CITY OF SANTA MONICA
LANE DILG, SBN 277220
City Attorney — Lane.Dilg@smgov.net
GEORGE S. CARDONA, SBN 135439
Special Counsel — George.Cardona@smgov.net
SUSAN COLA, SBN 178360
Deputy City Attorney — Susan.Cola@smgov.net
1685 Main Street, Room 310
Santa Monica, CA 90401
Telephone: 310.458.8336

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS JR., SBN 132099
tboutrous@gibsondunn.com
MARCELLUS MCRAE, SBN 140308
mmcrae@gibsondunn.com
WILLIAM E. THOMSON, SBN 187912
wthomson@gibsondunn.com
KAHN SCOLNICK, SBN 228686
kscolnick@gibsondunn.com
TIAUNIA N. HENRY, SBN 254323
thenry@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

Attorneys for Defendant,
CITY OF SANTA MONICA

Gov. Code, § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION; and MARIA LOYA,

Plaintiffs,

v.

CITY OF SANTA MONICA,

Defendant.

CASE NO. BC616804

DEFENDANT CITY OF SANTA MONICA'S CLOSING BRIEF FOLLOWING BENCH TRIAL

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

Assigned to Judge Yvette Palazuelos
Dep't 28

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statutes

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provisions

I. Introduction

Latinos are just over 13% of Santa Monica's eligible voters (and well under 10% of its *actual* voters), yet have consistently elected candidates of their choice to the City Council under the current at-large system. Notwithstanding this record of electoral success, plaintiffs ask the Court to ignore case law and common sense to conclude that, for Latino voters, present-day Santa Monica is the equivalent of what African-American voters faced in "the late '60s in the Deep South." (Pl. Br. at 10.)

To find a CVRA violation, this Court would need to adopt, as a matter of law, the following unsupported and illogical premises relied on by plaintiffs: (a) Latino voters can prefer only one candidate, even though they may cast up to three or four votes in a City Council election; (b) Latino voters cannot prefer non-Latino candidates; and (c) the City is liable if Latino and white levels of support for a candidate differ, *even if the Latino-preferred candidate wins*. None of this is correct, and plaintiffs neither acknowledge nor attempt to distinguish the mountain of contrary case law. Latino voters can and typically do prefer more than one candidate in City Council elections; their preferred candidates are not always Latino; and differences in voting patterns are legally irrelevant unless they *cause* Latino-preferred candidates to lose. In reality, Latino-preferred candidates rarely lose in Santa Monica—and even more rarely do they lose *because of* differences in white and Latino support. There has been no legally significant racially polarized voting, no vote dilution, and no violation of the CVRA.

Plaintiffs have all but abandoned their Equal Protection claim. Dr. Kousser's narrative of decades-long discrimination unraveled at trial, as it became clear that he had failed to account for, among many other things, how the transformation of the City's electoral system in 1946 *benefited* minorities and garnered the vocal support of the City's most prominent minority leaders. Tellingly, plaintiffs now say almost nothing about 1946, and they say nothing at all about 1975. Plaintiffs' theory of "intentional discrimination" now effectively reduces to speculation that a single councilmember in 1992 opposed a switch to districts not because he harbored racial animus, and not even because he wanted to preserve his seat (he was not running for reelection), but because he wanted to maintain a renters' rights group's ability to "dump" affordable housing in the Pico Neighborhood. (Pl. Br. at 18–19.) This speculation is contrary to the evidence—the councilmember said no such thing, and the renters' rights group was co-chaired at the time by the leader of the commission that recommended a change in election systems.

In any event, even if true, this would be far from enough to sustain an Equal Protection claim.

II. Plaintiffs have failed to prove a violation of the CVRA.

To prevail on their CVRA claim, plaintiffs must prove *legally significant* racially polarized voting (RPV)—i.e., that Latino voters cohesively prefer certain candidates, and that those candidates are usually defeated as a result of white bloc voting. They must also prove vote dilution—i.e., that the City's electoral system has reduced the ability of Latino voters to elect candidates of their choice as compared to some hypothetical alternative electoral system. Plaintiffs have proven neither.

A. There is no legally significant RPV in Santa Monica elections.

To prove legally significant RPV, plaintiffs must satisfy *Gingles*'s second precondition (that Latinos vote as a bloc) and third precondition (that whites also vote as a bloc and thereby "usually" cause the defeat of Latino-preferred candidates). (478 U.S. 30, 49–51; see also § 14026(e).)

1. Plaintiffs' RPV analysis erroneously fails to determine whether majority bloc voting *causes* the *usual* defeat of minority-preferred candidates.

The third *Gingles* precondition requires plaintiffs "to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate. . . . In establishing this [precondition], the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." (478 U.S. at 51.) This precondition is satisfied where the differences in voting patterns between the majority and minority groups *result in* the defeat of minority-preferred candidates. (See, e.g., *Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, 980; *Salas v. Sw. Tex. Jr. Coll. Dist.* (5th Cir. 1992) 964 F.2d 1542, 1554–1555.) Plaintiffs must show that white bloc voting "usually" causes the defeat of Latino-preferred candidates, which "mean[s] something more than just 51%" of the time. (*Lewis v. Alamance Cty., N.C.* (4th Cir. 1996) 99 F.3d 600, 606 & fn. 4; see also *Williams v. State Bd. of Elec.* (N.D.Ill. 1989) 718 F.Supp. 1324, 1328 & fn. 5 ["usually" means, at the very least, "more often than not"].)

Plaintiffs and Dr. Kousser rely on the false premise that it is unnecessary to show any causal connection between RPV and minority-preferred candidates losing. (Br. at 6–10.) Courts have properly rejected Dr. Kousser's incorrect conception of RPV, which "focuses exclusively on the relative percentage of Latino and white voters who chose the Latino candidate," but fails to "address whether the percentage of white . . . voters who voted against that candidate was sufficient to defeat

him or her." (*Cano v. Davis* (C.D.Cal. 2002) 211 F.Supp.2d 1208, 1238 & fn. 34 (three-judge panel).)

2. Plaintiffs' method of identifying Latino-preferred candidates is wrong.

"The proper identification of minority voters' 'representatives of . . . choice' is critical." (*Collins v. City of Norfolk* (4th Cir. 1989) 883 F.2d 1232, 1237.) Plaintiffs contend that this step is as simple as identifying minority candidates, citing *Gingles*. (Br. at 6.) But *Gingles* says no such thing. The Court used the phrase "black candidate" to refer to the *black-preferred* candidate only "as a matter of convenience"; Justice Brennan explained that the race of the candidate is *irrelevant* because "it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important." (478 U.S. at 67–68.) Ever since, courts have uniformly rejected the proposition that a minority group cannot prefer a candidate of a different race or ethnicity. (Part II.A.2.b.) *Gingles* left many questions unresolved, including *how* to identify minority-preferred candidates in multiseat elections. Circuit courts have filled in these gaps, but plaintiffs do not even *acknowledge* those decisions, instead incorrectly asserting (1) Latino voters can prefer only one candidate despite having three or four votes; and (2) that candidate must also have a Latino surname or be recognized as Latino. Neither assertion is the law, and plaintiffs' case collapses without them.

a. Latino voters can and often do prefer multiple Council candidates.

"In the multi-seat contests at issue here, the identification of minority-preferred candidates is complex. Because a voter can cast more than one vote, minority voters may (but will not necessarily) have a second (or third [or fourth]) candidate of choice." (*Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.* (E.D.Mo. 2016) 201 F.Supp.3d 1006, 1041.) Further complicating matters is that some voters may choose to "single-shot" or "bullet" vote—that is, vote for a single strongly preferred candidate instead of diluting their support for that candidate by casting equally valuable votes for other candidates as well. "A critical question, then," in light of these complexities, "is how to identify whether minority voters in fact have a second or third candidate of choice in a given election." (*Ibid.*)

"[L]ooking only at the top-ranked candidate does not capture the full voting preference picture in the context of a multi-seat election because it disregards the fact that multiple seats are available in each election, and with that the possibility that minority voters prefer more than one candidate." (*Id.*

at 1047.) To accommodate this possibility, many courts, including the Ninth Circuit, define as "minority-preferred" any "candidate who receives sufficient votes to be elected if the election were held only among the minority group in question." (*Ruiz v. City of Santa Maria* (9th Cir. 1988) 160 F.3d 543, 552; accord *Lewis*, 99 F.3d at 614; *Clay v. Bd. of Educ.* (8th Cir. 1996) 90 F.3d 1357, 1361–1362.)

Identifying all the candidates who received sufficient votes from the relevant minority group is not the end of the analysis, however, because sometimes that group might prefer one or more of those candidates more strongly than others. For that reason, courts have held that it is error to "treat[] as 'minority-preferred' successful candidates who had significantly less [minority] support than their unsuccessful opponents." (*N.A.A.C.P., Inc. v. City of Niagara Falls* (2d Cir. 1995) 65 F.3d 1002, 1017.) Conversely, "if the unsuccessful candidate who was the first choice among minority voters did not receive a 'significantly higher percentage' of the minority community's support than did other candidates . . . , then the latter should also be viewed . . . as minority-preferred candidates." (*Levy v. Lexington Cty.* (4th Cir. 2009) 589 F.3d 708, 716; see also *Niagara*, 65 F.3d at 1018.)[1]

Finally, to ensure that candidates with only tepid minority support do not count in the *Gingles* analysis, some courts hold that candidates cannot be deemed minority-preferred unless they win at least 50% of the minority group's votes. (E.g., *Niagara*, 65 F.3d at 1019; see also *Lewis*, 99 F.3d at 614 [candidates receiving less than 50% of minority vote deemed preferred only given further evidence].)

Identifying preferred candidates is thus a 3-step analysis: (1) start with candidates who would have won if only Latinos had voted; (2) if Latinos' top choice was unsuccessful, determine whether Latino support for that candidate was "significantly" higher than for other Latino-preferred candidates; (3) disregard candidates who did not earn at least half of Latino votes (absent further evidence).

b. Latino-preferred candidates need not be Latino or Latino-surnamed.

Neither the CVRA nor the federal law it incorporates provides that minority voters must prefer only candidates of their own race. (*Sanchez v. Bond* (10th Cir. 1989) 875 F.2d 1488, 1495 ["Such a rule would be clearly contrary to the plurality opinion" in *Gingles*, and inconsistent with "the language of § 2"].) RPV is defined in terms of *voter* preference, not candidate ethnicity. (§ 14026(e); see also § 14028(b) [focusing on "support . . . from members of a protected class"].) And courts, including the

[1] "The level of support that may properly be deemed 'substantial' will vary … depending on the number of candidates on the ballot and the number of seats to be filled." (*Lewis*, 99 F.3d at 614, fn. 11.)

Ninth Circuit, have consistently held that minority-preferred candidates need not themselves be members of the minority group. (See *Ruiz*, 160 F.3d at 551 [joining eight other circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority"].) Plaintiffs' view—that minorities can prefer only minorities—"would itself constitute invidious discrimination" and would "place the imprimatur of law behind a segregated political system." (*Lewis*, 99 F.3d at 607.)

Dr. Kousser admitted that in a prior CVRA case he counted a white candidate as "Latino-preferred," even though a Latino candidate was also running; Levitt agreed with that approach. (VF1. N.B. All "VF" citations refer to numbered paragraphs in the City's Proposed Verdict Form.) Dr. Kousser abandoned that methodology here only because it eviscerates plaintiffs' case.

Focusing on only Latino-surnamed candidates leads to absurd results. In 1996, for example, Dr. Kousser estimates that roughly *all* Latino voters voted for three white candidates, and yet he focuses only on Alvarez, who was Latino voters' *seventh* choice. (VF2.) In 2008, Piera-Avila likewise appeared on fewer Latino ballots than multiple white candidates. (VF3.) Dr. Kousser attempted to brush that fact aside by suggesting that Piera-Avila was nevertheless preferred by Latino voters because she was one of their top four choices or, alternatively, that she received few Latino votes because of "strategic voting"—Latinos selecting different candidates perceived to have a better chance at winning. (VF4.) The former explanation contradicts plaintiffs' insistence that there can be only one Latino-preferred candidate in an election. And the latter is nonsensical; not only does it depend on Latino voters having a strong pre-election sense as to whether a candidate might win, it is contradicted by Latino support for Latino-surnamed candidates both before and after 2008. (VF5.)

c. The court should examine *all* Council elections.

Courts deciding statutory vote-dilution claims examine *all* elections, including those in which only white candidates ran.[2] Courts have every "right to consider these elections and to give them such weight as the circumstances warrant." (*Sanchez*, 875 F.2d at 1495.) Plaintiffs are wrong to disregard such elections entirely. Nor are they faithful to their claim that only "cross-racial" elections matter—

[2] Plaintiffs will point to § 14028(b), which addresses, in part, "elections in which at least one candidate is a member of a protected class." But that same subdivision goes on to state that "elections involving ballot measures," or, more generally, "other electoral choices that affect the rights and privileges of members of a protected class," are relevant to the RPV inquiry. The same subdivision also states that the success rate of candidates who are members of a protected class and preferred by that class is but "[o]ne circumstance that may be considered by the Court."

they ignore the 2014 election, in which a Latino-surnamed candidate, Zoe Muntaner, ran (and finished last out of 14 candidates); Muntaner was not even close to preferred by Latinos, but more than half of Latino voters voted for a white candidate, McKeown. (VF6.)

3. White bloc voting does not usually defeat Latino-preferred Council candidates.

Plaintiffs cannot show that white bloc voting usually causes the defeat of Latino-preferred candidates because such candidates generally *win*. Those candidates must be identified in three steps:

Step 1: Which candidates would have won had Latinos been the only voters? Under this rudimentary analysis, it is undisputed that "Latino-preferred" candidates won 73% of the time from 2002 to 2016, and 62% of the time in plaintiffs' seven cherry-picked elections. (VF7.) Two of those Latino-preferred candidates, Tony Vazquez and Gleam Davis, also happen to be Latino.[3]

Step 2: If the candidate who won the most Latino votes was unsuccessful, was Latino support for that candidate "significantly" higher than for other Latino-preferred candidates? This analysis eliminates seven candidacies in plaintiffs' seven favored elections:

- **1994**: none eliminated (three candidates, including Vazquez, have point estimates over 100%)[4]
- **1996**: Bloom (52%) eliminated, as three candidates have point estimates near or above 100%
- **2002**: O'Connor eliminated (Aranda arguably wins significantly more votes, and loses)[5]

---

[3] Gleam Davis is Latina. (VF8.) The CVRA defines "protected class" by reference to the FVRA. (§ 14026(d).) The FVRA, in turn, defines as one protected class "persons who are . . . of Spanish heritage." (52 U.S.C. §§ 10303(f)(2), 10310(c)(3).) Because the statute speaks only in terms of the fact of Spanish heritage, not others' perception, Ms. Davis is Latina, and Mr. Brown's poll is irrelevant.

[4] All point estimates are taken from Dr. Kousser's weighted-ER analysis, which plaintiffs assert is the most accurate estimation methodology. (VF9.) Dr. Lewis's estimates are consistent with Dr. Kousser's. (VF10.)

[5] Plaintiffs will argue that Aranda was meaningfully more preferred than McKeown. She is not. Their Latino-support point estimates are nearly identical (82.6% and 76.8%)—far from "significantly" different, either under the relevant cases or as a statistical matter, particularly given the large confidence intervals around these point estimates. (VF11.) Plaintiffs will argue that the largely overlapping confidence intervals should be disregarded, citing *Fabela v. City of Farmers Branch* (N.D.Tex. Aug. 2, 2012) 2012 WL 3135545 and *Benavidez v. Irving Ind. Sch. Dist.* (N.D.Tex. Aug. 15, 2014) 2014 WL 4055366. But those cases do not hold that a point estimate is to be considered without reference to the confidence interval, or that one point estimate barely larger than another indicates a statistically or legally meaningful difference. The insignificance of the small difference between these point estimates is particularly apparent given the imprecision of ER and EI on Santa Monica's demographic facts, as Dr. Lewis explained. Plaintiffs make the straw-man argument that Dr. Lewis outright rejected ER and EI as unreliable. (Br. at 10–12.) Not so, as he repeatedly explained at trial. (VF12.) But his analysis does show that there is no reason to assume that small differences in estimates—like the gap in point estimates between Aranda and McKeown—are meaningful. First, the small population and dispersion of Latinos in Santa Monica make the confidence intervals unusually wide, and the point estimates correspondingly less accurate. Second, the intervals are also systematically inaccurate. Dr. Lewis showed that ER in particular depends on an assumption that, if wrong, biases its results, and he proved that *both* ER *and* the neighborhood model, which depends on a different assumption, produce biased

- **2004**: Bloom (55%), Hoffman (40%), and Genser (39%) eliminated because Loya wins a significantly higher share of Latino votes (106%) and loses
- **2008**: none eliminated (top four candidates have point estimates between 21% and 55%)
- **2012**: none eliminated (Latinos' top four candidates all win)
- **2016**: O'Day and Davis eliminated (de la Torre and Vazquez win a significantly higher share of votes, and de la Torre loses) (VF14)

Step 3: Disregard candidates who earned too few Latino votes. This removes Piera-Avila, Bloom, and Rubin in 2008 (who all fell short of the 50% threshold).[6] (VF15.)

Thus, in the seven elections involving Latino-surnamed candidates on which Plaintiffs have relied, the Latino-preferred candidates are: Vazquez, O'Connor, and Finkel in 1994; Feinstein, Olsen, and Genser in 1996; Aranda and McKeown in 2002; Loya in 2004; Genser in 2008; Vazquez, O'Day, Winterer, and Davis in 2012; and de la Torre and Vazquez in 2016. (VF14.)

Next, the Court must ask whether any of these candidates were defeated by white bloc voting. Plaintiffs' summary tables make that analysis impossible because they compare only two numbers—the levels of Latino and white support for a Latino-surnamed candidate. (Br. at 7; VF17.) This purely horizontal analysis misses the *vertical* dimension of each full election table.

Consider 1994, for example. Dr. Kousser's summary table shows only that Latino and white voters supported Tony Vazquez at statistically significantly different levels.[7] (VF18.) This omits that whites did not vote cohesively as a bloc; they split their votes almost evenly across their top five candidates. Vazquez was (by point estimates) whites' third choice—meaning that if whites had been the only voters, Vazquez would have *won*. (VF20.) He lost not because of white bloc voting, but because he attracted scarcely any votes from Asian and African-American voters (point estimates of - 209.4 and 19.2, respectively). (VF21.) Vazquez's defeat is thus not evidence of legally significant RPV. (*Nipper v. Smith* (11th Cir. 1994) 39 F.3d 1494, 1533 ["to be actionable, the electoral defeat at issue must come at the hands of a cohesive white majority"].) Analyzed properly—i.e., both horizontally *and* vertically—Dr. Kousser's tables show that just 3 of 16 Latino-preferred candidates were arguably defeated by white bloc voting in the past 22 years: Aranda (2002), Loya (2004), and de la Torre (2016).

---

confidence intervals when applied to Santa Monica's demographics. (VF13.) Thus, on the facts here, ER and EI are blunt instruments—not precise enough to make small differences legally meaningful.

[6] Bloom's 2008 point estimate is 49.7% under Dr. Kousser's weighted-ER model, but 56% under Dr. Lewis's weighted-ER model. (VF16.) To give plaintiffs the benefit of the doubt, he has been excluded.

[7] This is true only according to ER; according to EI, voting for Vazquez was not polarized. (VF19.)

(VF22.) That is far from "usual" defeat "at the hands of a cohesive white majority."[8]

Plaintiffs cannot show usual defeat on account of white bloc voting even if the Court narrows its focus not just to the elections selected by plaintiffs, but to the Latino-surnamed candidates who ran in those elections. Alvarez, Gomez, and Duron were not Latino-preferred, and voting for Alvarez and Duron was not racially polarized in any event. (VF26.) Vazquez won twice, and was not defeated by white bloc voting in 1994. (VF21.) Even if the Court does not discount Piera-Avila or de la Torre, plaintiffs have shown the defeat of a Latino-surnamed candidate through white bloc voting at most four of ten times. (VF22.) Dr. Kousser admitted that if, as the law requires, plaintiffs must prove *both* that voting was racially polarized and that the Latino-preferred candidates usually lost as a result, then plaintiffs fall short of that standard. (VF27.) This is dispositive. (E.g., *Askew v. City of Rome* (11th Cir. 1997) 127 F.3d 1355, 1381; *Perez v. Abbott* (W.D.Tex. 2017) 253 F.Supp.3d 864, 899.)[9]

4. Exogenous elections and ballot initiatives underscore the conclusion that there is no legally significant RPV in Santa Monica.

Plaintiffs do not deny that Latino-preferred candidates have won the vast majority of exogenous elections (School, College, and Rent Control Boards). (VF28.) Voting on ballot initiatives likewise shows that the City's white voters joined Latino voters in sufficient numbers to reject several racially charged propositions (Props. 187, 209, 227, and 54), even though three of them were approved

---

[8] Even if Piera-Avila (2008) were counted as preferred, it would be only 4 of 17, still not usual defeat. Further, the Court should disregard de la Torre's 2016 defeat. *Gingles* excludes from the RPV analysis certain outcomes that depend on "special circumstances." (478 U.S. at 51.) In 2016, after his wife and his organization (PNA) filed this lawsuit, de la Torre entered the City Council election. In his multiple successful School Board campaigns, de la Torre had sought endorsements from civic organizations; raised as much as $35,000; used a candidate-control committee; and advertised, including with mailers. (VF23.) Other candidates, both successful and unsuccessful, described taking similar steps in their campaigns. (VF24.) But in 2016, de la Torre sought no endorsements, raised less than $1,000, had no candidate-control committee, and did no advertising. (VF25.) This evidence shows that he ran and lost on purpose to bolster plaintiffs' weak case. Plaintiffs will argue that the City's special-circumstances argument is an improper attack on a minority candidate's qualifications, citing *Ruiz*, 160 F.3d at 558. This is wrong. First, the City is not attacking de la Torre, but arguing that he *is* a qualified candidate who very well may have won if only he had made a genuine attempt—by doing the things he had done in every other election in which he ran (and won). Second, the City's argument is quite similar to a special-circumstances theory *endorsed* by *Ruiz*—namely, one rooted in unusual endorsement and fund-raising activity. (*Ibid.*) Plaintiffs have not argued that the Court should discount any candidacies because of "special circumstances"; they have waived any argument to that effect.

[9] Recognizing as much, plaintiffs tried to pivot at trial to a theory that the analysis is *election*-centric rather than *candidate*-centric. But in multi-seat elections, it is the success rate of minority-preferred *candidates* that matters; where voters have three or four votes to cast, minority groups can and do prefer more than one candidate in each election. (See Part II.A.2.a.)

statewide. (VF29.) In 2002, an estimated 57% of white voters joined an estimated 82% of Latino voters in voting against Measure HH, which called for districts (and failed to pass). (VF30.)

Plaintiffs deflect from this record of success by again focusing solely on the differences between white and Latino support for Latino-preferred candidates and ballot measures. (Br. at 9–10.) This is a microcosm of the central flaw in plaintiffs' RPV analysis: They do not take into account *whether the Latino-preferred candidate (or result) prevails*. Latinos' preferences won out as to all 3 of the ballot measures that plaintiffs mention, and 13 of the 15 Latino-preferred candidacies mentioned by plaintiffs were successful (not including Duron's 2014 Rent Board election, which he effectively won unopposed). (VF31.) Whites consistently support Latino-preferred outcomes in sufficient numbers for those outcomes to occur; plaintiffs have therefore not satisfied the third *Gingles* precondition.

5. Plaintiffs' failure to prove legally significant RPV is fatal to their CVRA claim.

Plaintiffs' failure to prove legally significant RPV necessarily dooms their CVRA claim. (E.g., *Pope v. Cty. of Albany* (2d Cir. 2012) 687 F.3d 565, 582; *Clay*, 90 F.3d at 1361.)

B. The City's at-large electoral system has not diluted 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." (§ 14027, italics added.) Courts interpreting similar language in § 2 of the FVRA require proof of *harm* (vote dilution) and *causation* (a connection between the harm and the electoral system). (E.g., *Gingles*, 478 U.S. at 48, fn. 15; *Gonzalez v. Ariz.* (9th Cir. 2012) 677 F.3d 383, 405; *Aldasoro v. Kennerson* (S.D.Cal. 1995) 922 F.Supp. 339, 369, fn. 10.) California courts have stated, but not yet held, that the CVRA similarly demands proof of vote dilution caused by an election system. (*Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th 1223, 1229; *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 802; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 666.)[10]

1. Vote dilution can be proven only by showing that some alternative method of election would enhance Latino voting power.

[10] The Court need not reach the question of vote dilution if it agrees that plaintiffs have failed to prove legally significant RPV. If the Court does reach this question, it must decide (1) whether vote dilution is an element of the CVRA and (2) if not, whether the CVRA may constitutionally be applied to mandate a race-based change in election system absent evidence of vote dilution. (See Part II.D.)

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 electoral system, which serves as a "benchmark" for comparison. (See, e.g., *Reno v. Bossier Parish Sch. Bd.* (1997) 520 U.S. 471, 480; *Holder v. Hall* (1994) 512 U.S. 874, 880 (plurality)[11]; *Gingles*, 478 U.S. at 50, fn. 17.) "[I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." (*Gingles*, 478 U.S. at 88 (O'Connor, J., concurring).)

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.) But the key word is "opportunity"—"while a plan must provide a meaningful 'opportunity to exercise an electoral power that is commensurate with its population,' that is not the same as a guarantee of success"; to the contrary, "a necessary part of equal participation is the possibility of a loss." (*United States v. Euclid City Sch. Bd.* (N.D.Ohio 2009) 632 F.Supp.2d 740, 752.) "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." (*Johnson v. De Grandy* (1994) 512 U.S. 997, 1014, fn. 11.)

Where comparison to any reasonable benchmark reveals that a protected class's votes are *not* being diluted—i.e., where that class *already has* a voting opportunity that relates favorably to its population—there is no legal requirement to jettison an at-large system; "there neither has been a wrong nor can be a remedy." (*Emison v. Growe* (1993) 507 U.S. 25, 40–41.) Levitt agreed as much. (VF32.) Any requirement to abandon an at-large method of election despite a lack of vote dilution would violate

---

[11] The *Hall* Court further explained that, "[i]n certain cases, the benchmark for comparison in a § 2 dilution suit is obvious. . . . But where there is *no objective and workable standard* for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2." (512 U.S. at 880–881, italics added.) Here, the only "objective and workable standard for choosing a reasonable benchmark" is the one selected by the Supreme Court in *Bartlett v. Strickland* (2009) 556 U.S. 1, 16-25 (plurality): a constitutionally permissible single-member district in which minority voters account for a majority of the CVAP. The Court need not follow *Bartlett* to grant judgment in favor of the City, because plaintiffs' hypothetical alternative methods of election would not enhance Latino voting strength. (Part II.B.2.) Nevertheless, the City raises this argument here—that the only appropriate vote-dilution "benchmark" is a hypothetical district whose voting-age population is majority-Latino—to preserve it.

the federal constitution. (See, e.g., *Bartlett*, 556 U.S. at 21–22; U.S. Const., am. XIV.)

2. Plaintiffs have not identified any alternative method of election that would enhance Latino voting power.

The parties agree it is impossible to draw a majority-Latino district in the City. (VF33.) But it is at least possible that the CVRA, unlike federal law, permits plaintiffs to show vote dilution in some other way. Ely proposes a "Pico Neighborhood District" with a Latino CVAP of 30%.[12] (VF34.) He estimated that in three elections (1994, 2004, and 2016), a Latino candidate would have won the most votes in that district. (VF36.) There are several major problems with this analysis.

First, there is no precedent in case law or expert practice for Ely's methodology. The Latino CVAP of his proposed district is just over half the bare majority required for a federal claim to be cognizable. Because this figure is so low, Ely could not presume that Latino voters would be able to elect candidates of their choice; he had to invent a new test—estimating vote totals for each candidate in his district under three calculation methodologies. (VF37.) He admits that this test has no value in determining who would have actually won in his proposed district. (VF38.) Among other things, the candidates would be different in a districted election, because residency within the district would be a prerequisite of candidacy, and it would likely be necessary to earn a majority of votes to win, such that runoffs might become necessary. (VF39.) As a result, for example, Ely's conclusion about the 1994 election is meaningless because Vazquez did not live in the proposed district and therefore could not have won there. (VF40.)

Second, Latino CVAP in the proposed district is far below the 50% threshold of exclusion for a one-seat election; Latinos alone would be unable to elect candidates of their choice. (VF41.) Further, Latinos outside the district would be submerged in overwhelmingly white districts. (VF42.)

Third, Ely's opinion is outcome-driven and incomplete. He testified on direct examination about only *three* elections (1994, 2004, and 2016). His conclusion about the 2016 election is simply wrong; his own numbers show that the purportedly Latino-preferred candidate, de la Torre, would have *lost* under two of three scenarios to O'Day, who has lived in the Pico Neighborhood for 20 years.

[12] Levitt could not identify a single judicially created district with such low minority CVAP anywhere in the country. (VF35.) If the Court were to find a violation here, this case would be an extreme outlier. Plaintiffs point to *Georgia v. Ashcroft* to justify the creation of an "influence" district with minority CVAP as low as 25% (Br. at 24), but that was a *§ 5* case, *not* a *§ 2* case. The Supreme Court has held that "'the lack of [influence] districts cannot establish a § 2 violation.'" (*Bartlett*, 556 U.S. at 25.)

(VF43.) (And both lost to Vazquez, who does not live there; districts would have robbed voters of their top choice.) But Ely also analyzed four other elections. On cross-examination, Ely claimed that he omitted those from his opinion because they did not meet one of his criteria—that the Latino candidate must receive at least half the number of votes necessary to win citywide. (VF44.) In fact, in three of the omitted elections, a Latino candidate *did* receive at least that many votes. (VF45.) Ely did not include those Latino candidates in his analysis because they did not come in first in his Pico district. (VF46.) In 2012, for example, although Vazquez won citywide in an at-large election, he would not have received the most votes in Ely's district. (VF47.) In each of the four omitted elections, districts would have changed nothing—the top choices in the district prevailed citywide. (VF48.)

Fourth, because plaintiffs are unable to show that districts would enhance Latino voting power, the Court should not overlook the unrebutted evidence that districts would *dilute* the voting power of African-Americans and Asians. (VF49.) In 5 of the 7 at-large elections that Dr. Kousser studied, African-Americans' top choice was elected; the current system does not dilute their votes. (VF50.)

Levitt's analysis of alternative at-large systems likewise does not prove vote dilution. His analysis depends not on CVAP, but on Latinos' share of *actual* voters exceeding the "threshold of exclusion" of 12.5% under a destaggered at-large system. (VF51.) Any group's ability to meet such a threshold depends on its levels of cohesion and turnout. (VF52.) Latinos account for 13.6% of the City's CVAP, barely more than the threshold of exclusion if they *all* show up to vote *and* all vote cohesively. But historical Latino cohesion and turnout are nowhere close to 100%. (VF53.) Courts analyzing at-large alternatives presume minority turnout of 2/3. (E.g., *Euclid City Sch. Bd.*, 632 F.Supp.2d at 761–770.) Here, that same presumption would predict Latinos' share of actual voters to be 9%, well under the 12.5% exclusion threshold.[13]

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

In adjudicating statutory vote-dilution claims, courts do not consider evidence other than voting

[13] In *Euclid City School Board*, 2/3 of the minority CVAP (40%) was 27% of voters, which exceeded the 25% threshold of exclusion. (632 F.Supp.2d at 770.) Plaintiffs are wrong in emphasizing eligible voters (CVAP) rather than actual voters (turnout) in assessing the merits of *alternative at-large* systems. The two cases they cite, *City of Euclid* and *Village of Port Chester*, reject consideration of turnout when evaluating a group's ability to constitute a majority in a *district*. For that entirely distinct analysis, CVAP is the relevant guideline. (*Euclid*, 580 F.Supp.2d at 604; *Chester*, 704 F.Supp.2d at 425–427.)

results unless a plaintiff has proven legally significant RPV. (E.g., *Gingles*, 478 U.S. at 48 & fn. 15; *Johnson v. Hamrick* (11th Cir. 1999) 196 F.3d 1216, 1220; *McNeil v. Springfield Park Dist.* (7th Cir. 1988) 851 F.2d 937, 942.) Because plaintiffs have not done so, there is no cause for the Court to address secondary evidence of vote dilution. There also must be a causal connection between the "[o]ther factors" and vote dilution; generalized grievances about alleged social problems cannot demonstrate vote dilution. (See § 14028(e).) Plaintiffs are also wrong to use the Pico Neighborhood ("Pico") as a proxy for the City's Latino residents, the vast majority of whom do not live there. (VF54.) Further, Pico is little different from other neighborhoods across a wide range of metrics. (VF55.) Nevertheless, the City will respond briefly to plaintiffs' arguments. (Br. at 14–17.)

First, plaintiffs have not proven a history of official discrimination within Santa Monica. Their only City-specific evidence is that the beach was once segregated—but that was by tradition, not law. (VF56.) The Court should reject plaintiffs' effort to incorporate by reference evidence from *Garza*, a 28-year-old case that did not concern Santa Monica. Plaintiffs introduced no evidence of racial covenants in Santa Monica, which have not been legally enforceable for 70 years in any event. And the City was not responsible for a *DOJ* repatriation program or a *statewide* English-literacy requirement.

Second, there are sound, non-discriminatory reasons to stagger elections—e.g., reducing confusion and uninformed decision-making associated with voting for seven candidates at once, and giving voters the opportunity to make their voices heard every two years instead of every four.[14] (VF57.)

Third, plaintiffs' generic assertions about education and income disparities do not demonstrate that Latinos' participation in the political process is hindered. The barriers to entry in local politics are low, and the City provides resources to all candidates. (VF58.) Even if Latinos are on average less wealthy than whites, there is no evidence that Latino candidates can raise money only or principally from other Latinos. Latino candidates have raised large sums of money in Council and other elections, and many have won. (VF59.) And none of the disparities to which plaintiffs point would be any different if the City had used districts for Council elections. The achievement gap, for example, has nothing to do with the Council. The School Board—which has had between 1 and 3 Latino members, including de la Torre, for the last 25 years—has exclusive authority over City schools. (VF60.)

[14] The City also abandoned dilutive mechanisms like designated posts in 1946. (See Part III.B.3.)

Fourth, plaintiffs' limited and dated evidence of racial appeals (the 1994 election that Vazquez narrowly lost) is outweighed by the lack of evidence of any such appeals in any other elections, including Vazquez's 1990, 2012, and 2016 victories, and Nat Trives's 1971 and 1975 victories. (VF61.)

Fifth, plaintiffs' evidence of a supposed lack of responsiveness ignores historical context. The land where Gandara Park and the City Yards are located was first devoted to industrial use (clay-mining and brickmaking) well over a century ago, long before residences were built in the area. (VF62.) The placement of the Expo maintenance facility in the same historically industrial area was out of the Council's hands and replaced another private commercial yard at the same location. (VF63.)

Nor does Pico shoulder all the City's "burdens." There are other City yards in other neighborhoods, including a 7-acre bus lot downtown and yards on the PCH, in Mid-City, and in Sunset Park, as well as firehouses throughout the City. (VF64.) Plaintiffs' narrative about "poisonous" gas is irresponsible and false. The City has for decades hired experts to oversee a gas-abatement program and provide regular reports to the Council and regulatory authorities; the City has remained in compliance with all applicable regulations. (VF65.) Plaintiffs also have not shown that Latinos have *applied and been rejected* from positions on any commissions—an element of a prima facie case of racial discrimination in hiring. (*Tex. Dep't of Comm. Affairs v. Burdine* (1981) 450 U.S. 248, 253 & fn. 6.) And the theory that councilmembers select only applicants who share their race or ethnicity is unfounded; Vazquez has been on the Council the last six years. Finally, plaintiffs neglect to mention the tens of millions of dollars that the City has invested in Pico in recent years (e.g., on projects such as Virginia Avenue Park, Pico Library, Ishihara Park, MANGo, and Memorial Park, as well as City-sponsored vocational and educational programs). (VF66.) Plaintiffs also overlook the many City-funded programs that benefit lower-income Pico residents, including Latinos and non-Latinos, (e.g., affordable housing, strict rent-control laws, and direct assistance to low-income tenants). (VF67.)

D. The Court must find for the City to avoid unconstitutional application of the CVRA.

The U.S. Constitution forbids the imposition of any predominantly race-based remedy unless that 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, 191–192.) Courts have assumed without deciding that governments have a

compelling interest in remedying vote dilution. (*Cooper*, 137 S.Ct. at p. 1464.) Here, there is no evidence of vote dilution: As explained above, districts would not enhance the voting strength of Latinos within the "Pico" district, and would submerge other Latinos—and other minorities—in overwhelmingly white districts. (Part II.B.2; see also VF68; *Aldasoro*, 922 F.Supp. at 366; *Turner v. Ark.* (E.D.Ark. 1991) 784 F.Supp. 553, 571; *Overton v. City of Austin* (W.D.Tex. Mar. 12, 1985) 1985 WL 19986, at *15.)[15] Similarly, no alternative at-large voting system would enhance Latino voting strength. (Part II.B.2.) The Constitution precludes imposing a race-conscious "remedy" that would overturn the City's choice of electoral system while curing no ills and creating new ones.[16]

III. Plaintiffs have not proven their Equal Protection claim.

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. (*Rogers v. Lodge* (1982) 458 U.S. 613, 617; *Johnson v. DeSoto Cty. Bd. of Comm'rs* (11th Cir. 2000) 204 F.3d 1335, 1343–1346; *Cano*, 211 F.Supp.2d at 1245.) In other words, constitutional vote-dilution claims are proven in the same way as any other Equal Protection claims—through evidence of disparate impact, causation, and discriminatory intent. (*Rogers*, 458 U.S. at 617.)[17] Each is necessary but insufficient on its own. (*Washington v. Davis* (1976) 426 U.S. 229, 239 [disparate impact alone not enough];

---

[15] Supplying a remedy to enhance the "influence" of Latino voters, absent both an operational definition of that term and evidence that Latino voting strength would be enhanced, would not advance any compelling state interest. Federal courts have been unable to craft a workable standard for influence claims and have rejected them on constitutional and justiciability grounds. (See, e.g., *LULAC*, 548 U.S. at 446; *Dillard v. Baldwin Cty. Comm'rs* (11th Cir. 2004) 376 F.3d 1260, 1267.) The CVRA itself allows consideration of *Gingles*' first precondition, numerosity and geographic compactness, in determining an appropriate remedy (§ 14028(c)), and California courts have recognized the constitutional questions posed by a remedy other than a majority-minority district. (See *Sanchez*, 145 Cal.App.4th at 688-90.)

[16] Even were a remedy justified (for either the CVRA or Equal Protection claim), the Court could at most order the City to fashion one, not itself do so. Santa Monica is a charter city whose ordinances "supersede state law with respect to 'municipal affairs.'" (*State Bldg. & Constr. Trades Council v. City of Vista* (2012) 54 Cal.4th 547, 555, quoting Cal. Const., art. XI, § 5.) In *Jauregui*, 226 Cal.App.4th at 794–808, the Court of Appeal relied on a finding of vote dilution to hold that charter cities are subject to the CVRA and that the trial court had authority to enjoin election results under § 14029. To the extent *Jauregui* also held that courts may fashion remedies for charter cities after finding that their at-large electoral systems result in vote dilution, the case was wrongly decided. There may be a statewide interest in remedying vote dilution, but there is no such interest in remedying it by court order. Charter cities should be able to fashion their own remedies, subject to judicial review. (See, e.g., *Westwego Citizens for Better Gov't v. City of Westwego* (5th Cir. 1991) 946 F.2d 1109, 1124.)

[17] The relevant California decisional law tracks federal law. (See *Jauregui*, 226 Cal.App.4th at 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

Personnel Adm'r v. Feeney (1979) 442 U.S. at 273–274, 279 [intent must also be shown]; *Palmer v. Thompson* (1971) 403 U.S. 217, 224 [intent alone not enough]; *Cano*, 211 F.Supp.2d at 1248 [same]; *Johnson*, 204 F.3d at 1345–1346 [impact *and* intent not enough without proof of causation].)

A. Plaintiffs have not proven a disparate impact caused by the City's election system.

Disparate impact in an Equal Protection analysis is proven with evidence that a protected class would have greater opportunity under some other method of election. (E.g., *Johnson*, 204 F.3d at 1344.) Because the standard for proving vote dilution under VRA § 2 "was intended to be more permissive than the constitutional standard" (*ibid.*), and because the CVRA is, in turn, a more permissive version of § 2, failure to prove vote dilution in support of a CVRA claim must, *a fortiori*, mean failure to prove disparate impact in support of a constitutional claim. (See, e.g., *Lopez v. City of Houston* (S.D.Tex. May 22, 2009) 2009 WL 1456487 at *18.)

Plaintiffs have not shown that an alternative method of election would have enhanced minority voting power at any time since 1946. There is no "benchmark" against which the City's current electoral system can be measured and found wanting—either now or historically. As has been true since 1946, minority voters are too few in number and too dispersed throughout the City for any other system to enhance their voting strength. (VF69; see also Part II.B.2.) In 1946, the City moved from a three-commissioner at-large system to a seven-councilmember at-large system. (VF70.) 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 win even with limited support from whites. (*Ibid.*) Contemporary observers correctly argued that this new method of election would benefit minority voters. (VF71.)

B. The City did not adopt or maintain its electoral system to discriminate against minorities.

Discrimination did not inform the Freeholders' submission of the City's current Charter to the electorate in 1946 or the City Council's vote against switching to districted elections in 1992.

1. Purposeful discrimination is an element of plaintiffs' Equal Protection claim.

Whereas a statutory vote-dilution claim depends only on the *results* of an at-large system, a constitutional vote-dilution claim also requires proof that those results were *intended.* (See, e.g., *City*

---

the Fourteenth Amendment, and of the state's Constitution, are substantially the same"]; *Sanchez v. State* (2009) 179 Cal.App.4th 467, 487 [citing federal law for elements of Equal Protection claim]; *Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361 [same].)

of Mobile v. Bolden (1980) 446 U.S. 55, 66–67, superseded by statute on other grounds; *Osburn v. Cox* (11th Cir. 2004) 369 F.3d 1283, 1288.) The intent analysis is "a complex task requiring 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" (*Bossier*, 520 U.S. at 488.) The leading case on "[d]etermining whether invidious discriminatory purpose was a motivating factor" behind a challenged decision is *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 266, which identified five non-exhaustive factors that might support an inference that a challenged enactment was motivated by discrimination: (1) "[t]he impact of the official action"—i.e., "whether it 'bears more heavily on one race than another'"; (2) "[t]he historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) "[d]epartures from the normal procedural sequence" or "[s]ubstantive departures"; and (5) "[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 266–268.)

2. Proof of intentional discrimination requires more than mere awareness of a potentially adverse impact on minorities.

Plaintiffs have not produced even a scrap of direct evidence of intentional discrimination.[18] They suggest that the Board of Freeholders in 1946 and the City Council in 1992 were *aware* that their decisions *could* result in a disparate impact on minorities, and that this awareness alone is enough to prove their Equal Protection claim. (See Br. at 1, 17.) This is wrong. Even if the evidence did show an awareness that at-large elections could dilute minority voting power—and it does not—that showing would be insufficient under longstanding law to demonstrate purposeful discrimination.

The Supreme Court rejected plaintiffs' theory decades ago, holding that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . 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." (*Feeney*, 442 U.S. at 279.) Federal and California courts have quoted and applied this holding ever since. (E.g., *SECSYS, LLC v. Vigil* (10th Cir. 2012) 666 F.3d 678, 685; *Soto v. Flores* (1st Cir. 1997) 103 F.3d 1056, 1067; *David K.*

[18] Plaintiffs contend that Zane's comments at the 1992 Council meeting qualify as direct evidence of such intent. (Br. at 19–20.) This is false, as will be demonstrated in Part III.B.3.

v. Lane (7th Cir. 1988) 839 F.2d 1265, 1272; *People v. Superior Court* (1992) 8 Cal.App.4th at 711.)[19] And courts have applied *Feeney*'s evidentiary requirement of purposeful discrimination—and rejected plaintiffs' theory that mere awareness of consequences is enough to prove it—in vote-dilution cases like this one. (E.g., *Bolden*, 446 U.S. at 71, fn. 17.)

In support of their contrary theory, plaintiffs cite only the opinion and partial concurrence in *Garza*, but neither stands for the proposition that mere awareness of consequences is enough to support a claim of purposeful discrimination. In *Garza*, the district court found that the L.A. County Board of Supervisors, intent on maximizing the probability of their own reelection, "chose fragmentation of the Hispanic voting population as the avenue by which to achieve this self-preservation." (918 F.2d at 771.) "The supervisors intended to create the very discriminatory result that occurred." (*Ibid.*) In his separate opinion, Judge Kozinski noted that "there is no indication that what the district court found to be intentional discrimination was based on any dislike, mistrust, hatred, or bigotry against Hispanics or any other minority group." (*Id.* at 778.) The district court had instead found evidence of a "desire to assure that no supervisorial district would include too much of the burgeoning Hispanic population." (*Ibid.*) Neither opinion in *Garza* is inconsistent with *Feeney*, and neither reduces plaintiffs' burden of proof. At the least, plaintiffs must demonstrate that weakening minority voting power was the deliberately chosen "avenue" for accomplishing some other purpose, such as preserving incumbency.

3. The City's electoral history belies plaintiffs' discrimination claim.

1906: The City's voters adopted its original Charter, which divided the City into seven districts, or "wards," each represented by a different councilmember. (VF72.)

1914: The voters abandoned the ward system, approving a second Charter that replaced seven councilmembers elected by ward with three commissioners elected at-large. (VF73.) The new positions—heads of Public Works, Finance, and Public Safety—were designated posts; candidates ran against only other candidates for a particular commissionership. (VF74.) Elections were staggered, with voters selecting one commissioner in one election cycle and two in another. (VF75.) The City

[19] Some plaintiffs have attempted "to circumvent this unfavorable precedent by arguing that 'this case is not about "awareness" or "consciousness" of racial information,'" but something else entirely, such as "embracing and relying on such information"; courts have consistently rejected such efforts. (*Spurlock v. Fox* (6th Cir. 2013) 716 F.3d 383, 399; see also *Price v. Austin Ind. Sch. Dist.* (5th Cir. 1991) 945 F.2d 1307, 1319–1320; *Clark v. Huntsville City Bd. of Educ.* (11th Cir. 1983) 717 F.2d 525, 529.)

also adopted ranked-choice voting, with voters indicating their first, second, and "other" choices for each position. (VF76.) Dr. Kousser admitted "there is no evidence one way or the other of whether race or ethnicity played a role in th[e] decision" to adopt the new election system in 1914. (VF77.)

1925: The City abandoned ranked-choice voting but kept the three designated posts. (VF78.)

1946: By 1945, the limitations of the commission form of government had become evident, and the voters overwhelmingly approved the creation of a Board of Freeholders to draft a third Charter. (VF79.) The Board proposed comprehensive reforms of the City's elections and system of governance. The Charter won a substantial majority of votes in almost every precinct in 1946. (VF80.)

Although the 1946 Charter featured prominently at trial, plaintiffs scarcely mention it in their brief. And no evidence in their verdict form shows purposeful discrimination under *Arlington Heights*.

The new Charter's many changes could only have had a **positive impact on minorities**. Three commissioners became seven councilmembers, making it easier for a cohesive minority group to elect candidates of its choice. (VF81.) Voters who previously had at most two votes to cast (in separate races) could now cast three or four votes for candidates in the same election. (VF82.) Designated posts, recognized as a classic mechanism for perpetrating invidious discrimination, were abandoned. (VF83.) The new system did not impose a majority-vote requirement or prohibit bullet voting, allowing minorities to maximize their voting strength. (VF84.) And any districted system "would have been highly detrimental to minorities," as it would have packed some of them into a district where they would not have the ability to elect candidates of their choice and submerged the rest in overwhelmingly white districts. (VF85.) Also, the 1946 Charter prohibited discrimination against City employees on the basis of race, punishing violations with a fine and/or imprisonment. (VF86.)

No history of official discrimination preceded the 1946 charter. Plaintiffs' only source on the Zoot Suit Riots exonerates Santa Monica. (VF87.) Anti-Japanese sentiments—while despicable—were the isolated and temporary product of wartime fervor (and not focused on elections). (VF88.) The beach was segregated by tradition, not law. (VF89.) Plaintiffs have no specific evidence of racial covenants in Santa Monica; which would be features of private contracts in any event. (VF90.)

Nothing in the **sequence of events** leading up to the 1946 Charter's adoption suggests a discriminatory motive. **First**, Dr. Kousser identified no evidence that any Freeholders harbored any racial

animus. (VF91.) **Second**, Dr. Kousser pointed to the growth of the non-white population as a motive for changing the City's method of election, but the minority population grew substantially only in percentage, not absolute, terms; the City's population remained overwhelmingly white.[20] (VF92.) **Third**, Dr. Kousser suggested that Santa Monica voters must have been racist because they rejected Prop. 11, and that such racism must have bled into their voting on the 1946 Charter. (Pl. Br. at 18.) But his sole source on interpreting propositions, Prof. HoSang's book, notes that Prop. 11 was not, as Dr. Kousser contended and plaintiffs somehow still insist, a "pure measure of attitude on racial discrimination," because *both sides* appealed to racial tolerance and charged the other with racial intolerance. (*Ibid.*; VF94.) Prop. 11 was also associated with communism. (VF95.) And Prof. HoSang explains that it is unreasonable to conclude that opposition to Prop. 11 was racially driven because many people who voted against Prop. 11 also voted against a straightforwardly racist measure, Prop. 15, which would have barred aliens from holding land. (VF96.) Tellingly, Dr. Kousser omitted Prop. 15 from his declaration, even though he had remarked on it in his notes. (VF97.)

There were **no procedural or substantive departures** suggesting a discriminatory purpose in 1946. Dr. Kousser pointed to the Freeholders' consideration of putting districts or a hybrid system to a vote (VF98), but there is nothing suspicious about the decision not to do so. No one, particularly minorities or those opposed to the Charter, was clamoring for districts; the ballot was already long and complicated, so there was real risk of confusion if voters had to choose among competing systems; and a hybrid system would have been "the worst of all worlds for minorities," who were too few in number to control a district and who would have been able to vote for only four councilmembers (three at-large and one in a district) instead of seven. (VF99.) The high degree of transparency was also inconsistent with an intent to conceal racial discrimination. (VF100.) The Freeholders and local civic organizations organized meetings to discuss the Charter, including with members of the NAACP. (VF101.)

Finally, Dr. Kousser cited **no legislative or administrative history**, but an analysis of contemporaneous statements belies his contention that minorities opposed the Charter and favored districts. Little of the substantial public debate over the Charter concerned districts. (VF102.) Further, there is *no* record evidence showing that *any* members of *any* minority group advocated for districts (VF103),

[20] The Latino population, though not counted by the Census in that era, was likely quite small. (VF93.)

which is unsurprising because the minority population in 1946 was too small for districts to have given any minority group the ability to elect candidates of its choice. (VF104.) In fact, there is no evidence that *any* racial or ethnic minorities opposed the Charter. (VF105.) To the contrary, notable minority leaders in Santa Monica openly *endorsed* the Charter, including the City's most prominent African-American leader (Reverend W.P. Carter) and other members of Santa Monica's Interracial Progress Committee. (VF106.) (Dr. Kousser mentioned none of this in his declaration.)

Plaintiffs purport to identify evidence reflecting awareness of a connection between districts and increased minority representation. (VF107.) Any such evidence would, of course, be inadequate under longstanding law holding that mere awareness of consequences is insufficient to prove discriminatory intent. (Part III.B.2.) But plaintiffs' evidence does not remotely prove their point in any event. **First**, the *Outlook* editorials plaintiffs cite, one of which Dr. Kousser said "is quite close to a smoking gun," are calls for civic unity, not racial exclusion.[21] (VF108.) **Second**, Dr. Kousser twisted two Freeholders' statements in favor of the Charter into tacit acknowledgments that districts would be better for minorities than an at-large system. (VF110.) Those statements have nothing to do with districts (neither of the relevant articles even addresses districts); the speakers argue that the Charter would more than double the representation of minority groups; and Dr. Kousser overlooked the fact that both of those Freeholders expressly argued *against* districts, one of them citing "every authority on City government consulted by the Freeholders." (VF111.) **Third**, the Anti-Charter Committee advertisements (VF112) do *not* call for districted elections. On the contrary, the ads make clear that Committee favored the status quo: a three-commissioner, designated-post system, which was far less favorable to minorities than the new system. (VF113.) The Committee defended the commission form of government by lauding the example of Topeka, Kansas—whose Board of Education would, a few years later, be the defendant in *Brown v. Board.* (VF114.) Although supporters of the Charter, many of them minorities, publicly declared their support, Anti-Charter Committee members mostly identified themselves only as "business men and other private citizens"; and the few who did reveal their names were not members of the Interracial Progress Committee. (VF115.)

[21] Dr. Kousser cited the same editorial in his 1992 report, prepared for the City, but there noted that his "tentative" conclusion was *not* predicated on any "smoking gun." (VF109.)

1975: The voters overwhelmingly rejected Prop. 3, which called for districts and a host of other changes. (VF116.) In his 1992 report, Dr. Kousser concluded that this vote was not motivated by discrimination. (VF117.) He gave many reasons, among them that the City's two African-American councilmembers, one of whom had recently been elected mayor, opposed Prop. 3, and that the *Outlook* endorsed two minority candidates, both of whom were elected. (VF118.) Although at trial he had no evidence to contradict any of his prior findings (VF119), Dr. Kousser stated in his declaration and at trial that he had "now changed [his] mind." (VF120.) But neither of his reasons for doing so made any sense. His research on the *Crawford* decision, which concerned desegregation in L.A. schools, could not have "reminded" him of the extent of racism in the 1970s. (VF121.) Both the California Court of Appeal and U.S. Supreme Court held that the plaintiffs in that case had *failed* to prove purposeful discrimination. (113 Cal.App.3d 633, 645–646; 458 U.S. 527, 545.) And Dr. Lichtman proved that Dr. Kousser's statistical analysis (purportedly showing a connection between votes for Latino candidates and for Prop. 3) was flawed for at least half a dozen reasons. (VF122.) Dr. Kousser got it right in his 1992 report, as plaintiffs now recognize—they say not a word about 1975.

1984: The City began holding elections at the same time as gubernatorial and presidential elections. (VF123.) This favored minorities, as "off-year" elections depress turnout. (VF124.)

1988: Santa Monica voters overwhelmingly rejected Prop. J, which would have reintroduced designated posts, which are far less favorable to minorities than open seats. (VF125.)

1992: The City Council formed the Charter Review Commission to evaluate the merits of adopting a new method of election. The Commission engaged experts, held public meetings, and delivered a report to the Council.[22] (VF126.) Fourteen of the 15 Commissioners favored switching to a new method of election, but they could not agree on a substitute system. (VF128.) Eight Commissioners favored a ranked-choice-voting scheme; only five preferred districts. (VF129.) The Commissioners noted that they had drafted the report with limited information and time, and that further investigation was necessary before any conclusions could be drawn about the "probable success rates" of

[22] Plaintiffs claim Dr. Kousser concluded in his 1992 report that the City adopted its election system for a discriminatory purpose. (Br. at 18.) This is false. Dr. Kousser concluded only that a plaintiff could make a prima facie case to that effect, such that the City would have to defend itself—and he characterized even that conclusion as "quite tentative." (VF127.)

minority-preferred candidates under the competing systems. (VF130.) After a public hearing, the Council voted not to put either ranked-choice voting or districts on the ballot, but resolved to collect further information on alternative election schemes. (VF131.)

Plaintiffs admit there is no evidence of racial animus on the part of the Council in 1992; in fact, the councilmembers consistently expressed a desire to *expand* minority representation. (VF132.) At trial, plaintiffs' theory appeared to be that councilmembers voted against districts to preserve their own seats, as in *Garza*. (VF133.) But then it turned out that 3 of the 4 councilmembers who voted against districts, including Dennis Zane, did not seek reelection when their terms expired. (VF134.)

Plaintiffs now say that they never intended to argue this incumbency theory; they have instead contrived an even more attenuated theory of discrimination—that Zane was trying to preserve the clout of SMRR and "his power to continue dumping affordable housing" in Pico. (Br. at 19.) This outlandish theory has no basis in *any* case law. And it depends *entirely* on a gross misreading of Zane's public comments at a 1992 Council meeting, which plaintiffs term a "smoking gun." (Br. at 20.) Zane stated that districts might render each councilmember a parochial "case manager . . . rather than [a] policy maker," "afraid" to pass affordable housing projects in the face of "neighborhood protests." (VF135.) He therefore proposed a "hybrid" system that would, in his view, enhance minority representation *and* allow the Council to provide affordable housing for the poor. (*Ibid.*) Zane did *not* express a desire to "continue to dump" affordable housing in Pico.[23] (*Ibid.*; see also VF136.)

Plaintiffs discuss only Zane in their brief, but if their theory is that other councilmembers also voted against districts to preserve SMRR's power, the record disproves that argument, too. **First**, districts would not have eroded SMRR's influence; the Charter Review Commission stated that it had "no reason to believe that slate politics could not comfortably adapt to the district format." (VF138.) **Second**, after 1992, Latino voters did not perceive that their interests were being represented by the councilmembers who had backed a switch to districts. Holbrook favored districts (and explained at the Council hearing that he expected to win if districts were adopted, as no other incumbent lived in his district), but won roughly *zero* Latino votes in 1994; Olsen publicly opposed districts, but won roughly

[23] Plaintiffs question the City's decision not to call Zane to the stand to defend himself (Br. at 19), but their own expert said that any such testimony would be valueless. (VF137.)

all Latino votes in 1996. (VF139.) **Third**, SMRR has never been even remotely hostile to minority candidates and voters. SMRR has consistently endorsed minority candidates, including Loya and de la Torre. (VF140.) Minorities, including Loya, have also served on SMRR's steering committee. (VF141.) Nor is there any evidence of SMRR resisting districts. SMRR has endorsed many candidates who publicly favored districts, including Loya and de la Torre, and repudiated candidates who opposed districts. (VF142.) And the chair of the Charter Review Commission, which recommended the abandonment of the at-large system, was also then serving as the *co-chair* of SMRR. (VF143.)

A review of the *Arlington Heights* factors similarly demonstrates that the Council did not act with discriminatory intent in 1992. First, there is no evidence that the Council's decision resulted in any negative **impact on minorities**. No analysis shows that districted elections would have allowed Latinos to elect candidates of their choice in 1992. (VF144.) Any districted system would have had an *adverse* effect on minority groups, which would have been too small to elect candidates of choice in any district but whose influence would have been diluted across seven districts. (VF145.)

Plaintiffs have identified no evidence of **official discrimination**. To the contrary, the **sequence of events** leading up to the vote is entirely inconsistent with plaintiffs' theory of discrimination. The City had recently enacted measures beneficial to minorities, including changing the timing of its elections to coincide with national elections, prohibiting discrimination in private clubs, and requiring 30% of new construction to be set aside for affordable housing. (VF146.) Voters had also elected Vazquez in 1990 and rejected a 1988 measure that would have reinstituted designated posts. (VF147.)

Dr. Kousser admitted there were **no procedural or substantive departures** in 1992. (VF148.) And the relevant **legislative history** also belies plaintiffs' contention that the Council discriminated against minorities in declining to put districts on the ballot. Even the Charter Review Commission did not favor districts, and for a variety of reasons, including: (i) "voting Latinos in the district might be too few to prevail, and Latinos outside the district would have less influence on the outcome than they do now"; (ii) African-Americans and Latinos in the targeted district would not vote cohesively but instead for their own candidates "in head-to-head competition," with a white candidate possibly emerging as the winner; (iii) minorities were not sufficiently concentrated for districts to make sense; (iv) voters would lose influence over six of seven councilmembers; (v) councilmembers would focus only

on their own districts rather than the good of the whole City; and (vi) voters would vote only every four years instead of every two. (VF149.) The Commission also had many reservations about ranked-choice voting, expressing, among other things, "serious doubts about its practicality." (VF150.) Finally, insofar as plaintiffs' argument is that Zane or anyone else purportedly recognized a connection between districts and ethnic representation (VF151), *mere awareness* of such a connection is an inadequate basis for a finding of discriminatory intent. (See Part III.B.2.)

In **2002**, the voters again overwhelmingly rejected districted elections. (VF152.) Dr. Kousser elected not to examine this vote because districts were but one part of a package of significant proposed changes. (VF153.) But he had no qualms about analyzing the 1946 election, despite the fact that the Charter amendment did not even concern districted elections *and* proposed more (and more significant) changes to Santa Monica's government than Measure HH in 2002. (VF154.) The Court should consider his reservations about 2002 in evaluating his 1946 analysis.[24]

No court has ever predicated a weighty finding of intentional discrimination on so little as plaintiffs' Zane-centric theory. If the Freeholders or councilmembers had ever harbored a discriminatory purpose, they could have retained designated posts, prohibited bullet voting, reduced the size of the council, preserved off-year elections, and/or adopted a majority-vote requirement with runoffs. (See *Gingles*, 478 U.S. at 38, fn. 5; *Benavidez*, 2014 WL 4055366 at *21; VF155.) They did none of those things. (VF156.) The City's current system evidences no intent to discriminate against minorities.

IV. Conclusion

The Court should enter judgment in favor of the City.

DATED: October 15, 2018

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: _____
Theodore J. Boutrous, Jr.
Attorneys for Defendant
City of Santa Monica

[24] Plaintiffs also suggest that the Council recently rejected a proposal to switch to districts. (Br. at 21.) The record does not support that (irrelevant) assertion, just as it does not support plaintiffs' continuing speculation about consulting experts whom the City may have hired. (Br. at 4, fn.3.)

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 October 15, 2018, I served

DEFENDANT CITY OF SANTA MONICA'S CLOSING BRIEF

on the interested parties in this action by causing the service delivery of the above document as follows:

Kevin I. Shenkman, Esq.
Mary R. Hughes, Esq.
John L. Jones, Esq.
SHENKMAN & HUGHES PC
28905 Wight Road
Malibu, California 90265
shenkman@sbcglobal.net
mrhughes@shenkmanhughes.com
jjones@shenkmanhughes.com

R. Rex Parris
Robert Parris
Jonathan Douglass
PARRIS LAW FIRM
43364 10th Street West
Lancaster, California 93534
rrparris@parrislawyers.com
jdouglass@parrislawyers.com

Milton Grimes
LAW OFFICES OF MILTON C. GRIMES
3774 West 54th Street
Los Angeles, California 90043
miltgrim@aol.com

Robert Rubin
LAW OFFICE OF ROBERT RUBIN
131 Steuart Street, Suite 300
San Francisco, California 94105
robertrubinsf@gmail.com

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

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

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

Executed on October 15, 2018, in Los Angeles, California.

Cynthia Britt