no formal definition, but it is roughly the area within the City east of Lincoln Boulevard, south of Olympic Boulevard, and north of Pico Boulevard.[4] As is true in every neighborhood in the City, most of the Pico Neighborhood's residents are white.

The PNA's co-chair and representative in this action is Oscar de la Torre, who is plaintiff Loya's husband. Mr. de la Torre has won four at-large elections for the Santa Monica-Malibu Unified School District Board, and currently serves on that Board. He also ran for election to the City Council in 2016 (after this lawsuit was filed), but apparently did not campaign outside the Pico neighborhood, raised

[4] The PNA currently asserts boundaries that extend beyond this to encompass a larger area of the City east of the Pacific Ocean, south of Santa Monica Boulevard to 20th Street, and then south of Colorado Boulevard, and north of Pico Boulevard. (Ex. 235, Ex. 1.)

no money, did not seek significant endorsements, and—as planned—lost.

Mr. de la Torre and Ms. Loya also appear to be the PNA's record-keepers. To the limited extent that PNA's documents were produced, they came from Mr. de la Torre and Ms. Loya's garage.

Many of the PNA's members, like most of the population of the Pico Neighborhood, are white.

D. This lawsuit

This suit was filed in April 2016, on behalf of plaintiffs PNA, Maria Loya, and Advocates for Malibu Public Schools (AMPS). The complaint alleged that the City's at-large system for Council and School Board elections violates the CVRA and the Equal Protection Clause of the California Constitution. Plaintiffs asserted that Santa Monica adopted this system in 1946 to discriminate against "non-Anglo" voters, and that the system now operates to the detriment of Latinos, rendering them unable to elect candidates of their choice. Plaintiffs sought declaratory and injunctive relief, as well as an award of attorneys' fees. (Ex. 1200.)

AMPS filed a request for dismissal shortly after the suit was commenced.[5]

The City filed a motion for judgment on the pleadings, contending that the complaint stated legal conclusions rather than concrete facts. This Court granted the City's motion with leave to amend.

The PNA and Loya filed their first amended complaint (FAC) on February 23, 2017. Like the initial complaint, the FAC alleges that the City's at-large election system violates the CVRA and the Equal Protection Clause of the California Constitution. And, like the initial complaint, the FAC seeks a declaration that the City's at-large method of electing its City Council is invalid..[6]

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[5] As its name suggests, Advocates for Malibu Public Schools is an organization dedicated to forming a separate school district for residents of Malibu, which is currently part of the Santa Monica-Malibu Unified School District. (See AMPS, www.ampsmalibu.org, last visited July 25, 2018 ["AMPS exists to create an independent Malibu school district dedicated to excellence in education for the Malibu community."].) AMPS' website touts its strategy as a "Pathway To Separation." (*Ibid.*) Shortly after filing this lawsuit, AMPS filed a request for dismissal, apparently because of fears that its participation threatened to derail ongoing negotiations over the separation of Malibu schools from the SMMUSD.

[6] Plaintiffs confirmed at the final status conference that they had disclaimed any designs on forcing a change in the method of election for the School Board, a disclaimer consistent with the parties' understanding given that the School Board, which has its own counsel, has never appeared to defend against the FAC. As will be discussed below, it is also consistent with plaintiffs' recognition that School Board elections have repeatedly resulted in the election of Latino-preferred Latino candidates, including Mr. de la Torre, a fact that led plaintiffs to file a motion in limine that sought, unsuccessfully, to preclude evidence of these elections and their results. As was demonstrated by the City in opposing the motion in limine, and as will be discussed below, these elections remain relevant to demonstrate the absence of any CVRA or Equal Protection violation in this case. But the validity of the School Board election

Throughout the case—in its motion for judgment on the pleadings, demurrer, motion for summary judgment, and motion in limine, as well as two writ petitions—the City has argued that the CVRA requires a showing of vote dilution, which can be proven only with evidence that some alternative system would enhance Latino voting power. Plaintiffs, by contrast, have insisted that the only element of the CVRA, apart from the existence of an at-large election system, is the existence of "racially polarized voting," which they incorrectly define to require only statistically significantly different racial voting patterns, even if such patterns do not cause the electoral defeat of a minority-preferred candidate. This disagreement between the parties over what the CVRA requires a plaintiff to show remains the central legal question for the Court to decide.

III. California Voting Rights Act claim

A. Plaintiffs cannot satisfy the elements of the CVRA.

To prevail on their CVRA claim, plaintiffs must prove, inter alia, that they have standing to bring their claim and that the City's at-large method of election has resulted in racially polarized voting and caused an impairment of Latino voting power. Plaintiffs contend that a showing of racially polarized voting alone is sufficient. The City believes this is incorrect. But even if Plaintiffs are right, their evidence will not establish racially-polarized voting, as defined by the federal case law to which the CVRA instructs courts to look. Because Plaintiffs cannot make the showings required to demonstrate a CVRA violation, the Court should find for the City.

1. Plaintiffs must prove that they have standing to bring their claims.

"Because elements for standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." (*Troyk v. Farmers Grp., Inc.* (2009) 171 Cal.App.4th 1305, 1345, quotation marks and citation omitted; see also *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 330, fn. 15 [it is "the plaintiff's burden . . . to prove the elements of standing"].)

To prove that they have standing to pursue their claims against the City, plaintiffs must establish

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system itself is no longer at issue. The FAC retains references to Section 900 of Santa Monica's Charter, which concerns the method of elections for the School Board alone. (E.g., Ex. 1201, ¶ 58.) Given plaintiffs' counsel's disclaimer, this appears to be merely an accidental remnant of the initial complaint, and should be stricken. (See Exs. 1200, 1201.)

that Ms. Loya directly satisfies the statutory standing requirements, and that PNA indirectly does so as an associational plaintiff with standing to sue on behalf of its members.

The CVRA creates a cause of action for a "voter who is a member of a protected class and who resides in a political subdivision where a violation of [the CVRA] is alleged." (Elec. Code, § 14032.) A "voter" is "any person who is a United States citizen 18 years of age or older" and "who is registered under" the Elections Code. (Elec. Code, §§ 321, 359.) Only natural persons can therefore qualify as voters. The same is true of membership in a protected class, which the CVRA defines as "a class of *voters* who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act." (*Id.* § 14026, subd. (d), italics added.)

Although Ms. Loya may or may not meet these requirements (she has failed to produce any evidence of voter registration), the PNA cannot do so, because as a juridical entity it is neither a voter nor a member of a protected class. This failure to "satisfy the express standing requirements of the act" is fatal to the PNA's standing. (*Amalgamated Transit Union, Local 1756 v. Superior Court* (2009) 46 Cal.4th 993, 1004–1005 [rejecting union's attempt to bring representational suit under statute that creates standing only in "aggrieved employee[s]"].)

The PNA must also satisfy the requirements for associational standing in order to maintain this suit on behalf of its members.[7] To do so, the PNA bears the burden of proving that there is a "well-defined community of interest in the questions of law and fact involved affecting the parties to be represented" (*Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.* (1981) 114 Cal.App.3d 783, 795), and that it "can fairly protect the rights of the group [it] purports to represent." (*Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d. 117, 126.) The PNA cannot prove either of these things.

The PNA is a neighborhood organization dedicated to addressing neighborhood problems such as traffic and crime. (Ex. 1236.) There is no evidence that the PNA ever demonstrated any interest in the City's methods of election or Latino voting rights prior to filing this suit, much less that there is a

[7] Although this discussion of associational standing is located within a section of this brief addressing the CVRA, the City's argument applies equally to plaintiffs' Equal Protection claim, which the PNA also lacks standing to bring on behalf of its members.

"well-defined community of interest" concerning "the questions of law and fact" that this case presents. The PNA is therefore not a proper associational plaintiff with standing to bring this suit.

2. The CVRA is properly interpreted as requiring plaintiffs to prove that the City's at-large method of election is causing the dilution of Latino voting power.

A public entity violates the CVRA only if its at-large method of election "*impairs* the ability of a protected class to elect candidates of its choice or its 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." (Elec. Code, § 14027, italics added.) The CVRA has been the subject of only three published decisions, and none has resolved what a plaintiff must prove in order to prevail on a CVRA claim. Indeed, in the leading CVRA case, the court expressly declined to decide the statute's elements. (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 690.)

Section 14027 requires a plaintiff to prove that an at-large electoral system has diluted the voting power of a protected class. Courts interpreting similar language from section 2 of the Voting Rights Act (52 U.S.C. § 10301), on which the CVRA is modeled, similarly require proof of harm (vote dilution) and causation (a connection between the harm and the public entity's electoral system). (See, e.g., *League of United Latin Am. Citizens v. Perry* (2006) 548 U.S. 399, 433 (opn. of Kennedy, J.) ["Under § 2 . . ., the injury is vote dilution"]; *Aldasoro v. Kennerson* (S.D.Cal. 1995) 922 F.Supp. 339, 369, fn. 10 ["minority electoral defeat must be *caused* by the at-large system"].) California courts have stated, but not held, that the same is true of the CVRA. (See, e.g., *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223, 1229 ["both federal and California law create liability for vote dilution"]; *Sanchez*, 145 Cal.App.4th at p. 666 ["vote dilution" is what "the CVRA was designed to combat"].)

To prove vote dilution, a plaintiff must show that a protected class would have greater opportunity to elect candidates of its choice under some *other* permissible electoral system. (See, e.g., *Reno v. Bossier Parish Sch. Bd.* (1997) 520 U.S. 471, 480 ["Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice."]; *Thornburg v. Gingles* (1978) 478 U.S. 30, 50, fn. 17 ["Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice."].)

The "protected voting group" should have "a voting opportunity that relates favorably to the group's population in the jurisdiction for which the election is being held." (*Smith v. Brunswick Cty., Va., Bd. of Supervisors* (4th Cir. 1993) 984 F.2d 1393, 1400.)

It follows from these principles that where a protected class's votes are *not* being diluted, and where that class *already has* "a voting opportunity that relates favorably to [its] population," there is no legal requirement to jettison an at-large election system. Plaintiffs' expert, Professor Levitt, agrees. (Levitt Depo. Tr. 69:19–70:1 ["If an alternative system would not provide increased opportunity to elect a candidate of choice or influence the election of a candidate of choice, I believe there is no legal responsibility under the CVRA to move from an at-large system."].) Indeed, any requirement to abandon an at-large method of election despite a lack of vote dilution would raise constitutional problems; although courts have "assumed without deciding" that public entities may adopt "race-conscious measures" in order to avoid liability for vote dilution, such measures would be unconstitutional in the absence of vote dilution. (*Sanchez*, *supra*, 145 Cal.App.4th at p. 668.)

3. Determining whether the City's elections have been characterized by racially polarized voting is properly considered part of the vote-dilution analysis.

A valid claim under the CVRA depends, in part, on a showing of "racially polarized voting." (Elec. Code, § 14028.) That term is defined by reference to federal case law. (*Id.*, § 14026, subd. (e).) And the authoritative law on this question is the Supreme Court's decision in *Thornburg v. Gingles*. That case sets out three "preconditions" to federal VRA claims. The parties agree that at least the second and third preconditions, which have come to define legally significant racially polarized voting, apply to a CVRA case like this one. Those two preconditions require three factual showings: (1) the protected class at issue votes as a bloc (minority cohesion), (2) the white majority does the same (majority cohesion), and (3) white bloc voting "usually" defeats the candidate preferred by a cohesive minority bloc. (*Gingles*, *supra*, 478 U.S. at pp. 49–51.) "In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." (*Id.* at p. 51.) In other words, the third *Gingles* factor is satisfied where the differences in voting patterns between the majority and minority groups *result in* the defeat of minority-preferred candidates.

In determining whether the third *Gingles* precondition is satisfied, courts have required plaintiffs to show a regular pattern of minority electoral defeat—and more than a showing that minority-preferred candidates have lost a mere preponderance of elections on account of racially polarized voting. (See, e.g., *Lewis v. Alamance Cty., N.C.* (4th Cir. 1996) 99 F.3d 600, 606 & fn. 4 [the *Gingles* Court, in using the terms "usually," "normally," and "generally," "mean[t] something more than just 51%"]; see also *Clarke v. City of Cincinnati* (6th Cir. 1994) 40 F.3d 807, 812–813 [47% success rate for black-preferred candidates inadequate to demonstrate that those candidates were "usually" defeated].) Under any colorable definition of "usually," Plaintiffs must show, at a minimum, that a white bloc defeats a Latino-preferred candidate "more often than not." (See *Williams v. State Bd. of Elections* (N.D. Ill. 1989) 718 F. Supp. 1324, 1328 & fn. 5 [relying on dictionary definition of "usually"].) Plaintiffs' expert, Dr. Kousser, has conceded that "usually" must satisfy at least this lesser standard. (See, e.g., Kousser Depo. Tr. 205:9–13 [agreeing that "five out of ten elections" does not satisfy the *Gingles* requirement of "usually"].)

B. Plaintiffs erroneously contend that to prevail on their CVRA clam, they need to prove only that Latinos and whites vote differently for Latino-surnamed candidates.

As was explained in the foregoing sections, the CVRA requires proof of *vote dilution*, one necessary component of which is a legally significant pattern of racially polarized voting, which, in turn, is defined as statistically significantly different voting patterns *and* the usual defeat of the minority-preferred candidates. Plaintiffs contend that the statute requires much less—namely, proof of racially polarized voting. Moreover, they have contended as well that racially polarized voting can be shown by evidence that Latinos and whites vote differently for Latino-surnamed candidates and evidence that Latino-surnamed candidates usually lose, without the need to show any causal linkage between the racially-polarized voting and the Latino-surnamed candidate losses. This approach, which would make the CVRA a strict-liability statute notwithstanding the Legislature's plain intention to the contrary, has no basis in the statute or the relevant case law. Even if plaintiffs were right that racially polarized voting is all that must be shown to establish a CVRA violation, when racially polarized voting is properly defined, as instructed by the statute by reference to federal case laws, to depend not just on differences in voting patterns, but also on white bloc voting resulting in usual minority electoral defeat, the City would still prevail, because white bloc voting does not usually result in the defeat of Latino-

preferred candidates in Santa Monica.

1. The CVRA focuses on voter preference, not candidate ethnicity.

Plaintiffs have contended that the thousand-plus words of the CVRA reduce to just two phrases divorced from their statutory context: "A violation of Section 14027 is established if it is shown that racially polarized voting occurs," and "[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." Plaintiffs claim these words mean that they can satisfy their burden of proof solely by showing that white and Latino voters support Latino candidates at statistically significantly different levels. But this interpretation ignores the vast majority of the statute, as well as the federal case law to which the statute instructs courts to look to inform it. It is also inconsistent with this Court's denial of plaintiffs' motion in limine to exclude "all-white" elections—that is, elections not featuring a Latino candidate.

To state the obvious, the CVRA is a *voting* statute. It protects "minority *voters'* opportunity to participate in the political process" (*Rey*, *supra*, 203 Cal.App.4th at p. 1229, italics added), by ensuring that no electoral system "impairs the[ir] ability . . . to elect candidates of [their] choice." (Elec. Code, § 14027.) The statute is *not* designed to protect candidates, whatever their race or ethnicity.

Nothing in the statute, including the snippets of Section 14028 on which plaintiffs' theory of liability rests, suggests that a minority group's candidates of choice must themselves be members of that minority group, or that minority electoral defeat is irrelevant. Indeed, the rest of the statute proves that the opposite is true—namely, that "elections in which at least one candidate is a member of a protected class" are not the exclusive measure of proving racially polarized voting, and that what matters is not merely that different racial groups vote differently, but that such voting *results in* consistent minority electoral defeat.

The focus is on Latino voters' preferences, not candidates' race or ethnicity. The CVRA repeatedly makes plain that the touchstone of the racial-polarization analysis is not the race or ethnicity of the candidate, but instead the preferences of the voters. Indeed, the statute defines "racially polarized voting" in terms of voter preference. (Elec. Code, § 14026, subd. (e) ["difference . . . 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"].)

Several portions of Section 14028 similarly highlight the primacy of voter preferences, irrespective of candidate ethnicity. The first sentence of subdivision (b) of Section 14028 provides that "[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 or elections involving ballot measures, *or other electoral choices that affect the rights and privileges of members of a protected class*." (Elec. Code, § 14028, subd. (b), italics added.) Plaintiffs conclude that Latino candidacies alone matter only by ignoring the broadly worded final clause, which covers just about any "electoral choice."

Further, the subdivision goes on to provide that "the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class . . . have been elected" is only "*[o]ne circumstance* that may be considered in determining a violation of Section 14027 and this section." (Elec. Code, § 14028, subd. (b), italics added.) According to plaintiffs, votes for or against candidates who are members of a protected class are the only relevant circumstance, but it is plain from the statute that the opposite is true, as such voting is described as just "one" relevant circumstance that "may" be considered—not "the only" relevant circumstance that "must" be considered."

The final sentence in subdivision (b) also contradicts plaintiffs' theory. That sentence applies to multi-seat at-large elections of the type conducted in Santa Monica: "In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis." The question is whether the phrase "from members of a protected class" modifies "candidates" or "groupwide support." Both the syntax of the sentence itself and consideration of the statute as a whole make clear that it must be the latter. Where the statute addresses the ethnicity of candidates, it consistently uses the phrase "candidates who are [themselves] members of a protected class," including in the very same sentence. Here, by contrast, the statute uses a different formulation—"from members of a protected class"—which must modify "groupwide support." The statute thus provides that courts are to consider the voting support that candidates receive "from members of a protected class," whatever the race or ethnicity of those candidates might be.

Results matter. Plaintiffs' insistence that it is differences in voting patterns alone that matter, irrespective of how those voting patterns have affected results, likewise finds no support in the statute. As an initial matter, the CVRA directs courts to federal case law for a definition of racially polarized voting. And as the discussion above notes, *Gingles* and its progeny have made clear that both the second and third *Gingles* factors are required to demonstrate racially polarized voting – this requires a showing that white bloc voting has usually resulted in the defeat of minority-preferred candidates, that is, a showing both that minority and white voters vote differently, and that this difference in voting has led to the defeat of minority-preferred candidates. The inquiry is not simply whether there is a meaningful difference across racial or ethnic groups in levels of support for that candidate, but whether that difference *has had any impact* on the minority-preferred candidate's ability to win. Without this, there can be no case.

If plaintiffs' view were correct, then a tiny protected class of ten or even one could win a CVRA lawsuit. On plaintiffs' theory, the required evidentiary showing in such a case would consist only of proof the members of the protected class voted for their preferred candidate, that whites voted against the candidate, and that the candidate lost. If there were no requirement that a CVRA plaintiff show a *link* between white bloc voting and the loss of the preferred candidate—that is, proof of both the second and third *Gingles* requirements for establishing racially polarized voting through evidence that a minority-preferred candidate would have won but for the cohesive voting of a white bloc—the CVRA would effectively become a strict-liability statute, which it was never intended to be, and which is not supported by the statutory language.

2. Federal law likewise focuses on voter preferences rather than candidates' races or ethnicity.

A precondition of liability under the CVRA and FVRA alike is a protected class's ability to elect candidates of its choice. (Elec. Code, § 14027; 52 U.S.C. § 10301, subd. (b).) Both statutes—whose wording is quite similar, as the CVRA was modeled after the FVRA—also provide that "one circumstance" that "may be considered" is the "extent to which" "members of a protected class" "have been elected." (*Ibid.*)

Federal courts interpreting this language have consistently held that minority-preferred candidates need not themselves be members of the relevant minority group. Courts regularly warn litigants and experts not to draw the questionable assumption that voters can and do prefer only candidates of their own race or ethnicity. The Fourth Circuit, for example, has held that "Section 2 prohibits any election procedure which operates to deny to minorities an equal opportunity to elect those candidates whom they prefer, *whether or not those candidates are themselves of the minority race*." (*Lewis*, *supra*, 99 F.3d at p. 606.) The court's holding depended not just on the "unambiguous language" of Section 2, but also on its rejection of the presumption that voters always prefer candidates of their own race. Such a presumption "would itself constitute invidious discrimination of the kind that the Voting Rights Act was enacted to eradicate, effectively disenfranchising every minority citizen who casts his or her vote for a non-minority candidate. To acquiesce in such a presumption would be not merely to resign ourselves to, but to place the imprimatur of law behind, a segregated political system. . . ." (*Id.* at p. 607.) The Second Circuit has similarly "decline[d] to adopt an approach precluding the possibility that a white candidate can be the actual and legitimate choice of minority votes," as such a ruling "would project a bleak, if not hopeless, view of our society" and would "presuppose the inevitability of electoral apartheid"—a result particularly incongruous where courts are "interpreting a statute designed to implement the Fourteenth and Fifteenth Amendments to the Constitution." (*NAACP, Inc. v. City of Niagara Falls, N.Y.* (2d Cir. 1995) 65 F.3d 1002, 1016.) Many other courts have reached similar conclusions. (See, e.g., *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 551 [joining eight other circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority" and also holding that "a candidate who receives sufficient votes to be elected if the election were held only among the minority group in question qualifies as minority-preferred"].)

3. Plaintiffs' expert, Dr. Kousser, applies plaintiffs' erroneous theory and concludes that there is "racially polarized voting" only by ignoring the bulk of elections and assuming that only Latinos can be Latino-preferred.

In order to assess whether racially polarized voting has occurred in Santa Monica elections, the City's expert, Dr. Jeffrey Lewis, a renowned Professor of Political Science steeped in the latest methods of statistical analysis, assessed whether the candidates Latino voters preferred, whatever their race happened to be, won elections. He determined what the results of elections would have been if Latinos

had been the only voters, and compared those results against the actual results. He found that where Latinos expressed a preference for candidates, those candidates won 77 percent of the time in Council races and 86 percent of the time in other City races. (Ex. 1652 at pp. 70–71, Table 10.) This analysis, which is consistent with both the language of the CVRA and the federal case law that informs it, conclusively shows that Latinos' candidates of choice are not usually suffering defeat at the polls, and that there thus is no legally significant pattern of racially polarized voting.

Plaintiffs' expert, Dr. Kousser, who is a historian and not a statistician or political scientist, takes a fundamentally different approach—one that is consistent with plaintiffs' insistence that they need prove only an adulterated version of "racially polarized voting." Contrary to the language of the statute, which focuses on minority-preferred candidates, irrespective of those candidates' race or ethnicity, Dr. Kousser erroneously assumes that the only candidates whom Latinos could possibly prefer are themselves Latino. Dr. Kousser accordingly begins his analysis not with Latino preferences as revealed by analysis of voting patterns, but instead with Latino surnames. (Ex. 1206, ¶¶ 57–59.) Because he assumes that a non-Latino-surnamed candidate could never be preferred by Latino voters, Dr. Kousser throws out all non-Latino-surnamed candidates. He then measures whether there was a difference in support for the Latino-surnamed candidate(s) between Latino and non-Latino voters. Finally, *in a separate exercise*, he counts the wins and losses of the Latino-surnamed candidates. In other words, Dr. Kousser does not even attempt to relate his "polarization" analysis to Latino victory or defeat. Where voting is allegedly racially polarized but the Latino-preferred candidate is nevertheless *successful* (e.g., in the case of Tony Vazquez), Dr. Kousser counts the election against the City.

Dr. Kousser has attempted to pull off this same maneuver before—unsuccessfully. In *Cano v. Davis* (C.D.Cal. 2002) 211 F.Supp.2d 1208, a three-judge panel held that the same theory—a vision of "racially polarized voting" that "focuses exclusively on the relative percentage of Latino and white voters who chose the Latino candidate," but that does not take into account whether the minority-preferred candidate *actually won*—"finds no support in the law" and is directly contrary to the Supreme Court's holding in *Gingles*. (*Id.* at p. 1238 & fn. 34.) "[T]o the extent Dr. Kousser concludes that there is 'racially polarized' voting in the district," the court explained, "it is not the type of 'legally significant' polarization about which *Gingles* speaks." (*Ibid.*) The same is true here. To prove "legally

significant" polarization, plaintiffs must show the existence of white bloc voting and Latino bloc voting, and that the former "usually" causes the defeat of the Latino-preferred candidate. (*Gingles*, *supra*, 478 U.S. at pp. 49–51.) Their failure to do so is fatal to their case, just as it was in *Cano*. Dr. Kousser *admits as much*, conceding that under the correct legal standard, his analysis shows that the Latino candidate is not "usually" defeated, and that it therefore flunks the *Gingles* analysis. (Kousser Depo. Tr. 302:11–304:6 [only four or five elections out of ten feature polarization *and* candidate defeat].)

Dr. Kousser's analysis is incomplete not just because he addresses only Latino-surnamed candidates, but also insofar as he does not account for any elections other than City Council elections. As the Court already recognized in denying plaintiffs' motion in limine, it should consider evidence from other Santa Monica elections, as such evidence bears directly on the question whether Latino-preferred candidates have been able to win in Santa Monica. The CVRA authorizes evidence as to "endogenous" and "exogenous" elections alike. (See Elec. Code, § 14028, subd. (a) [authorizing inquiry into "other electoral choices by the voters of the political subdivision"], subd. (b) [permitting examination of "other electoral choices that affect the rights and privileges of members of a protected class" and clarifying that endogenous elections featuring a member of a protected class are but "[o]ne circumstance that may be considered"]; see also *id.*, § 14027 [creating liability where an at-large method of election "impairs the ability of a protected class to elect candidates of its choice," but not specifying in which elections].) Federal courts also routinely consider exogenous elections. (See, e.g., *Bone Shirt v. Hazeltine* (8th Cir. 2006) 461 F.3d 1011, 1021 [exogenous elections have "probative value"]; *Rodriguez v. Bexar Cty., Tex.* (5th Cir. 2004) 385 F.3d 853, 860 & fn. 5 ["This court has repeatedly endorsed the analysis of exogenous elections in Section 2 vote dilution cases."]; *NAACP v. Fordice* (5th Cir. 2001) 252 F.3d 361, 370 [there is a "critical evidentiary reality that 'the exogenous character of . . . elections does not render them nonprobative'"]; *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.* (3d Cir. 1993) 4 F.3d 1103, 1134–1135 [district court "appropriately" considered evidence of exogenous elections].) Finally, Dr. Kousser himself has considered exogenous elections in other cases (see, e.g., Kousser Depo. Tr. 307:25–311:1), and has admitted that examination of exogenous elections would be appropriate at least under certain circumstances in this case and might even tip the scales in the City's favor. (*Id.* 304:7–15, 318:4–9.)

C. Latino votes have not been diluted in Santa Monica, because no legally permissible alternative electoral system would enhance Latino voting power.

Plaintiffs' failure to demonstrate a legally significant pattern of racially polarized voting under the proper legal standard is a sufficient basis for the Court to rule in the City's favor. But plaintiffs' CVRA claim fails for another reason as well: they have not shown vote dilution. Santa Monica's Latino voters are few in number, integrated throughout the City, and, when they do cohesively prefer candidates, extremely successful at electing them. Plaintiffs cannot prove vote dilution because they cannot show that any permissible alternative electoral system would enhance Latino voting power. There are two reasons for this.

First, Latino voters already have "a voting opportunity that relates favorably to [their] population." (*Smith, supra*, 984 F.2d at p. 1400.) Latinos account for less than 14 percent of the City's voting population. (Ex. 1214, ¶ 13.) But they have proven influential far beyond their numbers at the polls. Latino-preferred candidates have won 77 percent of their Council races and 86 percent of their races for other City offices. (Ex. 1652, pp. 70–71, Table 10.) And two members of the seven-member Council—or roughly 28 percent of it—are both Latino *and* preferred by Latino voters. (Ex. 1653.) These figures are, in a nutshell, why plaintiffs have no case. (See, e.g., *Baca v. Berry* (10th Cir. 2015) 806 F.3d 1262, 1274–1275 ["fatal flaw" in plaintiffs' experts' analysis was that "*minority-preferred candidates had won every one of the plaintiffs' exemplar races*"]; *Radogno v. Illinois State Bd. of Elections* (N.D.Ill. 2011) 836 F.Supp.2d 759, 772–773 [fact that Latino-preferred candidates "have won more often than not" dispositive]; *Cano v. Davis* (C.D.Cal. 2002) 211 F.Supp.2d 1208, 1238 (per curiam) [rejecting argument that plaintiffs can prevail "so long as they demonstrate that the electorate is 'racially polarized,'" because plaintiffs' own evidence showed that Latino-preferred candidates "actually win elections"]; see also Levitt Depo. Tr. 69:19–70:1 ["If an alternative system would not provide increased opportunity to elect a candidate of choice or influence the election of a candidate of choice, I believe there is no legal responsibility under the CVRA to move from an at-large system."])

Second, Latino voters are both too few in number and too integrated throughout the City for any alternative system to improve on this record of Latino success. The City has shown through the

analysis of its expert demographer, Dr. Peter Morrison, and plaintiffs have conceded, that it is impossible here to show injury and causation in the way required in FVRA claims—by proving that Latinos could form the majority of any legally permissible district. (Ex. 1214, ¶ 25; Ex. 1209, ¶ 29.) Instead, plaintiffs have purported to produce evidence of vote dilution in other forms—a "Latino-opportunity crossover district" and a set of alternative at-large schemes, including cumulative voting. (Ex. 1209, ¶¶ 26–35; Ex. 1213, ¶¶ 28–34.) But neither of these alternatives would permissibly enhance Latino voting strength.

Districts. There are statutory and constitutional limitations on the Court's power to fashion a remedy in this case. Section 14029 provides that remedies must be "appropriate" and "tailored to remedy the violation." And the Equal Protection Clause forbids the imposition of any remedy predominantly on the basis of race unless the remedy is narrowly tailored to serve a compelling governmental interest. (See *Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463–1464; *Shaw v. Hunt* (1996) 517 U.S. 899, 907–908; *McLaughlin v. Florida* (1964) 379 U.S. 185, 192.)

Here, it is impossible to narrowly tailor a race-conscious remedy to cure a harm (vote dilution) that does not exist. In particular, it is impossible to draw any district in which Latino voters are even close to a majority of the citizen-voting-age population.[8] (Ex. 1214, ¶ 25.) Plaintiffs propose a hypothetical district drawn by their expert, Mr. Ely, in which the citizen-voting-age population would be only 30 percent Latino. (Ex. 1209.) No court in the history of voting-rights litigation has ever drawn a district where the protected class is barely 30 percent of the citizen-voting-age population. There is a reason for that: Such a district would not be effective at strengthening minority voting power. Plaintiffs' own evidence proves as much—namely, that the district would not have delivered more Council seats to Latinos than the City's current electoral system, much less that it would "usually" do so. Mr. Ely analyzed only three elections over a 22-year span: 1994, 2004, and 2016. (*Id.*, ¶¶ 31–34.) He ignored the remainder, including Tony Vazquez's victories in 1990 and 2012, presumably because they did not support plaintiffs' vote-dilution theory. But even on its own exceedingly narrow terms, Mr.

[8] That makes this case dramatically different from other CVRA cases in which the relevant minority population was both larger and more concentrated. For example, according to the most recent Census Bureau figures, Latinos account for 78.2%, 58.6%, and 49.2% of Madera, Palmdale, and Highland, respectively. The Latino share of Santa Monica's population, by contrast, is just 16.1%.

Ely's three-election analysis fails to prove that Latino votes have been diluted. In the most recent of the elections (2016), Mr. Ely's calculations show that the allegedly Latino-preferred candidate, Oscar de la Torre, would have *lost* in the hypothetical district.[9] (*Id.*, ¶ 34, Ex. 22.) And in the earliest of the three elections, Mr. Ely concludes that the Latino-preferred candidate, Mr. Vazquez, would have won the district's seat, but neglects to mention that Mr. Vazquez has never lived within that district and would therefore have been ineligible to run for its seat in 1994—or, for that matter, in the three races that Mr. Vazquez won (in 1990, 2012, and 2016). (*Id.*, ¶ 32; Ex. 3, p. 7; Ex. 15.) Mr. Ely hazards no guess as to how Mr. Vazquez would have performed in some other district encompassing his home, nor would his work allow the Court to draw any such conclusion. Mr. Ely's analysis therefore proves, at most, that a Latino-preferred candidate might have won in a single year, 2004—but at the potential cost of undoing three races that a Latino-preferred candidate *actually won*, in 1990, 2012, and 2016. In other words, the "undiluted" Latino voting power under Mr. Ely's scheme may be at least two electoral victories *weaker* than the "diluted" Latino voting power under the current scheme. Mr. Ely's analysis is thus not just incomplete, but self-defeating, as it produces demonstrably worse results for Latino voters.[10]

Alternative at-large schemes. Alternative at-large remedies are no better for plaintiffs. Cumulative voting, for example, has not only been squarely rejected as a remedy in vote-dilution cases (see, e.g., *Cousin v. Sundquist* (6th Cir. 1998) 145 F.3d 818, 822, 829–831), but it is not even authorized under California law. (See, e.g., *Aldasoro*, *supra*, 922 F. Supp. at p. 355, fn. 4 [noting that cumulative voting "is rarely used in this country . . . and it is not legally authorized by the California Legislature as a method of electing School Board trustees"]; Ex. 1307 [Los Angeles Superior Court finding that "a California City may not adopt a cumulative voting method pursuant to a settlement of a lawsuit alleging

[9] Indeed, Mr. de la Torre was not even the runner-up in this hypothetical district. He received fewer votes than Tony Vazquez under all three of Mr. Ely's calculations and fewer votes than Terry O'Day under two of three calculation methodologies. (Ex. 1209, Ex. 22.)

[10] Mr. Ely's analysis suffers from another problem. It is impossible to determine how voters would have voted under a districted system, which would give them only one vote to cast, based on their votes under an at-large system that gave them three or four votes. (E.g., Kousser Depo. Tr. 91:13-92:20.)

violations of the California Voting Rights Act"]; *ibid.* [letter from California Secretary of State explaining that there is no "express statutory authority for the use of cumulative voting in California by a general law city," nor has the Secretary ever certified such a system].) For those reasons, it should be unsurprising that not a single California jurisdiction uses cumulative voting. (Levitt Depo. Tr. 147:7–11.)

Courts have been similarly hostile to other potential remedies in vote-dilution cases, including single-transferable-vote schemes (see *Brantley v. Brown* (S.D.Ga. 1982) 550 F.Supp. 490, 493, fn. 2), and increasing the size of the governing board. (*Holder v. Hall* (1994) 512 U.S. 874, 880–885.)

Even if such schemes were lawful, they would not be practicable, as they would require extensive voter education and the installation of new voting equipment. (See Levitt Depo. Tr. 146:6–148:21, 189:19–21, 191:18–21.) Then, too, these alternatives are all at-large systems, and would thereby leave the City vulnerable to further challenges under the CVRA. (See § 14027.)

Plaintiffs nevertheless insist that alternative at-large systems could, in theory, show vote dilution in this case. But the paper-thin analysis of their expert on this subject, Professor Levitt, fails to show that alternative at-large schemes would enhance Latino voting strength for two reasons. First, his analysis depends on assumptions of "perfect cohesion and equal turnout," which are contradicted by the evidence, including evidence from plaintiffs' own experts. (See Ex. 1206, ¶ 57 [fewer than two-thirds of Latinos voted for Latino candidate in four of ten studied elections]; Ex. 1209, Ex. 17 [Latino turnout is more than ten percentage points lower than white turnout].) Second, Latino-preferred candidates have already had great success under Santa Monica's electoral system, winning the vast majority of their races. These successful candidates also include at least two members of the protected class at issue, Tony Vazquez and Gleam Davis. Accordingly, even if Mr. Levitt's analysis did not depend on false assumptions, an alternative at-large system would not *enhance* Latino voting strength.

In sum, the City's electoral system is not broken and does not need to be fixed—a fact evident from both the long history of Latino-preferred candidates' success at the polls and the impossibility of any other electoral system enhancing Latino voting power.

D. Two issues are sure to arise in connection with the Court's racial-polarization and vote-dilution analysis: "special circumstances" and the method of determining ethnicity.

1. The Court should take account of Councilmember Vazquez's repeated electoral

victories and should discount Oscar de la Torre's 2016 electoral defeat.

Plaintiffs appear intent on urging the Court to give little or no weight to particular elections because of "special circumstances." *Gingles* offered a few examples of what this means, none of which applies here: "the absence of an opponent, incumbency, or the utilization of bullet voting may explain minority electoral success in a polarized contest" and cause a court to give lesser weight to such success. (478 U.S. at p. 57.) But courts have cautioned that "[t]he *Gingles* Court's comment regarding circumstances that may explain a single minority candidate's victory cannot be transformed into a legal standard which requires the court to force each and every victory of several minority candidates to fit within a prescribed special circumstance. Every victory cannot be explained away as a fortuitous event." (*Rollins v. Fort Bend Ind. Sch. Dist.* (5th Cir. 1996) 89 F.3d 1205, 1213.) To be truly special, some factor "must play an unusually important rule in the election at issue; a contrary rule would confuse the ordinary with the special." (*Clarke*, *supra*, 40 F.3d at p. 813.) Although litigants in vote-dilution cases often argue that some fact or another qualifies as a "special circumstance" in order to remove an inconvenient electoral victory or defeat, courts should be leery of such efforts, as most such facts are ordinary incidents of campaigns. For example, "obtaining name recognition and professional success prior to a candidacy are not 'special circumstances'; they are ordinary and necessary components of a successful candidacy." (*Anthony v. Michigan* (E.D.Mich. 1999) 35 F.Supp.2d 989, 1006.)

Here, each side will make an argument that a candidate presents a special circumstance. Plaintiffs will argue that Tony Vazquez's two most recent victories (2012 and 2016) should be discounted, and the City will argue that Oscar de la Torre's 2016 defeat should be discounted. The factual bases for and credibility of these requests differ drastically.

Mr. De la Torre. The Court should disregard the 2016 campaign of Mr. de la Torre for one simple reason: He threw the election in order to support this lawsuit. Mr. de la Torre is a four-time winner in School Board elections. In each of those elections, he did all the things that every successful candidate in Santa Monica does, including raising money and seeking endorsements. In 2006, for example, he secured the endorsement of a powerful local civic organization, Santa Monicans for Renters' Rights (SMRR), as well as the endorsement of the Santa Monica Democratic Club. Mr. de la Torre also raised just shy of $25,000. In 2010, he secured the endorsements of SMRR and the Los

Angeles County Democratic Party, and he raised over $13,000. And in 2014, he secured the endorsements of SMRR, the Los Angeles County Democratic Party, the Santa Monica-Malibu Classroom Teachers' Association, the Educational Workers of SEIU Local 99, the Los Angeles County Federation of Labor, and Advocates for Malibu Public Schools, which was once a plaintiff in this suit. He also raised almost $24,000. In Mr. de la Torre's first campaign for City Council, by contrast—in 2016, after this suit was filed—he sought and secured *no* endorsements, and he did not even file a campaign disclosure form (Form 460), because he evidently raised less than the $2,000 reporting threshold. He also declined to complete other steps completed by nearly every other candidate, including responding to candidate questionnaires. What is more, he focused all of his campaigning efforts on the Pico Neighborhood—the centerpiece of plaintiffs' case—and ignored the rest of the City. Many in Santa Monica reasonably interpreted his conduct as indicative of an intent not just to lose, but to lose in a particular way—with most of his support appearing to be concentrated in the Pico Neighborhood.

Mr. Vazquez. Plaintiffs will argue that Councilmember Vazquez's recent victories should be discounted as a "special circumstance" because he supposedly is an "unusually 'well-financed'" candidate. It is plaintiffs' theory that Councilmember Vazquez has "financed his recent political career" with the fruits of an "influence-peddling scheme." (Mot. for Sanctions at p. 1.) There is no factual or legal basis for this contention.

First, the facts show that Vazquez is not an "unusually 'well-financed'" candidate. In 2012 and 2016, Councilmember Vazquez raised substantially less money than every other winning candidate and contributed hardly any of his own funds, as the table below demonstrates:

	2012		2016	
Ted Winterer	Total raised: Personal contribution:	$49,919 $500	Total raised: Personal contribution:	$54,485.10 $0
Gleam Davis	Total raised: Personal contribution:	$46,683 $3,500	Total raised: Personal contribution:	$42,069.88 $15,514.51
Terry O'Day	Total raised: Personal contribution:	$40,680 $0	Total raised: Personal contribution:	$30,817.50 $0
Tony Vazquez	Total raised: Personal contribution:	$13,466 $4,000	Total raised: Personal contribution:	$25,067 $0

(Ex. 1526.) Nor, for that matter, is Councilmember Vazquez even an "unusually 'well-financed'" *Latino* candidate. Ironically, plaintiff Loya herself spent almost exactly the same sum on her unsuccessful

2004 Council campaign as Councilmember Vazquez did on his successful 2012 campaign. (Indeed, in real rather than nominal dollars, she spent much more.) (See Loya Depo. Tr., 187:8-22 [estimating she spent $12,000 to $14,000].) And on her recent unsuccessful campaign for a seat on the College Board—which plaintiffs have consistently argued requires substantially less money to win than a Council seat—Ms. Loya spent $34,038.73, almost as much as Councilmember Vazquez spent on his two *Council* races *combined.* (Ex. 1526.)

Even if Councilmember Vazquez had engaged in improprieties, as plaintiffs will claim, those improprieties, and any income that resulted from them, have no conceivable bearing on this case. There is no evidence that Councilmember Vazquez contributed *any* funds derived from his allegedly wrongful dealings to his own campaign. To the contrary, the only evidence demonstrates that Mr. Vazquez won elections in both 2012 and 2016 even though he contributed practically nothing to his own campaigns, raised by far the smallest amount of money of any successful candidate in those two elections, and spent substantially less than even Ms. Loya herself on contests that, according to plaintiffs' theory of the case, require too much money for Latinos to win.[11]

Second, even if plaintiffs' theory were not plainly wrong as a factual matter, it would nevertheless be wrong as a legal matter. Plaintiffs' lone support for the proposition that an "unusually 'well-financed'" candidate can be discounted as a "special circumstance" is a case from the Eastern District of New York, *Reed v. Town of Babylon.* (Vazquez Mot. at p. 2.) But *Reed* does not support their "special circumstances" theory. In that case, the "special circumstance" was unusual crossover voting by white voters supporting a black-preferred Democratic candidate, which occurred in part because of an aggressive "campaign to defeat the incumbents" financed by a "private citizen unhappy with a Board decision affecting his business." (914 F.Supp. 843, 858.) The case stands for the proposition that a "well-financed" anti-incumbent crusade is a special circumstance, *not* that a minority candidate with larger-than-average financial resources is per se a special circumstance (particularly when that minority

[11] Plaintiffs will contend that Councilmember Vazquez's public disclosure forms cannot be trusted, because he allegedly understated his income on certain other forms. But unless plaintiffs have evidence of election spending that is demonstrably inconsistent with his contribution and spending disclosures, they cannot show a causal connection between any funds Councilmember Vazquez received through his alleged "influence-peddling scheme" and his recent electoral victories.

candidate does not contribute much to his own campaign).

There is, of course, great irony in plaintiffs' demand that the Court disregard the achievements of a successful Latino and Latino-preferred candidate in a case ostensibly aimed at rectifying a lack of successful Latino and Latino-preferred candidates. The Court should reject this demand for what it is—a transparent effort to eliminate facts that are inconsistent with plaintiffs' flawed theory of the case.

2. Gleam Davis is a member of a protected class for purposes of the CVRA.

The parties agree on the race or ethnicity of most candidates for the City's governing boards. But they disagree about the ethnicity of at least one such candidate, Gleam Davis, who has been a member of the City Council since 2009 and prevailed in three straight elections (2010 special election and 2012 and 2016 general elections). Councilmember Davis testified that her father was Mexican and that she has "discussed that with people [her] entire lifetime" and "characterized [her]self as . . . half Latino." (Davis Depo. Tr. 26:2–27:16.) She is of the view that candidates do not run "as" Latinos, but instead as concerned citizens who "believe in public service." (*Id.* at p. 28:18–25.) Each time she ran for office, it was not "specifically to represent Latinos, whatever that means, because both the school district and the city council elections are at-large and so you are running to represent everyone regardless of their race, regardless of their income." (*Id.* at p. 30:13–24.)

Plaintiffs try to discount this testimony. They hired a purported expert, Jonathan Brown, to ask a small group of Santa Monica residents whether, among other things, they perceive Councilmember Davis to be Latino. (Ex. 1337 at p. 1.) According to Mr. Brown, few Santa Monicans perceive her to be Latino.[12]

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[12] That misperception likely results from a number of errors. One major source of error is the problem of misleading surnames. As plaintiffs' experts, Dr. Kousser and Mr. Ely, have admitted, Latino surnames are not an accurate indication of Latino ethnicity. (E.g., Ely Depo Tr. 86:4–89:21; Kousser Depo. Tr. 207:19–210:1; see also *Cisneros v. Pasadena Ind. Sch. Dist.* (S.D.Tex. Apr. 25, 2014, No. 4:12-CV-2579) 2014 WL 1668500, at *7 ["Spanish surnames are an imperfect proxy for Hispanic self-identification"].) The Census Bureau publishes a list of Latino surnames, but using that list (or voters' intuitive approximation of that list) alone to identify Latinos is prone to significant error. The list is both over-inclusive and under-inclusive. It is over-inclusive because of, for example, non-Latino women who take the surname of their Latino spouses and also men and women of non-Hispanic European descent (e.g., French and Italian) whose names nevertheless appear on the Census list. And the list is under-inclusive because of, for example, Latino women taking the surnames of their non-Latino husbands, or Latino children being adopted by non-Latino parents, as is the case with Councilmember Davis. Thus, Mr. Brown's poll proves only that voters are reasonably proficient at surname analysis, not that Councilmember Davis is not, in fact, Latino.

Mr. Brown's poll result has no bearing on the question whether, as a legal matter, Councilmember Davis is a member of a protected class. Under neither state nor federal law does a person's membership in a protected class depend on anyone else's *perception* of that person's race or ethnicity. The CVRA defines "protected class" as "a class of voters who are members of a race, color, or language minority group, as this class is referenced in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.)." (Elec. Code, § 14026, subd. (d).) And that statute, in turn, defines as one protected class "persons who are . . . of Spanish heritage." (52 U.S.C. § 10303, subd. (f)(2); § 10310, subd. (c)(3).) The statute speaks only in terms of the *fact* of Spanish heritage, not others' *perception* of it. And the relevant case law and the Census Bureau alike focus on self-identification as the touchstone of race or ethnicity, not some nebulous standard grounded in the perception of others. (See, e.g., *Aldasoro*, *supra*, 922 F.Supp. at p. 348 ["Social scientists agree that self-identification is the accepted method for determining a person's race or ethnicity, and is the method utilized by the Census."].) Councilmember Davis need not show that she is Latino "enough" to satisfy whatever standard plaintiffs might concoct. The facts that she *is* "of Spanish heritage," and the fact that she self-identifies as Latino, are dispositive under the CVRA of her membership in the relevant protected class.

Finally, it bears repeating that the focus in this vote-dilution case should not be the race of any candidate, but the *preference* of Latino voters. Latino voters should not be presumed to favor candidates simply because those candidates are, or are perceived to be, Latino. The Court should rely on estimates of Latino voting behavior in order to determine whether Latino-preferred candidates, *regardless of their race*, have won election to office in Santa Monica. And the fact that they overwhelmingly have done so is fatal to plaintiffs' claims. (See Parts III.B–C, *supra*.)

E. Because there is no evidence of legally significant racially polarized voting or vote dilution, the Court need not reach the "[o]ther factors" set out in Section 14028(e).

This is a vote-dilution case. The question before the Court is whether the City's electoral system has diluted and is diluting Latino voting power. Plaintiffs will attempt at trial to make the case about much more than just vote dilution, using the statutory hook of Section 14028(e), which says that "[o]ther factors are probative, but not necessary . . . to establish a violation" of the CVRA.

These "[o]ther factors" are irrelevant here for two reasons. First, the law is clear that courts should not consider such evidence unless and until a plaintiff has proven a legally significant pattern

of racially polarized voting through the *Gingles* analysis. Because plaintiffs cannot do so, there is no cause for the Court to consider lesser secondary or tertiary evidence of vote dilution. Second, there must be some causal connection between these "[o]ther factors" and vote dilution. Generalized grievances about social problems that would have been no different if the City had adopted a districted method of election cannot demonstrate, even indirectly, that Latino votes have been diluted.

1. The 1982 Senate Report: the model for Section 14028(e).

Section 2 of the federal Voting Rights Act was amended in 1982, largely in response to a Supreme Court decision holding that Section 2 plaintiffs must show that an election system was intentionally adopted or maintained for a discriminatory purpose. (*City of Mobile v. Bolden* (1980) 446 U.S. 55.) "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test'" previously used by the Supreme Court and circuit courts. (*Gingles*, *supra*, 478 U.S. at p. 35.) Accompanying the bill amending section 2 was a Senate Judiciary Committee Report that "elaborate[d] on the circumstances that might be probative of a § 2 violation." (*Id.* at p. 36.)[13]

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[13] Those circumstances, now known as the "Senate factors," are:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

"whether there is a significant lack of responsiveness on the part of elected officials to the particularized

The CVRA follows the lead of federal law, providing in Section 14028(e) that five non-exclusive factors "are probative, but not necessary factors to establish a violation" of the statute. Those factors closely track the Senate Report factors: "the 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."

2. These "[o]ther factors" are relevant if and only if the Court concludes that plaintiffs have shown legally significant racially polarized voting under *Gingles*.

The three published appellate opinions on the CVRA offer no guidance on the application of the "[o]ther factors" set out in Section 14028(e), and so the Court should turn to federal courts' application of the Senate Report factors that were imported into California law.

Federal courts have long made clear that the Senate Report factors should be considered only if a Section 2 plaintiff has already proven vote dilution by satisfying the *Gingles* preconditions. The Supreme Court held as much in *Gingles* itself: "While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances [namely, the three *Gingles* preconditions], the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." (478 U.S. at p. 48.) The Court further explained that "if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates." (*Id.* at p. 48, fn. 15.) And evidence relating to the Senate factors cannot bridge the evidentiary gap: "Minority voters may be able to prove that they still suffer social and economic effects of past discrimination . . ., but they have not demonstrated a substantial inability to elect caused by the use of a multimember district." (*Ibid.*)

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needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

(S. Rep. No. 97–417 (1982) 97th Cong. 2d Sess. at pp. 28–29.)

Other federal courts have likewise consistently held that failure to prove any of the *Gingles* preconditions is fatal to a Section 2 plaintiff's claim. Here are but a few examples:

- *Johnson v. Hamrick* (11th Cir. 1999) 196 F.3d 1216, 1220: "If one or more of the *Gingles* factors is not shown, then the defendants prevail. If all three factors are shown, then the district court must review all relevant evidence under the totality of the circumstances."
- *McNeil v. Springfield Park Dist.* (7th Cir. 1988) 851 F.2d 937, 942: "Only upon satisfaction of these threshold criteria should a court conduct its totality-of-the-circumstances analysis and consider other relevant factors. . . ."
- *Aldasoro*, *supra*, 922 F.Supp. at p. 368: "If any one of these three preconditions is not met, there is no need to consider the totality of the circumstances or the presence of the 'Senate factors'. . . . The Senate factors are now of secondary relevance and only must be considered if plaintiffs prove each of *Thornburg*'s three preconditions."
- *Clark v. Holbrook* Unified *Sch. Dist. No. 3 of Navajo Cty.* (D.Ariz. 1988) 703 F. Supp. 56, 59: "Plaintiff must first establish these preconditions before the Court will consider the factors."

Here, the Court will have no occasion to consider the "[o]ther factors" set out in Section 14028(e) because plaintiffs cannot satisfy the requirements of *Gingles*. In other words, plaintiffs cannot prove that Latinos vote cohesively, that whites vote cohesively, *and* that the cohesive white voting bloc has usually voted in such a way as to defeat Latino-preferred candidates. (*Gingles*, *supra*, 478 U.S. at p. 51; see also Part III.B, *supra*.) The Court therefore ought to follow federal courts' lead in declining to reach any collateral issues of disputed fact under Section 14028(e).

3. To be relevant, the Section 14028(e) factors must relate to vote dilution.

The CVRA, like the FVRA, is designed to remedy minority vote dilution. (See *Rey*, *supra*, 203 Cal.App.4th at p. 1229 ["To protect against a voting system that impairs the minority voters' opportunity to participate in the political process, both federal and California law create liability for vote dilution"]; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 798 ["City-wide elections where there is no vote dilution are not in actual conflict with section 14027"]; *Sanchez*, *supra*, 145 Cal.App.4th at p. 681 ["liability ... is imposed because of dilution of the plaintiffs' votes"].) Evidence that does not bear on the question whether Latino votes have been diluted is irrelevant, and Section 14028(e) should not be read so expansively that its factors become ends unto themselves.

There are at least two reasons for reading Section 14028(e) to preclude free-for-all trials on an array of subjects that have no bearing on the question of vote dilution. First, the plain text of the

provision says as much, as it makes the factors relevant only where they "enhance the dilutive effects of at-large elections" or "hinder [a protected class's] ability to participate effectively in the political process." (Elec. Code, § 14028, subd. (e).) Second, an unduly expansive reading of the provision would conceptually be incompatible with the purpose of the CVRA. Evidence untethered to the vote-dilution inquiry would contradict the very "essence" of a vote-dilution claim, which "is that a certain electoral law, practice, or structure interacts with social and historical conditions *to cause an inequality in the opportunities* enjoyed by [Latino] and white voters to elect their preferred candidates." (*Gingles*, *supra*, 478 U.S. at 47, italics added.)

4. The "facts" that plaintiffs will argue are probative under section 14028 are not supported by the evidence, are irrelevant, and will require the waste of judicial and party resources on a series of needless miniature trials.

Plaintiffs intend to tell at trial a variety of stories about the Pico Neighborhood, which they use as a proxy for Latinos citywide despite the facts that the vast majority of Latinos live outside of that neighborhood and that the neighborhood is itself majority-white. These stories are false, they have no bearing on the fundamental question in this case (namely, whether Latino votes are being diluted), and they threaten to mire the parties and Court alike in a weeks-long series of pointless miniature trials. Below the City briefly sets the record straight on several of these stories.

- **Methane in Gandara Park presents no hazard to human health, is not poisoning children in the Pico Neighborhood, and has no connection to the at-large electoral system.**

Gandara Park is a 3.8-acre park containing a variety of recreational facilities that hosts a well-attended and City-funded jazz concert series every summer. The land on which the park sits was not always used for recreation. In 1904, well before nearly all of the residences in the Pico Neighborhood were built, the area around the park became home to a brick factory and adjacent clay pits. Following decades of mining, the empty clay pits were filled with construction waste. Today, reminders of the site's use as a landfill persist in the form of intermittently escaping methane gas. Methane is nontoxic and poses no threat to human health. No scientific literature supports plaintiffs' outlandish theory that the park is "poisoning" the children who play in it. (Opp. to MIL 3 at p. 8.) Since 1998, the City has contracted with environmental consultants to operate a state-of-the-art gas extraction and treatment system. This system is permitted by the South Coast Air Quality Management District and the L.A. County Department of Health Services. The City submits reports to both agencies on a quarterly basis,

and remains in compliance with all applicable federal, state, and local regulations.

- **Industrial uses of the City Yards site long predate residential life in the Pico Neighborhood, and have no connection to the at-large electoral system.**

The City Yards is a 14.7-acre site adjacent to Gandara Park and dedicated to a wide array of City functions, including fleet maintenance, traffic operations, and Fire Department training. The City Yards also provides direct community services, including a vocational educational program. This site was once part of the clay-mining and brickmaking complex as the park, and has been in continuous use by the City since the 1940s. Its century-plus of industrial use began long before residents, Latino or otherwise, built homes nearby. Once the clay pits were exhausted, the pockmarked landscape was hardly fit for residential use. Further, for many decades after the dumping of trash ceased the vast majority of residents around the site were *white*, not Latino. Finally, it is hard to imagine that, if only the City had had a districted method of election in the late 1940s, it would have done anything with a pitted brownfield site other than to reclaim it for the City's industrial uses.

- **The location of the I-10 freeway was beyond Santa Monica's control, and has no connection to the at-large electoral system.**

The Santa Monica Freeway connects Santa Monica to downtown Los Angeles. It was completed in 1964, nearly 20 years after the adoption of the method of election that is the subject of this case. The location of the freeway was decided at the federal and state level; municipalities such as Santa Monica had no say in the matter. And even if they had been able to participate in the decision, there is no reason to believe that the highway's location would have been any different if Santa Monica had elected its councilmembers under a districted rather than at-large system.

- **The Pico Neighborhood does not suffer from a high rate of crime, which would have no connection to the at-large electoral system in any event.**

The Santa Monica Police Department tracks crime statistics in each of the City's eight neighborhoods. As is shown in the table below, over the last decade, the Pico Neighborhood had fewer reported incidents than all but two other neighborhoods. Downtown had by far the largest volume of reported incidents—more than twice as many as the next-highest neighborhood total—and by far the largest volume of incidents per capita—almost seven times as many as the next-highest neighborhood total. (Ex. 1732, p. 81.)

Neighborhood	2010 population	Reported incidents (2007–2018)	Incidents per capita
Downtown	4,016	34,410	7.82
Mid-City	14,180	13,956	0.98
Ocean Park	12,006	13,913	1.16
Wilshire Montana	19,634	12,442	0.63
Sunset Park	14,598	11,734	0.80
Pico	8,578	8,055	0.94
North of Montana	10,807	5,130	0.47
Northeast Neighbors	4,165	2,918	0.70

- **The Pico Neighborhood does not contain a disproportionate number of homeless shelters, which would have no connection to the at-large electoral system in any event.**

There are approximately 15 homeless shelters in the City. Only two of them are located within the Pico Neighborhood, and a third is on Olympic Boulevard, the boundary between the Pico Neighborhood and the Mid-City Neighborhood. (See O'Day Depo. Tr. 99:10–100:6; McKeown Depo. Tr. 34:2–5.) Shelters are located throughout the City—as far north as Washington Avenue and as far south as Ocean Park Boulevard. The largest concentration of shelters is downtown.

5. There are no "electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections."

Certain "electoral devices" can make it more difficult for cohesive minority groups to elect candidates of their choice. Some such devices date to the Jim Crow era, when various facially neutral laws were designed to suppress or dilute black votes. The Supreme Court singled out a few of these devices in *Gingles*: majority-vote requirements, designated posts, prohibitions against bullet voting, poll taxes, and literacy tests. (*Gingles*, *supra*, 478 U.S. at pp. 39–40, 48, fn. 15, 56.)

Santa Monica does not employ *any* such device. Council seats are not numbered or designated. A candidate need not win a majority of the vote to get elected, and there are no runoffs. Residents are not prohibited from bullet voting—that is, concentrating their support for their favorite candidate by voting only for him or her and declining to cast their remaining votes. And, of course, there are no

impediments to voter registration like poll taxes or literacy tests.[14]

6. Latino candidates are not denied "access to those processes determining which groups of candidates will receive financial or other support in a given election."

According to plaintiffs, it is expensive to run for office in Santa Monica, Latino candidates have less money of their own to spend on elections than white candidates, and Latino candidates have a harder time raising money from the Latino "community" than do whites from the "non-Hispanic white community." (Ex. 1201, ¶ 28.) As a factual matter, this story is riddled with holes. First, the vast majority of Santa Monica election spending is done by independent political action committees (PACs). It would be illegal for candidates to coordinate with such PACs, and so *no* candidate has "access to the processes determining which groups of candidates will receive [their] financial or other support." Second, there is little evidence that a candidate must spend much or any of their own money to succeed in Council elections. In 2016, for example, three of the four victorious candidates spent not a dime of their own money. (Ex. 1526.) In any event, although white residents have higher average incomes and wealth than Latinos, that is not necessarily true of particular candidates. Third, plaintiffs' suggestion that all or most contributions to a candidate will come from members of that candidate's race reflects, like much of plaintiffs' case, a lamentably narrow view of the world. A candidate's race or ethnicity is not determinative of the sources of his or her financial support.

Nor are the slating processes of prominent civic organizations biased in favor of non-Hispanic whites. SMRR and other organizations have no racially charged mission—except, perhaps, insofar as their advocacy is designed to help the disadvantaged, who may in some circumstances be disproportionately non-white—and nothing prevents Latino and Latino-preferred candidates from benefiting to the same extent as white and white-preferred candidates (if indeed Latinos and whites systematically prefer any candidates). SMRR, for example, has consistently endorsed Latino and Latino-preferred candidates, including plaintiff PNA's representative Oscar de la Torre. In 2016 alone, the organization supported three Latino candidates (Tony Vazquez, Gleam Davis, and Margaret Quinones-Perez).

[14] Plaintiffs have suggested that the slating procedures of prominent civic organizations like Santa Monicans for Renters' Rights count as dilutive "electoral devices" for purposes of Section 14028. (See, e.g., Ex. 1201, ¶ 29.) But they have identified no authority, and the City is not aware of any, holding that the practices of a nongovernmental third party qualify as a kind of surreptitious or indirect state action under the CVRA or Section 2. The next section directly addresses those slating processes.

7. There is no history of "overt or subtle racial appeals in political campaigns."

Plaintiffs and their expert, Dr. Kousser, have pointed to "racial appeals" in just one election—the general election held in 1994. Tony Vazquez ascribed the failure of his reelection bid that year in part to "racism." (Ex. 1206, ¶ 123.) Others vehemently disagreed with this assessment. Then-Councilmember Asha Greenberg, for example, took Councilmember Vazquez's comment as "an insult to Santa Monica voters and the democratic process." Councilmember Greenberg, "an East Indian immigrant," noted that because of the "openness and inclusiveness of the Santa Monica electorate," she "perceived, correctly, treat the determining issues would be public safety and rent control, not [her] skin color and ethnicity." She ascribed Councilmember Vazquez's defeat to what she characterized as his "abysmal voting record" on public-safety issues.

8. The City has been responsive to the needs of all its residents, including Latinos.

A lack of "responsiveness" to the needs of a minority group does not appear in the list of "[o]ther factors" in subdivision (e) of Section 14028. It does appear in the 1982 Senate Report (*Gingles*, *supra*, 478 U.S. at p. 37), which appears to be why Plaintiffs contend that the City Council has been unresponsive to the needs of Latinos. That contention is false.

Plaintiffs focus all of their attention on the Pico Neighborhood, which they use as a proxy for Latinos. But the Pico Neighborhood is majority-white, and roughly 70 percent of the City's Latinos live *outside of* it. (Ex. 1732 at p. 7; Ex. 1532.) Plaintiffs' focus on that neighborhood therefore proves nothing about the City's relationship with all or even most of its Latino residents.

Even if the Pico Neighborhood were a suitable proxy for Latinos, the evidence shows that the City has been consistently responsive to the needs of that neighborhood. The City has made massive investments in the neighborhood, including by renovating Virginia Avenue Park ($13 million), constructing the Pico Branch Library ($11 million), building Ishihara Park ($5 million), and revamping the Pico Streetscape ($6 million). (Ex. 1416.) The City also offers a wide array of free programming in the neighborhood, including an after-school program, a vocational educational program, and even a micro-grant program for Pico residents. Additionally, the City has conducted a groundbreaking study of all its residents across a wide variety of dimensions in order to focus its attention and resources on the issues that affect residents' lives most. Following the publication of this "Wellbeing Index," the

City recently published a lengthy report to kick off the "Pico Wellbeing Project," which will guide the City's further investments in the Pico Neighborhood. Finally, one Councilmember, Terry O'Day, is a longtime resident of the Pico Neighborhood. Plaintiffs' suggestion that he cannot be responsive to the needs of the neighborhood because he is white reflects the erroneous animating presumption of their case—that a community of interest can be forged only on the basis of skin color or ethnicity.

9. The Court should preclude or limit evidence as to these and other collateral matters.

The CVRA is not a neighborhood statute. It does not appoint courts as roving commissions charged with redressing every societal ill. The Court can and should preclude or limit evidence having little or no bearing on the central question in this case—whether Latino votes have been and are being diluted—in order to conserve judicial and party resources. (See Evid. Code, § 352.)

IV. Equal Protection claim

Because plaintiffs' Equal Protection claim, like their CVRA claim, depends on a showing of vote dilution caused by the City's at-large method of election, their inability to prove liability under the CVRA is necessarily also fatal to their Equal Protection claim. That claim also fails for the independent reason that plaintiffs have no evidence that the City adopted or maintained its current method of election in order to discriminate against its minority residents.

1. A vote-dilution claim brought under the Equal Protection Clause has three elements: impact, causation, and intent.

To prevail on their Equal Protection claim, plaintiffs must demonstrate that the City's at-large electoral system has caused a disparate impact that was intended by the relevant decisionmakers. (See, e.g., *Personnel Adm'r of Mass. v. Feeney* (1979) 442 U.S. 256, 273, 279 [in a disparate-impact case, the relevant decisionmakers must have "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group"]; *Sanchez v. State* (2009) 179 Cal.App.4th 467, 487 [same]; see also *Spurlock v. Fox* (6th Cir. 2013) 716 F.3d 383, 396–402 [outlining methods of proving Equal Protection claim]; *Jauregui*, *supra*, 226 Cal.App.4th at p. 800 ["California decisions involving voting issues quite closely follow federal Fourteenth Amendment analysis."]; *Hull v. Cason* (1981) 114 Cal.App.3d 344, 372–374 ["[t]he equal protection standards of the Fourteenth Amendment, and of the state's Constitution, are substantially the same"].)

Each of these elements—disparate impact, causation, and discriminatory intent—is necessary but insufficient on its own to make plaintiffs' case. Disparate impact alone, for example, does not establish a constitutional violation. (*Washington v. Davis* (1976) 426 U.S. 229, 239.) To the contrary, a plaintiff must demonstrate both that the challenged enactment *caused* the disparate impact and that the relevant decisionmakers *intended* such an impact. (See *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project* (2015) 135 S. Ct. 2507, 2523 [this "robust causality requirement ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create," alterations and internal quotation marks omitted]; *Johnson v. DeSoto Cty. Bd. of Comm'rs* (11th Cir. 2000) 204 F.3d 1335, 1345 [similar]; *Feeney*, *supra*, 442 U.S. at pp. 273–274, 279 [no liability without proof of discriminatory intent].) Nor is discriminatory intent alone sufficient to prove an Equal Protection claim. (*Palmer v. Thompson* (1971) 403 U.S. 217, 224 ["no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it"]; see also *Garza v. Cty. of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 771 ["Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result."].)

2. Plaintiffs cannot prove that the City's at-large electoral system has caused the dilution of minority voting power.

Disparate impact in an Equal Protection analysis is proven in the same way as vote dilution in a CVRA or FVRA analysis—through evidence that a protected class would have greater electoral opportunity given the adoption of some other method of election.[15] (*Johnson*, *supra*, 204 F.3d at p. 1344; *Lowery v. Deal* (N.D.Ga. 2012) 850 F.Supp.2d 1326, 1331; *Lopez v. City of Houston* (S.D.Tex., May 22, 2009, No. CIV. A. H-09-0420) 2009 WL 1456487, at *19 ["a benchmark is required for Equal Protection . . . vote dilution claims"].)

There is no "benchmark" against which the City's current electoral system can be measured and found wanting—either now or as an historical matter. As has been true throughout the 72 years

[15] Because the standard for proving vote dilution even in federal cases "was intended to be more permissive than the constitutional standard" (*Johnson*, *supra*, 204 F.3d at p. 1344), and because the CVRA is, in turn, a liberalized version of section 2 of the FVRA, a plaintiff who has failed to show vote dilution in furtherance of a CVRA claim cannot, *a fortiori*, make the requisite showing of disparate impact in furtherance of an Equal Protection claim.

since the City's Charter was amended, Latinos are too few in number and too integrated throughout the City for any alternative system to yield a greater electoral opportunity for Latino voters.

Nor, for that matter, does the record support even the *theory* that the City's electoral system somehow limited minority voting rights. In 1946, the City moved from a three-commissioner at-large system to a seven-councilmember at-large system. (Ex. 1206, ¶¶ 12, 79.) Candidates no longer ran for a single numbered seat, but for one of three or four seats, making it easier for representatives of minority groups to succeed at the polls even with limited support from the white majority. Contemporary observers were aware that this new method of election would benefit minority voters. (*Id.*, ¶ 90 [secretary of Board of Freeholders "pointed out that the opportunity for representation of minority groups has been increased two and a half times over the present charter by expansion of the City Council from three to seven members"]; ¶ 91 [Board member contended that "seven councilmen are almost certain to assure better geographic representation than the three council members now elected"].)

3. Plaintiffs also cannot prove that the relevant decisionmakers affirmatively intended to discriminate against minority voters.

Whereas a vote-dilution claim brought under the CVRA or Section 2 rises or falls with the *results* of an at-large electoral system, a vote-dilution claim brought under the Equal Protection Clause requires proof of more than just results. It also requires proof that those results were *intended* by the relevant decisionmakers. (See, e.g., *Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361–1362; *Gingles*, 478 U.S. at p. 35; *Osburn v. Cox* (11th Cir. 2004) 369 F.3d 1283, 1288; *Irby v. Virginia State Bd. of Elec.* (4th Cir. 1989) 889 F.2d 1352, 1357.) Here, the decisionmakers must have decided to amend the City's Charter in 1946 "because of, not merely in spite of, [the amendment's] adverse effect upon an identifiable group." (*Feeney*, *supra*, 442 U.S. at p. 279.)

Plaintiffs' expert, Dr. Kousser, contends that mere awareness of what he calls the probable consequences of an official act can serve as an adequate basis for a judicial finding of discriminatory intent. (Kousser Depo. Tr. 374:10–375:14; 434:21–425:23.) This is not the law.[16] The Supreme Court

[16] Dr. Kousser's deposition testimony and declaration are similarly in large part directly contrary to the law. Dr. Kousser does little more than serve as a conduit for inadmissible hearsay, and his proposed "expert" testimony requires no specialized skill or knowledge, since it consists almost entirely of interpreting newspaper articles within the four corners of those articles. Many of his opinions, including his ten-factor test on intent, are improper because they embrace legal issues within the exclusive province of the court (and are inaccurate statements of law besides). Finally, none of his purported evidence of intent is, in fact, relevant to the question why the Charter amendment was adopted (or any other

squarely rejected Dr. Kousser's argument almost 40 years ago in *Feeney*: "'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences." (442 U.S. at p. 279; see also *People v. Superior Court* (1992) 8 Cal.App.4th 688, 711 [quoting same language]; *Veasey v. Abbott* (5th Cir. 2016) 830 F.3d 216, 331 (en banc) ["Legislators' awareness of a disparate impact on a protected group is not enough; the law must be passed *because of* that disparate impact."]; *Spurlock*, *supra*, 716 F.3d at pp. 398–399 [foreseeable consequences not indicative of intent to discriminate].)

Plaintiffs have no such evidence of intent. Dr. Kousser claims that the City may have intentionally discriminated against minority residents on three separate occasions—in 1946, when the City adopted the Charter; in 1975, when the electorate overwhelmingly voted against a proposal that the City adopt a districted method of election; and in 1992, when the City declined to switch to a districted method of election following its receipt of Dr. Kousser's opinion that the City. The City will address a few telling deficiencies as to each of the three aforementioned events below.

a. The 1946 adoption of the Charter was not motivated by discrimination.

Plaintiffs contend, relying solely on the analysis of Dr. Kousser, that the City's adoption of its current Charter in 1946 was motivated by discriminatory intent. They have no evidence whatsoever for this claim. Dr. Kousser relies almost exclusively on a set of newspaper articles that demonstrate, at most, that some people in Santa Monica in the 1940s harbored racist views, *not* that those people made the challenged decision, much less that those who did make it were inspired by racial animus.

The leading case on discerning whether a legislative body acted with discriminatory intent on the basis of circumstantial evidence is the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252. There, the Court identified five factors that might give rise to an inference that a challenged enactment was motivated by a discriminatory purpose. (429 U.S. at pp. 266–268.) What follows is a brief review of those factors and the reasons why Dr. Kousser's analysis fails to demonstrate that any of them is satisfied here.

The first factor is the "impact of the official action," especially "whether it bears more heavily

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decision made) by the relevant decisionmakers.

on one race than another." (*Arlington*, *supra*, 429 U.S. at p. 266.) As explained in Part III.B, *supra*, the adoption of the Charter has had *no* deleterious effect on minority voters. Nor could it have. In 1946, whites accounted for over 95 percent of the City's population. (Ex. 1206, Table 5.) No minority group, whether alone or in combination with all other minority groups, would have been large enough to elect candidates of its choice under any alternative electoral system. As a result, the nature of the City's electoral system could not possibly have resulted in any dilution of minority voting strength. If anything, the new Charter had the *opposite* effect. The expansion of the number of seats from 3 to 7 and the elimination of numbered seats made it mathematically easier for cohesive minority groups to elect their preferred candidates. If any decisionmakers intended to weaken minority influence in 1946, they picked a strange way of doing it.

The second factor is the "historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes." (429 U.S. at p. 267.) In other cases, experts and courts can point to a long history of official discrimination that makes it more likely that the challenged enactment was also intended to discriminate against minorities. (See, e.g., *North Carolina State Conf. of NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 223–224 [record "replete with evidence," including over 50 DOJ objection letters and 55 successful Section 2 cases].) Here, by contrast, Dr. Kousser does not relay *any* history of *official* discrimination in Santa Monica predating the adoption of the seven-member Council in 1946. The most that he can say is that there was some discrimination "by tradition, though not law." (Ex. 1206, ¶ 95.)

The third factor is the "specific sequence of events leading up to the challenged decision." (429 U.S. at p. 267.) Dr. Kousser's chief evidence on this score is a purportedly booming minority population that, he speculates, white residents must have wanted to disenfranchise. (Ex. 1206, ¶ 80.) But there was no such minority population boom in the 1940s. As Dr. Kousser's own numbers show, the City's nonwhite population remained tiny throughout the relevant period, growing from 3.4 percent to 4.5 percent in 1946. (Ex. 1206, Table 5.) It is not plausible that a 1.1 percentage-point increase in the minority population could have prompted the adoption of a new method of election.

The fourth factor is "[d]epartures from the normal procedural sequence" or "[s]ubstantive departures." (429 U.S. at p. 267.) Dr. Kousser identifies *no* such irregularities.

The fifth factor is "[t]he legislative or administrative history . . ., especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." (429 U.S. at p. 268.) But nowhere does Dr. Kousser cite any legislative history of the decision of the Board of Freeholders—no minutes, agendas, or reports. In fact, he cites almost no statements attributable to any members of the Board. And the few he does cite prove the very opposite of his point, as they show that the Board was aware that the Charter amendment would *strengthen* minority voting power. For example, the Secretary of the Board spoke at an NAACP meeting in favor of the Charter, specifically arguing that it would increase minority voting power "two and a half times over the present charter by expansion of the City Council from three to seven members." (Ex. 1206, Ex. 32 [*Outlook* article entitled "New Charter Aids Racial Minorities"].) Many prominent members of minority groups agreed with this analysis, urging their fellow residents to vote "yes" on the Charter. (Ex. 1816.)

Other facts likewise show that, if anything, the Board sought to *protect* rather than harm minority voters. For example, the Charter included a fair employment clause prohibiting discrimination in hiring. (Ex. 1512.) The Charter also included a provision to protect collective-bargaining rights, which would have disproportionately benefited minority workers. Finally, the Charter also reduced the residency requirement for Council candidates from five years to two, which would have favored minority candidates who were recent arrivals. Dr. Kousser ignores these and other facts inconsistent with his unsubstantiated theory of discrimination.

b. There is no evidence of discriminatory intent in 1975.[17]

In 1975, voters overwhelmingly rejected Proposition 3, which would have split the City into seven districts. Dr. Kousser analyzed those events both in connection with his 1992 report, when he was working for the City, and in connection with this litigation, in which he is working for the plaintiffs. In 1975, he concluded that there was insufficient evidence of any discriminatory motive. In 2018, Dr. Kousser said he "changed [his] mind." (Ex. 1206, ¶ 104.)

In 1992, when the year 1975 was much closer than it is now, Dr. Kousser concluded that "it

[17] Plaintiffs do not even mention 1975 in their operative complaint, which defines the scope of this action at trial. The Court should exclude evidence relating to the 1975 election for this reason alone.

seems dubious . . . that a case for discriminatory intent could be made for the 1974–1975 events." (Ex. 1315 at p. 23.) Dr. Kousser cited five facts. First, both Nat Trives and Hilliard Lawson (the City's first two black councilmembers) opposed Prop. 3. Second, "no major African-American or Latino spokespersons seem to have campaigned for it, there were no racial appeals for its defeat, and minority voters seem to have opposed [it] in nearly the same propositions as Anglos did." (*Id.* at p. 22.) Third, the *Outlook*, on which Dr. Kousser's so heavily relies, "endorsed both Trives and [Fred] Beteta," a Latino School Board candidate. (*Ibid.*) Fourth, Trives was not only elected, but voted mayor by his fellow councilpersons. (*Id.* at p. 23.) (Dr. Kousser does not mention it, but Beteta also won his School Board election.) And fifth, "Santa Monicans had become more tolerant" over the years. (*Id.* at pp. 22–23.)

But in 2018, 43-plus years after the events at issue, Dr. Kousser reached a very different conclusion. He gave two reasons for his change of heart, neither of which withstands scrutiny. The first is that his research concerning *Crawford v. Board of Education of the City of Los Angeles* convinced him that the "general climate of racial opinion in the region in the 1970s was worse than [he] had remembered during 1992." (Ex. 1206, ¶ 104.) But in that case, only the trial court found intentional discrimination. Both the Court of Appeal and the United States Supreme Court disagreed with that assessment. (113 Cal.App.3d 633, 645 ["When the . . . findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found."]; 458 U.S. 527, 545 [seeing "no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose"].) A desegregation case concerning Los Angeles schools in which multiple appellate courts expressly held that there was *no* discriminatory intent is hardly evidence of a substantially "worse" "general climate of racial opinion" in Santa Monica than Dr. Kousser "remembered" almost 30 years ago. Dr. Kousser's memory of 1975 did not get sharper over the 26 years between his initial report and subsequent declaration. The only thing that changed was who he was working for.

Dr. Kousser's second reason for changing his mind is no more persuasive than the first. He purports to have done a "more complete statistical analysis of the election returns for Prop. 3," concluding that "almost everyone who voted for the two Spanish-surnamed candidates favored districts

and that almost none of the opponents of Prop. 3 voted for them." (Ex. 1206, ¶¶ 105–106.) This opinion is nonsense. The results from Dr. Kousser's ecological-regression analysis are ludicrous—negative 28.8 percent to 262.3 percent (Ex. 1206, Figure 5), well beyond acceptable margins of error. And the results are also inconsistent with the election returns. Fred Beteta was a popular candidate. He received 7,232 votes citywide. (Ex. 1368.)[18] The other Spanish-surnamed candidate, Beulah Juarez, received 3,558 votes citywide. (*Ibid.*) Even if we make the charitable assumption that *every last* Juarez voter was also a Beteta voter—which was surely not the case—the number of Beteta/Juarez voters would outstrip the number of voters for districts (just 5,060) by 2,172. (*Ibid.*) And, under that same assumption, even 80 percent of the Beteta/Juarez voters (5,785) would *still* outnumber the total actual voters for districts. In other words, Beteta alone was so much more popular than districts that it is *impossible* that 80 percent of Beteta supporters, much less Beteta *and* Juarez supporters, favored districts. What is more, Beteta was a Republican who was endorsed by the *Outlook*, which opposed districts. (Ex. 1206, Ex. 51.) Beteta's political affiliation and endorsement are inconsistent with the notion that Beteta voters would be inclined to support districts. Dr. Kousser's conclusion depends on bad math and his pernicious assumption that Latinos vote principally or even exclusively on the basis of race or ethnicity.

In short, districts simply were not very popular in 1975. They would prove almost equally unpopular in 2002, when the electorate again overwhelmingly rejected them. (Ex. 1387.) Dr. Kousser's "statistical analysis" cannot overcome that basic fact any more than his analysis of voting patterns can overcome the facts of Santa Monica's historically low Latino population and history of successful Latino-preferred candidates.

c. There is no evidence of discriminatory intent in 1992.

Finally, plaintiffs assert that "in or around 1992 Defendant was made aware of the fact that its at-large method of electing its city council diluted the vote of the city's racial minorities, and that the at-large method of election was intended to do exactly that." (Ex. 1201, ¶ 45.) Not true. Dr. Kousser

[18] The election included certain precincts that were outside Santa Monica, in Malibu. Malibu precincts did not vote on Prop. 3. Accordingly, the figures cited are the vote totals only for precincts in Santa Monica and absentee ballots from within Santa Monica.

concluded in his 1992 report only that "if someone brought a case, the city would have to defend itself." (Ex. 1315 at p. 1.) Dr. Kousser also emphasized that "the time for my investigation was very short, my research has not been exhaustive by any means, and my conclusions should be regarded as quite tentative." (*Id.* at p. 2.) Dr. Kousser is not an attorney, nor was he in a position to make decisions for the City. That he suggested that the City replace its at-large system with a districted system on the basis of his "quite tentative" conclusions is of no moment. Further, like his 2018 declaration, Dr. Kousser's 1992 report contains *no* evidence that the City adopted its third Charter to discriminate against minorities.

Dr. Kousser suggests that the City Council declined in 1992 to propose a charter amendment to adopt a districted electoral system for racially discriminatory reasons, but he has no evidence for that proposition other than councilmembers' purported awareness that districted elections would supposedly increase minority representation. He repeatedly and improperly infers from this mere awareness that the Council declined to switch to districts for discriminatory reasons. (See, e.g., Kousser Depo. Tr. 374:10-375:14; see also *Feeney*, *supra*, 442 U.S. at p. 279 [holding that mere awareness of potentially disparate impact is inadequate to show discriminatory intent].) And he completely discounts the nondiscriminatory reasons the councilmembers gave for favoring the maintenance of the at-large system. (See, e.g., *id.* at p. 354:20–358:25 [giving no weight to Councilmember Zane's concern that a districted system "would make it harder to get affordable housing in Santa Monica"].)

Dr. Kousser goes to great lengths to shoehorn facts to fit his theory, but he cites no evidence showing that the Council in 1992 voted against including districts in a series of proposed amendments to the Charter not in spite of the fact that it was aware that districts might improve minority representation, but *because of* it. For that reason, plaintiffs cannot satisfy the requisite element of discriminatory intent.

V. Anticipated evidentiary issues

The City expects certain evidentiary issues to arise at trial and offers a summary of them here so that the Court may reach an informed decision without the undue delay required for further briefing.

A. Newspaper articles are inadmissible hearsay.

Under the landmark case *People v. Sanchez* (2016) 63 Cal.4th 665, an expert "cannot . . . relate

as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."[19] (*Id.* at p. 686.) Dr. Kousser repeatedly runs afoul of this rule throughout his declaration, and he will do the same at trial.

Most of Dr. Kousser's sources are articles published in the *Santa Monica Evening Outlook* in the 1940s and 1970s. Those articles are in almost every case Dr. Kousser's *exclusive* sources for a host of case-specific facts—that is, facts "relating to the particular events and participants alleged to have been involved in the case being tried" (*id.* at p. 676)—but Dr. Kousser offers no non-hearsay basis for any of them. Newspaper articles are classic hearsay—out-of-court statements inadmissible for the truth of the matter asserted therein. (See, e.g., *Serri v. Santa Clara Univ.* (2014) 226 Cal.App.4th 830, 866; *People v. Gibson* (1958) 160 Cal.App.2d 535, 537; *Shumate v. Johnson Pub. Co.* (1956) 139 Cal.App.2d 121, 133; see also *Nooner v. Norris* (8th Cir. 2010) 594 F.3d 592, 603 ["Newspaper articles are 'rank hearsay'"]; *Cody v. Harris* (7th Cir. 2005) 409 F.3d 853, 860.) Where their sole basis is such inadmissible hearsay, Dr. Kousser cannot testify as to case-specific facts at trial.

Sanchez would apply even notwithstanding any argument that Dr. Kousser's newspaper articles and other hearsay are not being offered for the truth of the matters they assert. *Sanchez* itself explains that "an expert's testimony regarding the basis for an opinion *must* be considered for its truth" by the finder of fact. (63 Cal.4th at p. 679 [rejecting old "paradigm" under which the finder of fact was asked to separate hearsay offered for its truth from hearsay offered only as the basis of an expert opinion]; see also *People v. Stamps* (2016) 3 Cal.App.5th 988, 994–995 [observing that the "not-admitted-for-its-truth rationale was jettisoned" in *Sanchez*].) And because the statements at issue were not made by the relevant decisionmakers, there is no applicable non-hearsay exception or valid non-hearsay purpose to render the statements admissible. The statements were not, for example, made against the interest of the decisionmakers, nor do they reveal the decisionmakers' state of mind. If the challenged decision

[19] This rule applies to civil as well as criminal cases. (See, e.g., *People v. Bona* (2017) 15 Cal.App.5th 511, 520 ["Although *Sanchez* is a criminal case, it also applies to civil cases, such as this one, to the extent it addresses the admissibility of expert testimony under Evidence Code sections 801 and 802."]; *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1282 ["*Sanchez* is not, however, limited in its application to criminal proceedings."]; *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 10 ["This aspect of *Sanchez* concerning state evidentiary rules for expert testimony (Evid. Code, §§ 801-802) applies in civil cases such as this nuisance lawsuit."].)

had been made by the *Santa Monica Evening Outlook*, Dr. Kousser's newspaper clippings might have probative value. But it was not, and so they do not.

Plaintiffs might also contend that newspaper articles are all that they have, and that excluding them would deprive them of the opportunity to put on their Equal Protection case. But the fact plaintiffs have no non-hearsay evidence to support their case is no cause to lower or abandon evidentiary standards or give them a free pass on satisfying their burden of proof.[20]

B. The Court should grant the City's motions in limine in light of further evidence at trial.

"In limine rulings are not binding; they are subject to reconsideration upon full information at trial." (*Chen v. L.A. Truck Ctrs., LLC* (2017) 7 Cal.App.5th 757, 768 [collecting cases and explaining that motions in limine "are not subject to the formal constraints of a motion for reconsideration under Code of Civil Procedure section 1008"].) The Court should grant each of the City's motions.

Motion in Limine No. 1 (nonsuit for lack of vote dilution). From the very beginning of this case, the City has argued that given both the indisputable demographics of Santa Monica and the long history of success by Latino-preferred candidates, including Latino candidates, plaintiffs cannot prove that the City's at-large method of election has diluted Latino voting power. Without evidence of vote dilution, there can be no liability under either the CVRA or the Equal Protection Clause.

Motion in Limine No 2 (exclusion of Jonathan Brown). Mr. Brown polled a small number of Santa Monica voters for two purposes—to support plaintiffs' contention that Gleam Davis is not perceived by voters to be Latino, notwithstanding that her father was Latino, and to show that Santa Monica voters would favor districted elections, notwithstanding the fact that they have twice overwhelmingly rejected them. Mr. Brown's opinions should be excluded for three reasons. First, they are irrelevant. Voters' purported preferences shed no light on whether the City's at-large electoral system was intended to dilute Latino voting power or has had that effect. Nor is voters' perception of Ms. Davis's

[20] Of course, if the Court declines to exclude plaintiffs' newspaper articles as inadmissible hearsay, the City must be allowed to complete the historical record with newspaper articles of its own. But should the Court exclude plaintiffs' articles, the City would have no cause to introduce its own articles, and would rely exclusively on documents such as the 1946 Charter, which by itself reveals a lack of discriminatory intent. (Ex. 1512.)

ethnicity legally determinative of her membership in a protected class. (See Part III.B.4, *supra.*) Second, Mr. Brown's polling methodology was improper, partial, and entirely out of step with the standard practices of his profession. (See Brown Depo. Tr. 43:23–45:7, 74:25–75:11, 78:3–22, 93:20–94:4, 97:1–98:11, 124:14–125:15, 176:15–22, 186:23–187:3, 188:3–7, 190:14–20.) Third, Mr. Brown is not qualified to give any opinion on polling or statistical analysis. Among other reasons, he has no training in and has published nothing on polling. (*Id.*, 14:6:6–17:3, 148:20–149:10.)

Motion in Limine No. 3 (collateral matters; granted in part and denied in part). The Court should exclude or substantially curtail evidence regarding methane leaks in Gandara Park, land features of the Pico Neighborhood, and alleged improprieties on the part of Councilmember Tony Vazquez and School Board member Maria Leon-Vazquez. These matters are not relevant to the litigation. Evidence on "[o]ther factors" is relevant under the CVRA only insofar as it bears on Latinos' inability to participate in the political process and elect candidates of their choice. (See Elec. Code, § 14028, subd. (e); see also Part III.C.3, *supra.*) And even if these matters were minimally relevant, they nevertheless are too far afield from the core issue in dispute—namely, whether the City's at-large electoral system has diluted Latino voting power. Without the Court's intervention, there is substantial risk of prolonging and complicating the trial without providing the Court any evidence that will bear on its decision on the vote-dilution question. To take but one example, if the Court allows plaintiffs to make their outrageous claims that the City has endangered the lives of children by not doing more to contain methane gas escaping into Gandara Park, the City will need to set the record straight. If it must, it will defend its environmental and safety record by introducing evidence concerning, inter alia, the history of Gandara Park; Santa Monica's efforts to monitor and remediate methane leaks; Santa Monica's compliance with relevant federal and state regulations; the latest scientific findings on the effects of methane on human health, if any; and Santa Monica's communications with residents about methane in the park.

C. Plaintiffs' discovery misconduct should result in evidentiary sanctions.

Plaintiffs repeatedly frustrated the discovery process, destroying some documents and refusing to produce others even after acknowledging both their existence and responsiveness to the City's requests and even after they were ordered to do so following the City's successful motion to compel. The Court should decline to admit into evidence any documents that were responsive to the City's

discovery requests that plaintiffs refused to produce.[21]

Plaintiffs did not produce, among other things, *any emails* from plaintiff Loya's Gmail account, which they admit contains case-related messages; *any Facebook posts* from Ms. Loya's Facebook account, which she deleted notwithstanding the facts that she posted frequently this case and elections in Santa Monica and that she was ordered to produce those posts; and various documents that plaintiffs said under oath that they would be "willing" to produce but nevertheless failed to produce after repeated requests. (See, e.g., de la Torre Depo. Tr. (5/9/18), pp. 216:16-217:9; 283:7-284:24; 325:3-327:5; de la Torre Depo. Tr. (5/11/18), pp. 141:15-143:16.)

Below is a timeline of the City's fruitless efforts to obtain plaintiffs' responsive documents:

- October 2017: The City moved to compel after Plaintiffs failed to produce a single document in response to the City's requests.

- January 2017: Plaintiffs made 4,400 pages of documents available to the City, albeit only in paper form and outside their home on a rainy afternoon. (The City had to hire a vendor to scan the materials on-site in the rain.)

- September 29, 2017: Plaintiffs represented to the discovery referee that "there is nothing in Plaintiffs' possession, custody, or control left to produce."

- February 2, 2018: The referee ordered Plaintiffs to conduct good-faith searches as to more than ten specific categories of documents (reflecting approximately 45 individual discovery requests), to produce additional responsive documents, and/or to confirm under oath that no additional responsive documents exist.

- March 3, 2018: For *every* document request covered by the February 2 Order, Plaintiffs stated, under oath, that they conducted good faith searches and that there was *nothing else to produce*.

- Late March/early April 2018: Plaintiff Loya de-activated her Facebook account, on which she had posted many times about this lawsuit and other relevant issues. Ms. Loya made no attempt to preserve her posts in electronic or physical form before deactivating the account, even though she has never produced a single post in discovery.

- May 2018: Ms. Loya and Oscar de la Torre (designated by Plaintiff PNA as its representative) testified in deposition about numerous additional documents responsive to the February 2 Order—e.g., PNA board minutes, Ms. Loya's emails about the issues in the case, and

[21] The City moved for sanctions, including evidentiary sanctions, on May 29, 2018. The referee denied that motion on July 21. On the same day that this trial brief is being filed, July 30, 2018, the City is concurrently filing a formal objection to the referee's ruling within the ten-day objection period. The issue of the propriety of sanctions has therefore been properly preserved for this Court's review.

presentations given to Santa Monica residents about the lawsuit—that do, in fact, exist and remain in Plaintiffs' possession, and yet Plaintiffs have never produced them.

- June 2018: Three months after verifying under oath that they had searched for additional documents and found none, Plaintiffs produced 53 pages of additional documents (only a single page of which had been produced previously). Yet Plaintiffs continued to withhold the vast majority of documents responsive to the February 2 Order.

Plaintiffs' discovery misconduct should have consequences at trial—namely, evidentiary sanctions prohibiting them from (1) introducing any document that was responsive to the City's discovery requests but never produced and (2) testifying about the subjects addressed in any responsive-but-withheld documents. (See, e.g., *Juarez v. Boy Scouts of Am., Inc.* (2000) 81 Cal.App.4th 377, 390 ["Absent some unusual extenuating circumstances not present here, the appropriate sanction when a party repeatedly and willfully fails to provide certain evidence to the opposing party as required by the discovery rules is preclusion of that evidence from the trial—even if such a sanction proves determinative in terminating plaintiff's case."].) For example, plaintiff Loya's voter registration would have been responsive to multiple requests for production, but she failed to produce it. (E.g., RFP Nos. 1, 3–5.) Now plaintiffs appear to have added proof of her voter registration to the exhibit list. (Ex. 120.) The Court should exclude that document and any other documents that the City repeatedly requested in discovery to no avail.

D. The City's expert historian, Dr. Allan Lichtman, will testify as to the effects of the City's at-large system on minority voting power.

The Court will hear from an expert historian on each side. Plaintiffs' expert, Dr. Kousser, is pulling double duty, as he will testify concerning both his statistical analysis of voting patterns *and* his historical analysis of the City's third Charter and the reasons for its adoption and maintenance. The City, by contrast, has designated one expert on each of these subjects. Dr. Jeffrey Lewis, who is not an historian, but instead a political scientist and statistician, will testify as to his statistical analysis of voting patterns in Santa Monica. And Dr. Allan Lichtman, who is a historian, will respond to Dr. Kousser's historical analysis of the third Charter and the reasons for its adoption and maintenance.

Plaintiffs objected both to Dr. Lichtman's designation and to the scope of his testimony. The discovery referee overruled both of those objections. Because plaintiffs failed to have this Court set

aside the discovery referee's decision, that decision is final and should be enforced. But even if plaintiffs renew their second objection, as to the scope of Dr. Lichtman's testimony, at trial, the court should join the referee in overruling any such objection.

Plaintiffs' objection, although vague, appears to be this—that Dr. Lichtman should be allowed to testify only as to the City's intent in adopting or maintaining its current electoral system, and that he therefore should not be allowed to testify about the *effect* or *impact* of the system on minority voting rights, including any present-day impact.

This argument turns the law on its head, as it incorrectly severs disparate impact from discriminatory intent. In order to assess the merits of Dr. Kousser's legal conclusion that the City adopted its third Charter for discriminatory reasons, Dr. Lichtman must assess whether the Charter has had the effect that plaintiffs and Dr. Kousser claim that it has had—dilution of minority voting power.

Although disparate impact alone is not enough to prove a constitutional violation (*Washington*, *supra*, 426 U.S. at p. 239), it can be probative of intent. (See, e.g., *Arlington Heights*, *supra*, 429 U.S. at p. 266 ["The impact of the official action . . . may provide an important starting point," but "impact alone is not determinative"]; *Bossier*, *supra*, 520 U.S. at pp. 481–482 ["the impact of an official action is often probative of why the action was taken in the first place"]; *SECSYS, LLC v. Vigil* (10th Cir. 2012) 666 F.3d 678, 685–686 ["a starkly disparate impact—while not itself automatically or presumptively unlawful—may well inform a court's investigation into the law's underlying intent or purpose"]; *Hall v. Holder* (11th Cir. 1997) 117 F.3d 1222, 1225–1226 ["degree of minority electoral success," among other effect-centric factors, is probative of intent].)

Proof of a disparate impact under the Equal Protection Clause is identical to proof of vote dilution under Section 2 or the California Voting Rights Act. (See, e.g., *Lowery*, *supra*, 850 F.Supp.2d at p. 1331 ["the requirements to establish that vote dilution has occurred (separate from any discriminatory intent) are the same under both provisions [namely, the Equal Protection Clause and Section 2"]; *Rodriguez v. Harris Cty., Tex.* (S.D.Tex. 2013) 964 F.Supp.2d 686, 801 [noting that plaintiffs must "prove that the purpose and operative effect of the challenge scheme is to dilute the voting strength of minority citizens," and that "[t]o prove discriminatory effect, a plaintiff must show that the redistricting scheme impermissibly dilutes the voting rights of the racial minority"]; *Lopez*, *supra*, 2009 WL

1456487 at *18–19 ["precedent requires the same type of comparative effects analysis" for Equal Protection and Section 2 claims"].) Specifically, plaintiffs cannot prove that the Charter was enacted for racially discriminatory reasons without evidence that some hypothetical alternative system would have produced and would continue to produce greater minority electoral success. (See, e.g., *Bossier*, *supra*, 528 U.S. at p. 334 ["It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice."]; *Thornburg v. Gingles* (1986) 478 U.S. 30, 50, fn. 17 ["Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice."]; *Johnson*, *supra*, 204 F.3d at pp. 1345–1346 ["Plaintiffs did not establish that an alternative system of districting could exist whereby the black-minority vote could elect its preferred candidates."]; *Irby v. Fitz-Hugh* (E.D. Va. 1988) 693 F.Supp. 424, 433–434 [dismissing claim because plaintiffs "have not demonstrated that the law results in a present discriminatory impact" and contrasting complaint with other cases in which "laws continued to have a present day disparate impact upon blacks"].)

Dr. Kousser agrees that the impact of the City's electoral system, including through the present day, is integral to his intent analysis supporting plaintiffs' Equal Protection claim. (See, e.g., Ex. 1206, ¶ 74 [one factor in intent analysis is "the impact of the adopted rule"]; Kousser Depo. Tr. 425:13–426:8 [impact is "part of a measure of intent"].) Indeed, the crux of his disparate-impact conclusion is his claim that "[s]ince 1946, there have been 16 Latino candidates and 22 separate candidacies by Latinos for the City Council," and [o]nly one Latino candidate, Tony Vazquez, has ever won." (Ex. 1206, ¶ 134.) Analysis of recent elections is thus fundamental to Dr. Kousser's Equal Protection analysis. (See, e.g., *id.*, ¶ 124 [attributing 1994 defeat of Tony Vazquez to at-large electoral system]; Depo. Tr. 510:9–511:6 [arguing that defeat of Oscar de la Torre in 2016 is evidence of a "continuing discriminatory impact," and that "[t]he current impact is a result of the impacts over a long period of time"].) If there could be any doubt that recent election results undergird Dr. Kousser's Equal Protection findings, Dr. Kousser dispelled them when he agreed that, to complete an Equal Protection analysis, "one would need to analyze the impact of the law on elections going all the way through to the present date." (Kousser Depo. Tr. 523:14–18.)[22]

[22] Further, Dr. Kousser has incorrectly insisted that mere awareness of the consequences of a decision

In light of the foregoing law and Dr. Kousser's own statements on the necessity of proving disparate impact through an analysis covering the entire period from 1946 to 2016, there is no basis for plaintiffs to contend that Dr. Lichtman cannot address this same history. For the City to put on its defense and for Dr. Lichtman to be able to assess Dr. Kousser's argument in full, Dr. Lichtman must be able to address the historical and present-day impact of the City's Charter on minority voting power.

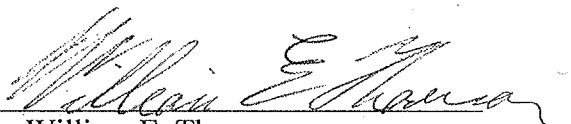
VI. CONCLUSION

For the foregoing reasons, the City respectfully submits that plaintiffs' claims in this suit are meritless and will not succeed at trial.

DATED: July 30, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
William E. Thomson

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City of Santa Monica

can be sufficient proof of discriminatory intent. This argument flies in the face of long-established law. (See *Feeney*, 442 U.S. at p. 279 ["'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences."].) But in order to defend against it as a factual matter as well as a legal matter, the City must be able to present rebuttal evidence demonstrating that the consequences of which the relevant decisionmakers were purportedly aware never came to pass.

PROOF OF SERVICE

I, Cynthia Britt, declare:

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

On July 30, 2018, I served

DEFENDANT CITY OF SANTA MONICA'S TRIAL BRIEF

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☑ **BY MESSENGER SERVICE**: I placed a true copy in a sealed envelope addressed to the persons named at the addresses shown above and gave the same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

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

Executed on July 30, 2018, in Los Angeles, California.

Cynthia Britt