No. B295935

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 8

CITY OF SANTA MONICA,

Petitioner-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Respondents and Plaintiffs.

REPLY IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS OR OTHER EXTRAORDINARY RELIEF

Appeal from the Superior Court for the County of Los Angeles
The Hon. Yvette M. Palazuelos, Judge Presiding
Superior Court Case No. BC616804
Department 9 Telephone: (213) 310-7009

Gov't Code, § 6103

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I. INTRODUCTION

Plaintiffs take issue with the application of the longstanding rule that mandatory injunctions are automatically stayed on appeal. To be sure, this case implicates important values, including the fundamental right to vote, but that fact does not displace a procedural rule of general application.

Nor does section 917.8 of the Civil Procedure Code create an applicable exception to the automatic-stay rule. Section 917.8 applies only to actions brought in *quo warranto*, as the case law and secondary sources on the subject uniformly confirm. Plaintiffs do not claim that this is a *quo warranto* action—nor could they, since they are not proceeding with leave from the Attorney General.

Instead, plaintiffs effectively ask this Court to make new law, asserting that the language of section 917.8 must be read expansively to apply to orders issued under the California Voting Rights Act. There is zero support for plaintiffs' construction in the statutory text, the case law, secondary sources, or the legislative history of either section 917.8 or the CVRA. Plaintiffs' position is also contrary to the plain language of section 917.8, which applies only when "*a party to the proceeding* has been adjudged guilty of . . . unlawfully holding a public office." (Italics added.) Here, the Council members are not, and have never been, parties to this proceeding.

The question for this Court, then, is whether paragraph 9 of the judgment is mandatory and thus automatically stayed by the City's appeal. Plaintiffs' opposition confirms that it must be. According to plaintiffs, paragraph 9 requires the City either to hold a

district-based election this summer—which is what the concededly mandatory paragraph 8 requires—or to "go without a quorum." Under either circumstance, the City would have to take the affirmative step of terminating its Council members, who would otherwise continue to be entitled under the City Charter to a salary and medical benefits. Courts have consistently held that a commandment to terminate an employee, even if phrased in prohibitory language, is a mandatory injunction. (E.g., *Feinberg v. Doe* (1939) 14 Cal.2d 24.)

But there really is no choice here in any event; plaintiffs all but admit that "go[ing] without a quorum" is an impossibility. The only case they cite as "precedent" for a city making do without a council held that the Governor was obligated to appoint commissioners to make arrangements for a new council to be elected. (*Elliott v. Pardee* (1906) 149 Cal. 516.) So even if the City could decide to forego having a Council after August 15—and it could not, because its Charter vests the Council with all the City's powers, an issue plaintiffs never address—the inevitable result of such a decision would be the imposition of district-based elections by the Governor, which is precisely what plaintiffs' counsel emphasized at the hearing in the trial court. (Vol. 5, Ex. II, pp. 1174, 1184.)

Plaintiffs' attempts to distinguish the key cases similarly reinforce the conclusion that paragraph 9 is mandatory. To take but one example, plaintiffs observe that *URS Corp. v. Atkinson/Walsh Joint Venture* , which concerned an order disqualifying counsel, turned on the fact that the corporation would have to hire new counsel because it could not litigate pro se. (Opp. at p. 49.) But

the City is in an identical position, as it cannot govern itself except through its Council. The ouster of the current Council members by August 15 would thus require the election of new members before then.

In short, if paragraph 9 is not stayed, all roads lead to a district-based election this summer. There is no real alternative, so paragraph 9 must be mandatory and therefore automatically stayed.

In the alternative, a discretionary stay is warranted. If paragraph 9 is enforced and the City prevails on appeal, it will have suffered serious and irreparable harm. Among other things, it will have spent almost one million dollars of unrecoverable public funds holding an election for which there was no lawful basis. Plaintiffs have no response to this point, other than questioning the accuracy of the monetary figure, which was supplied by the Los Angeles County Clerk and Registrar-Recorder, not the City.

Either because paragraph 9 is automatically stayed or in the interest of avoiding irreparable harm, the Court should grant the City's petition and issue a writ of supersedeas.

II. ARGUMENT

A. Paragraph 9 is mandatory because it compels the performance of affirmative acts that will alter the status quo.

"An order enjoining action by a party is prohibitory in nature if its effect is to leave the parties in the same position as they were prior to the entry of the judgment." (*Musicians Club of Los Angeles v. Superior Court* (1958) 165 Cal. App. 2d 67, 71.) "On the

other hand, it is mandatory in effect if its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered." (*Ibid.*) Here, "[t]he legal issue presented is whether [paragraph 9] . . . is a mandatory injunction (requiring affirmative action that changes the status quo) or a prohibitory injunction (restraining parties . . . from taking particular actions, consistent with the status quo)." (*URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 884–885.) "[T]he answer depends largely on how one defines the 'status quo.'" (*Ibid.*)

1. The status quo is governance through a seven-member Council elected at-large.

Plaintiffs' leading case, *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80, defines the status quo as "the last actual peaceable, uncontested status which preceded the pending controversy." (*Id.* at p. 87.) Here, the status quo in Santa Monica is governance through a seven-member Council elected at-large. In fact, that has been the status quo for decades—since 1946, when the City adopted its current Charter, and including the 15 years between the CVRA's enactment and the filing of this action.

Plaintiffs seek to define the status quo not in terms of any "uncontested status which *preceded* the pending controversy" or that preceded the judgment itself, but instead in terms of the status created (over the City's continuing protest) by the trial court's judgment: "the status quo is actually preserved only by prohibiting any further actions by th[e] unlawfully-elected council." (Opp.

at p. 40.) This flips the status-quo inquiry on its head, elevating the status quo *post*-judgment over the status quo *ante*-judgment.

Plaintiffs justify their position solely by citing *United Railroads*, but that case is nothing like this one. There, the city of San Francisco breached its contract with United Railroads by running too many rail cars over commonly owned tracks. (*United Railroads*, *supra*, 172 Cal. at pp. 81–82.) United Railroads promptly brought suit to stop these trespasses. (See *id.* at p. 86 [city had been in breach of contract only for a matter of months].) "There was no" period of "uncontested possession" by the city; to the contrary, United Railroads "protested before beginning its action, protested vigorously against the misuse of its property, and only brought its action when its protests were disregarded." (*Id.* at p. 87.) The status quo was therefore the parties' commercial practice before the controversy arose—that is, the city's operation of the number of rail cars called for by contract.

Here, by contrast, the controversy arose in 2016, after *seven decades* of at-large elections held under the current Charter. Not until 2016 was the City's electoral system "contested" in the way that United Railroads contested the city's trespasses—through an action seeking injunctive relief.[1] And not until the trial court's judgment was there any requirement for the current Council to

[1] There were contests, of a sort, in 1975 and 2002, in the form of votes on two proposals calling for district-based elections, but both of those proposals were overwhelmingly defeated, leaving in place the status quo, at-large election of seven Council members. (Vol. 2, Ex. E, pp. 294, 297.)

vacate, before their terms expired, the positions to which they were duly elected. The status quo ante therefore is governance by a seven-person Council elected at-large.

2. Paragraph 9 requires affirmative acts that would alter the status quo.

The enforcement of paragraph 9 will compel the City, one way or another, to strip its Council members of their positions and to hold district-based elections starting this summer.

Plaintiffs do not (and cannot) deny that the City can be governed only by its seven-member Council. (See Mem. at p. 35.) The current Council members were elected to four-year terms pursuant to valid certificates of election—those terms expire in November 2020 or November 2022—and they receive compensation for their services. (Santa Monica City Charter, § 602 [monthly salary and "medical, dental, health, and other benefits of employment paid for by the City"].) Paragraph 9 would compel the City to cut those four-year terms short, release the Council members from their employment, and terminate their salary and benefits, as such compensation is available only to Council members currently serving. (*Ibid.*)

Moreover, if paragraph 9 is not stayed pending appeal, the current Council members will be unable to serve after August 15, 2019. The newly vacated seats could not be filled by appointment. For one thing, the judgment forbids anyone not elected in a district-based election, using the districts drawn by plaintiffs' expert, from serving on the Council after August 15. For another, the City Charter requires Council members to make appointments to

fill vacancies (*id.*,§ 603), and there would be no Council members to do so. Accordingly, if the Council members resolved to step down to comply with the trial court's judgment (in itself an affirmative act that would alter the status quo), those Council members, in order to ensure that the resulting vacancies would be filled (thus providing the City with a Council capable of exercising the City's powers), would be compelled to set an election date as their final act in office.

In sum, paragraph 9 demands the very same affirmative acts as the trial court's plainly mandatory injunction: to hold a district-based election this summer.

Plaintiffs' opposition confirms as much. They claim the City "could comply with paragraph 9 of the Judgment by holding a district-based election for the seats on its city council, or [the City] could opt to exist with no quorum on its city council." (Opp. at p. 38.) The first of these choices, of course, is unquestionably a mandatory injunction. Plaintiffs' position, then, rests on the second choice—opting to run the City without any Council members at all.[2]

That contention is farcical. Plaintiffs never address the le-

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[2] Not only is this option impossible (for reasons discussed below), plaintiffs ignore that it, too, would be an affirmative choice that would both alter the status quo (removing governance from a seven-member Council elected at-large) and cause irreparable harm (leaving the City with no body capable of exercising its powers), demonstrating that Paragraph 9 must be stayed pending appeal.

gal reality that the City, by the terms of its Charter, can be governed *only* by its Council. (Santa Monica City Charter, § 605.) Plaintiffs instead simply assume that a city that is home to more than 90,000 people, with an annual budget approaching one billion dollars, can make do without a government during the pendency of this appeal.

Plaintiffs insist that there is precedent "for a city to go without a quorum on its city council," citing the Supreme Court's 1906 decision in *Elliott v. Pardee*. (Opp. at p. 38.) But *Elliott* only underscores that the City could not, even if it wished to, "go without a quorum on its city council." The question in *Elliott* was whether the Governor has discretion not to appoint commissioners of election when properly petitioned to do so. The court concluded he did not, because "the duty imposed upon the governor . . . to appoint commissioners is statutory and ministerial." (149 Cal. at p. 520.)

Indeed, this was precisely the scenario that plaintiffs' counsel envisioned at the hearing on the City's *ex parte* application for confirmation of the automatic stay:

> If they choose not to [hold a district-based election], the Governor will do it for them. He will order an election. We are not talking about them not having an election. They have time to do it. They will do it. They just don't want to do it.

(Vol. 5, Ex. II, p. 1184; see also *id.* at p. 1174 [similar].) Plaintiffs backpedal from this contention in their opposition, arguing in passing that "what the Governor may or may not do is irrelevant to the question of whether paragraph 9 is a prohibitory injunction." (Opp. at p. 18.) But the near-certainty that the Governor

would be petitioned to appoint commissioners (Elec. Code, §§ 10300–10302), along with the Governor's lack of discretion to deny such a petition (*id.*, § 10303; *Elliott*, *supra*, 149 Cal. at p. 520), means that there is no realistic possibility that the City could "go without a quorum on its city council" for long beyond August 15, even if it were somehow desirable to do so.

Simply put, paragraph 9 compels that there will be a district-based election this summer. Because paragraph 9 therefore requires affirmative acts that would alter the status quo that existed before the judgment issued, it was stayed by the City's appeal.

3. The enforcement of paragraph 9 would partially moot the City's appeal.

Plaintiffs argue that "[t]his Court's jurisdiction and authority could not be affected by anything [the City] does or doesn't do to comply with paragraph 9 of the Judgment," and that "there is no question that if [the City] ultimately prevails in its appeal it can revert to its racially-discriminatory at-large election system." (Opp. at p. 41.) Of course, if the City prevails on appeal, this Court will have decided that Santa Monica's election system is *not*, in fact, racially discriminatory.

In any event, if the City is forced to hold off-cycle, district-based elections this summer using the districts drawn by plaintiffs' expert, the appeal will, in part, be "rendered nugatory or merely nominal if [the City] should succeed." (Opp. at p. 41, internal quotation marks omitted.) The City will contend on appeal

that there is no legal basis on which to compel it to hold *any* district-based elections, much less to follow a districting plan drawn by plaintiffs' expert without public input, in violation of section 10010 of the Elections Code. If the City prevails on appeal, but in the meantime has been compelled to hold district-based elections in the middle of the summer, it will never be able to recover the costs (monetary, political, and democratic) associated with holding those elections; unwind all of the many actions that may be taken by the newly elected Council during the appeal; or turn back the clock and restore its current Council members to positions from which they were wrongly ousted. (See Part D.3, *infra* [outlining these and other irreparable harms that the City would suffer should it prevail on appeal]; Mem. at pp. 56–58 [same].) A writ of supersedeas therefore *is* necessary to protect this Court's jurisdiction over the City's appeal.

B. The relevant cases confirm that paragraph 9 is a mandatory injunction because it changes the status quo ante.

As the City has explained, paragraph 9 is much like the injunctions entered in many other California cases—across many different subject matters—that were held to be prohibitory in form but mandatory in effect. (Mem. at pp. 36–40.) Plaintiffs spend dozens of pages of their opposition brief laboring to distinguish those authorities based on the supposedly "unique" facts in each. But plaintiffs fail to confront, let alone refute, the unifying principle animating all of these decisions: An injunction is deemed mandatory when it *compels or coerces some affirmative action and*

effects a change to the status quo ante. This rule is one of general application—it is not, as plaintiffs incorrectly suggest, limited only to cases that concern "real or personal property" (Opp. at p. 44), "contracts with third parties" (*id*. at p. 46), the "sale of fish" (*id*. at 48), the "discharge of an employee" (*id*. at p. 48), or the "disqualifying of counsel" (*id*. at p. 49).

Five examples are representative.

Feinberg v. Doe. Plaintiffs' discussion of *Feinberg v. Doe* (1939) 14 Cal. 2d 24, betrays their improper focus on the form of paragraph 9, rather than its effect. In *Feinberg*, the Supreme Court concluded that an order prohibiting the defendants from continuing to employ individuals who were not members of a certain union was mandatory, even though it "purports to be prohibitive," because it "in effect commands the defendants to release [the plaintiff-employee] from [her] employment." (*Id.* at pp. 27, 29.)

The effect of the injunction in *Feinberg* is materially identical to the effect of paragraph 9. Although it is couched in prohibitive language—by forbidding Council members who have not been elected through a district-based election from serving on the Council after August 15, 2019—paragraph 9 in effect requires the City to oust the current Council members no later than August 15, 2019, because all were elected through an at-large election, and to hold a district-based election to replace them this summer.

Plaintiffs' only response to *Feinberg* is that the defendant there was required to fire the plaintiffs, but in this case, the City is not required to discharge or fire anyone. (Opp. at pp. 48–49.)

But that is untrue. Paragraph 9 does not, as plaintiffs erroneously contend, permit the seven current Council members (none of whom was elected through a district-based election) to remain in office and simply prohibit them from "taking official action on behalf of the City." (Opp. at p. 49) Rather, paragraph 9 prohibits them "from serving on the Santa Monica City Council," and, as a result, as described above, compels the City to terminate their employment and benefits by August 15, 2019, because none will have been elected under the trial court's brand new district-based system. (See *supra* section II.A.2; see also *Agricultural Labor Bd. v. Superior Court* (1983) 149 Cal.App.3d 709, 712–713 [following *Feinberg*, and holding that an injunction prohibiting an employer during a labor strike from "failing or refusing to immediately reinstate a group of workers" is effectively mandatory because it compels affirmative action to change the status quo].)

URS v. Atkinson/Walsh. *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal. App. 5th 872, highlights the futility of plaintiffs' contention that paragraph 9 is not mandatory because the City could simply choose to operate without a Council. In *URS*, the Court of Appeal concluded that an injunction disqualifying a corporation's lawyer was mandatory because "it requires affirmative acts that upset the status quo"—namely, the hiring of a new lawyer. (*Id.* at p. 886.) Paragraph 9 is similarly mandatory because it requires the City to hold a district-based election by August 15, 2019, to replace its current Council.

Plaintiffs try to distinguish *URS* by noting that the court there observed that the mandatory nature of the disqualification

order was evident because corporations "cannot represent themselves in court," which is not a concern here. (Opp. at p. 49.) Contrary to plaintiffs' suggestion, the Court of Appeal's observation supports *the City's* position. Like the corporation that can represent itself only through its lawyers, the City can govern itself only through its seven-member Council. (Mem. at pp. 35–36.) And just as it was not a realistic option for the corporation to represent itself in court pro se, it is likewise not a tenable option for a City of more than 90,000 residents to exist without a governing body.

Paramount v. Davis. In *Paramount Pictures Corp. v. Davis* (1964) 228 Cal. App. 2d 827, Paramount sued actress Bette Davis, seeking to force her to film a final scene for the movie *Where Love Has Gone*, at a time when she was under an exclusive contract with another studio (Aldrich), to shoot *Hush . . . Hush, Sweet Charlotte*. Paramount obtained an injunction prohibiting Ms. Davis from "rendering her services in connection with any motion picture photoplay," unless and until she completed the final scene for Paramount. (*Id*. at p. 833.) The Court of Appeal held that the injunction was mandatory to the extent it required Ms. Davis to break her existing contract with Aldrich and film the additional scene for Paramount, but prohibitory to the extent it barred her from filming scenes for any other studios. (*Id.* at p. 838.) The status quo that existed at the time of the injunction was that Ms. Davis was filming for Aldrich, not Paramount; the injunction operated to change *that* status.

Plaintiffs contend that *Davis* is inapposite because the pro-

hibitory portion of the injunction was left in place during the appeal, "even though it likely would, as a practical matter, compel her to comply with the mandatory features of the injunction—requiring her to fulfill her contract with Paramount Pictures." (Opp. at pp. 46–47.) There is no basis for this argument. The injunction in *Davis* was exclusively prohibitory in form, yet the Court of Appeal parsed its effect to be (a) mandatory, to the extent it would require Ms. Davis to break her existing contract with Aldrich and would coerce her to film the final scene for Paramount, both of which were changes to the status quo; and (b) prohibitory, to the extent Ms. Davis would be precluded from filming for any other studio, which she was not then doing. (*Davis, supra*, 228 Cal. App. 2d at p. 839.)

The same parsing could be done on paragraph 9, and it would still confirm that paragraph 9 is mandatory in effect:

- At the time of the judgment, Santa Monica had a seven-member City Council that was not elected in a district-based election. If paragraph 9 remains in effect during the appeal, the City would need to oust all of them as of August 15, 2019, and replace them in a district-based election, long before their terms would have expired. *That* portion of paragraph 9—like the portion of the injunction prohibiting Ms. Davis from continuing to film scenes for Aldrich and thus coercing her to film the additional scene for Paramount—is unquestionably mandatory in effect.
- By contrast, at the time of the judgment, there were more than 90,000 Santa Monica residents who were *not* serving on the Council and who, under paragraph 9, will be unable to serve on the Council after August 15, 2019, unless they were elected in a district-based election.

> *That* portion of the injunction—like the portion prohibiting Ms. Davis from filming scenes for studios other than Aldrich—may well be nothing more than a prohibitory injunction because it does not disrupt the status quo.

Plaintiffs also suggest that *Davis* is distinguishable because the decision "hinges on the fact that the injunction was preliminary and would have effectively granted the plaintiff all of the relief it sought in the underlying case." (Opp. at pp. 46–47.) This is a misreading of *Davis*—in fact, the Court of Appeal expressly noted that these considerations were *irrelevant*, since the injunction was mandatory and thus automatically stayed on appeal. (*Davis, supra*, 228 Cal. App. 2d at p. 839 ["In view of our conclusion that the stay is automatic, we deem it unnecessary to weigh these arguments as we would if the question of the issuance of the writ was solely a matter of discretion."].)

Plaintiffs' efforts to distinguish *Davis* on the basis that any harm to the City from enforcement of paragraph 9 is easily remedied (Opp. at p. 47) also fail. Just as the mandatory portion of the injunction posed irreparable harm to Ms. Davis because she could not "undo any work she did for Paramount if she later won at trial or appeal," so the enforcement of paragraph 9 poses irreparable harm to the City because if it later wins on appeal it will be unable to undo either (a) the results of total inaction during any period in which the City is left without a Council or (b) the results of whatever work a temporary Council might do during the pendency of the appeal.

Ambrose v. Alioto. In *Ambrose v. Alioto* (1944) 62 Cal.App.2d 680, a fishing company was enjoined from delivering

fish to anyone other than Westgate, even though it was then performing under a contract with Sun Harbor. (*Id.* at p. 686.) The injunction was deemed mandatory because it was "but another means of stating that defendant must cease delivering to Sun Harbor . . . and must deliver fish to Westgate." (*Ibid.*)

Plaintiffs claim that *Ambrose* has no application here because it is a "case regarding the sale of fish" and involved "the transfer of property." (Opp. at pp. 47–48.) But neither distinction is meaningful. The decision turned on whether the injunction coerced a change to the status quo, not on the nature of the goods or services at issue in the underlying case: "The result and effect of the decree is not only mandatory in character but compels the performance of a substantive act and also contemplates a change in the relative position or rights of the parties which existed at the time the decree was entered." (*Ambrose, supra*, 62 Cal.App.2d at p. 686; see, e.g., *City of Pasadena v. City of Alhambra* (1946) 75 Cal.App.2d 91, 95–96 [relying on *Ambrose* in a dispute over water rights, and finding the injunction to be mandatory and thus stayed].)

Clute v. Superior Court. Plaintiffs' effort to cabin *Clute v. Superior Court* (1908) 155 Cal. 15 to "injunctions that operate to compel a party to relinquish possession or real or personal property" (Opp. at pp. 44–45) also misses the mark.

In *Clute*, the Supreme Court held that a contempt order punishing the treasurer and manager of a hotel for refusing to turn over his control of corporate property, books, and records was

mandatory in nature because "the injunction compels him affirmatively to surrender a position which he holds." (155 Cal. at p. 20.) The "*status* of the parties, at the time the injunction was issued," was that Mr. Clute was operating the hotel as manager on behalf of the corporation; the injunction "operate[d] to change that *status*." (*Id*. at pp. 19–20.) An injunction prohibiting a corporate officer from holding himself out as the hotel's manager and fulfilling the duties of that office—thus coercing him to turn over management to others—is directly analogous to an order prohibiting Council members from serving in their elected roles after August 15, 2019.

Plaintiffs claim that *Clute* is distinguishable because it was really focused only on the corporate officer's "possession of certain tangible property" (a hotel and its books, keys, and other property), and not the maintenance of his position as a corporate officer. (Opp. at p. 43.) Even if that were a valid distinction (it is not), plaintiffs misread *Clute*. Although the injunction there did effectively order the transfer of possession of hotel property, books, and records, the key point was that the transfer of this property would have effectively ousted Mr. Clute from his *role* as manager; turning over the hotel property was akin to turning over the management of the hotel itself. After all, Mr. Clute was in possession of the hotel property, books, and records only in his capacity as "manager of the corporation." (*Id.* at p. 19.) That is why the Court described the injunction as "compel[ling] him affirmatively to surrender *a position* which he holds," not merely the

transfer of property. (*Id.* at p. 20, italics added; see also *Davis*, *supra*, 228 Cal.App.2d at p. 835 [noting that an injunction is mandatory if it effects a "surrender of or change in . . . rights"].)

C. Section 917.8 does not apply.

The City has explained that the exception to the automatic-stay rule provided in section 917.8 applies only to actions brought in *quo warranto*, and there is no dispute that this is not a *quo warranto* action. (Mem. at pp. 43–46.) Plaintiffs contend that section 917.8 nonetheless applies here, purporting to rely on the "plain text" of the statute and the decision in *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781. (Opp. at pp. 50–54.) But neither the statute nor *Jauregui* supports plaintiffs' position, which also runs squarely counter to controlling case law.

First, although plaintiffs accuse the City of reading language into the statute (Opp. at pp. 51–52), plaintiffs ask the Court to read language out of it. The statute applies only "[i]f a *party to the proceeding* has been adjudged guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state." (Code Civ. Proc., § 917.8, subd. (a), italics added.) Here, the parties to the action are not the seven Council members who, according to plaintiffs, were "unlawfully" elected, but rather the City of Santa Monica and the two plaintiffs, the Pico Neighborhood Association and Maria Loya. None of these parties "has been adjudged guilty of . . . unlawfully holding a public office." This statutory language underscores that section 917.8 applies only in *quo warranto* actions, for in those actions, the challenged

officeholder *must* be a party. (See Code Civ. Proc., § 803 [authorizing Attorney General to bring action "against any person who usurps, intrudes into, or unlawfully holds or exercise any public office . . . within this state"].)

Second, plaintiffs do not grapple with the fact that the relevant language in section 917.8 is materially identical to language from section 803, the *quo warranto* statute. "'[E]very statute should be construed with reference to all other statutes of similar subject so that each part of the law as a whole may be harmonized and given effect.'" (*People v. Frawley* (2000) 63 Cal.App.4th 794, 799.)

Third, plaintiffs do not deny that the cases cited by the City, *Day v. Gunning* and *Anderson v. Browning*, make clear that section 917.8 applies only to actions brought in *quo warranto*—and not to actions in which incumbents who entered office pursuant to a valid certificate of election have later, for whatever reason, "lost the right to retain the office"—even when the trial court's judgment includes a statement that the defendant was "unlawfully holding said office." (*Day v. Gunning* (1899) 125 Cal. 527, 528–529; Mem. at pp. 43–45.) Other cases stand for the same proposition. In *Covarrubias v. Board of Supervisors of Santa Barbara County* (1878) 52 Cal. 622, for example, the Supreme Court held that a candidate who was "duly qualified" as sheriff, but later adjudged to have committed malfeasance in office, had not been found guilty of "unlawfully holding" his office within the meaning of section 917.8's predecessor, and therefore he could remain in his position pending appeal.

Fourth, plaintiffs are unable to identify any legal treatises suggesting that section 917.8 has a reach any broader than *quo warranto* actions. The City identified in its memorandum one treatise recognizing that section 917.8 is limited to *quo warranto* actions. (Mem. at p. 44, citing Cal. Jur. 3d, Appellate Review, § 412.) There are others. Witkin, for example, defines section 917.8 by reference to *quo warranto* proceedings, explaining that the statute creates an exception to the automatic-stay rule for a "[d]ecree in a *quo warranto* proceeding adjudging the defendant guilty of usurping, or intruding into, or unlawfully holding a public office." (9 Witkin (2008) Cal. Proc. 5th Appeal, § 277.)

Fifth, plaintiffs contend that *Day* and *Anderson* cannot be good law anymore, simply because they were decided a long time ago, or because they were impliedly modified by the passage of the CVRA or the Court of Appeal's decision in *Juaregui*. As an initial matter, a case's age says nothing of its vitality, especially when the statutory provision at issue has not been cited in a published decision since 1902—in, not coincidentally, a *quo warranto* case. (*People ex rel. Bledsoe v. Campbell* (1902) 138 Cal. 11.)[3]

Further, there is nothing in the language of the CVRA or its

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[3] Section 917.8 (or, more specifically, its predecessor, section 949) has been cited a handful of times in other cases, most recently in 1945 (*People v. Smith* (1945) 71 Cal.App.2d 211), but those cases concerned exceptions to the automatic-stay rule not for *quo warranto* actions, but for cases involving the inspection of corporate records or the closure of buildings adjudged to be public nuisances. (See Code Civ. Proc., 917.8, subds. (b)-(c).)

legislative history that suggests the Legislature intended to modify or displace the automatic-stay rule. "[N]o authority . . . supports the notion of legislation by accident. . . . '[A]n intention to legislate by implication is not to be presumed.'" (*In re Christian S.* (1994) 7 Cal.4th 768, 776 [collecting authorities]; see also *Bell v. Duffy* (1980) 111 Cal.App.3d 643, 650 [rejecting argument that statute "expressly or by implication eliminate[d] . . . longstanding distinctions"].)

Nor does *Juaregui* have any bearing on the question whether section 917.8 applies in this case. According to plaintiffs, the case stands for the proposition that the remedial authority of a trial court in a CVRA case is at least as broad as that of a district court in a federal Voting Rights Act case. (Opp. at pp. 52–53.) But, as the City noted in its memorandum (Mem. at pp. 45–46), the question here is not how broad the trial court's remedial authority may or may not have been. Instead, the relevant question is whether the remedies ordered by the trial court are subject to the automatic-stay rule. *Juaregui* says nothing at all about that issue. Nor, of course, do federal cases, as there is no automatic stay of mandatory injunctions under federal law—a distinction raised in the memorandum but not addressed in the opposition. (See Mem. at p. 46.)

As a result, plaintiffs are asking the Court not to *apply* section 917.8, but to rewrite it, and urging the Court not to follow controlling precedent, but to ignore it. No authority supports their expansive interpretation of a narrow exception to the automatic-stay rule.

D. A discretionary stay is warranted.

Even if paragraph 9 of the judgment were prohibitory in effect as well as form, the prospect of irreparable harm to the City, the current Council members, and the public would nevertheless warrant a discretionary writ of supersedeas.

In opposing such a writ, plaintiffs argue that the judgment is unlikely to be reversed and that the enforcement of paragraph 9 would not result in irreparable harm. But plaintiffs have misstated the relevant standard of review, which will be de novo on most or all issues. And the enforcement of paragraph 9 would result in real and irreparable harm to the City in the form of, among several other things, an irrecoverable election-related expense of almost one million dollars.

1. The issues on appeal will be mostly or entirely legal, so the standard of review will be de novo.

In an effort to make the City's odds of prevailing on appeal appear long, plaintiffs contend that the judgment cannot be reversed "except for an abuse of discretion," particularly because the trial court has entered permanent injunctions. (Opp. at p. 55.) But when the issues raised on appeal are purely legal, as they will mostly or entirely be here, review is de novo even if the issues relate to a permanent injunction. (See, e.g., *Classis of Central Cal. v. Miraloma Cmty. Church* (2009) 177 Cal.App.4th 750, 759 [collecting cases]; *In re Lugo* (2008) 164 Cal.App.4th 1522, 1535 [same].)

In fact, plaintiffs' own recitation of rulings that they believe

insulate their case from challenge on appeal reveals that the disputes between the parties are legal in nature. Consider the following two examples.

First, plaintiffs insist that racially polarized voting must be determined solely by examining voter support for Latino candidates. (Opp. at p. 56.) The City, by contrast, contends that this approach is erroneously and unconstitutionally narrow; Latino-preferred candidates need not themselves be Latino, and such candidates, properly identified, prevail more often than not in Council elections in Santa Monica. (Mem. at pp. 47–50.) The parties thus dispute not the facts—namely, who won certain elections, or who is estimated to have received more support from Latino voters—but the application of law to those undisputed facts.[4]

Second, there is also a legal question whether, even if the factual findings of the trial court were correct, they support a conclusion of intentional discrimination. No evidence at trial demonstrated that the relevant decisionmakers in 1946 or in 1992 (the only two years in which the trial court purported to find discriminatory intent) were not only aware that at-large elections might negatively impact minorities, but also preferred such elections for that reason. (Mem. at pp. 53–56; Vol. 2, Ex. E, pp. 287–297, 325–337.) The trial court's judgment is therefore

[4] Indeed, plaintiffs' own evidence demonstrated that in certain elections, Latino voters preferred non-Latino candidates over Latino candidates. (E.g., Vol. 2, Ex. E, p. 313 [in the 2008 election, Latino voters preferred Richard Bloom and Ken Genser over Linda Piera-Avila].)

legally erroneous. (See, e.g., *Personnel Adm'r of Mass. v. Feeney* (1979) 442 U.S. 256, 279; *Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361–1362.)

2. Plaintiffs' responses to the City's exemplary merits arguments serve only to reveal the flaws in the judgment.

The City offered a few examples of the arguments it may raise on appeal in order to show that there is a real possibility of reversal and irreparable harm. (Mem at pp. 47–56.) Plaintiffs' responses only underscore that possibility.

a. The judgment depends on the unconstitutional assumption that Latino voters can prefer only Latino candidates.

In its memorandum, the City argued that the trial court erred in assuming that the only candidates Latino voters can legitimately prefer must themselves by Latino. (Mem. at pp. 47–50.) The City cited case law holding that such an assumption is unconstitutional, and offered specific examples of the assumption leading to the incorrect identification of Latino-preferred candidates. (*Ibid.*) Plaintiffs do not address those cases or examples. Instead, they assert that the trial court rejected a "rigid 'mechanical approach' suggested by" the City under which a white candidate who receives fewer votes from Latino voters than a Latino candidate is nevertheless regarded as preferred. (Opp. at p. 59.)

This is demonstrably false. The City has expressly disclaimed such a "rigid 'mechanical approach,'" noting in its briefing

that "courts have held that it is error to 'treat[] as "minority-preferred" successful candidates who had significantly less [minority] support than their unsuccessful opponents.'" (Vol. 2, Ex. E, p. 276; see also *id*. at p. 304; Vol. 4, Ex. X, p. 843.) Rather, following federal case law, the City has argued that Latino-preferred candidates must be identified in three steps. (E.g., Vol. 2, Ex. E, pp. 275–279.) The first of those three steps is to identify which candidates, *whatever their race or ethnicity*, would have won had Latinos been the only voters. The second step is to determine whether some of those candidates received significantly less Latino support than others. If so, they cannot be regarded as Latino-preferred. The third and final step is to disregard candidates who did not earn at least half of Latino votes, so that candidates with little Latino support are not inappropriately regarded as Latino-preferred. (*Ibid*.)

When Latino-preferred candidates are properly identified, it becomes clear that they have not usually lost as a result of white bloc voting in Santa Monica, and therefore that there is no legally significant pattern of racially polarized voting. (E.g., Vol. 2, Ex. E, pp. 278–280.)

b. The trial court's conclusion on vote dilution reflects legal error.

Plaintiffs defend the trial court's ruling on vote dilution on the ground that it depends on some factual finding. (Opp. at pp. 59–60.) Not so. The question for this Court will be what, as a legal matter, a CVRA plaintiff must show in order to prove vote

dilution—which is (as it constitutionally must be) an element of liability under the CVRA. (Elec. Code, § 14027.)

Plaintiffs contend that it is enough simply to demonstrate that an alternative electoral system would enhance a minority group's "influence." But federal courts have consistently rejected that very argument. (See, e.g., *League of United Latin Am. Citizens v. Perry* (2006) 548 U.S. 399, 446 (opn. of Kennedy, J.) ["If § 2 were interpreted to protect . . . influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions."]; *Dillard v. Baldwin Cty. Comm'rs* (11th Cir. 2004) 376 F.3d 1260, 1267 ["This 'influence dilution' concept . . . has been consistently rejected by other federal courts."].)[5] Where the relevant minority group is too small and/or dispersed for any alternative electoral system to enhance its voting strength, "there neither has been a wrong nor can be a remedy." (*Growe v. Emison* (1993) 507 U.S. 25, 41.)

Plaintiffs also remark in passing that it makes no difference that Latinos outside the one purportedly remedial district would be submerged in six overwhelmingly white districts. (Opp. at p. 61, fn. 5.) Plaintiffs might be right if that one district were actually remedial, as was true in the two cases they cite. But here, the judgment strikes a double blow against Latino voting strength—packing Latinos into one district where they are too few

[5] Plaintiffs' own expert could not identify a single judicially created district in which the citizen-voting-age population of the target population was as low as in this case: just 30 percent. (Vol. 2, Ex. E, pp. 283, 318.)

in number to elect their preferred candidates, and cracking the remaining Latino voters (roughly two-thirds of the City's Latinos overall) across six other districts. This is a classic recipe for the dilution of Latino voting strength, not its enhancement.

c. ***Sanchez* and *Higginson* did not reject the City's constitutional arguments.**

Plaintiffs largely dodge the City's constitutional arguments by asserting, incorrectly, that they have been rejected in two other cases. Plaintiffs are wrong. Both of those decisions addressed facial challenges to the CVRA, neither of which resembled the City's as-applied challenges in this case.

In *Sanchez*, the defendant argued that the CVRA was facially unconstitutional because the use of race "to identify the polarized voting that causes vote dilution . . . constitutes reverse racial discrimination and is a form of unconstitutional affirmative action benefiting only certain racial groups." (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 666.) And in *Higginson*, the plaintiff argued that *Sanchez*'s rejection of a facial constitutional challenge was incorrect, and that he had alleged a facial violation of the Equal Protection Clause based on intentional racial gerrymandering because "California legislators passed the CVRA to maximize minority voting strength by making it easier to sue local governments for vote dilution, 'based on the existence of racially polarized voting and nothing more.'" (*Higginson v. Becerra* (S.D. Cal. Feb. 4, 2019) 2019 WL 424609, at *3, 7–8.)

Both *Sanchez* and *Higginson* were decided on the pleadings. In *Sanchez*, the Court of Appeal reversed the trial court's ruling

that the CVRA was *facially* unconstitutional, and left open the possibility of an *as-applied* constitutional challenge on remand (after which the case settled). (145 Cal.App.4th at p. 665.) *Higginson* was decided after the City of Poway voluntarily adopted district-based elections to avoid a lawsuit. (2019 WL 424609 at p. *2.)

In this case, by contrast, the trial court ordered the creation of a purportedly remedial district despite the fact that plaintiffs failed to prove vote dilution, under constitutionally required standards, at trial. (Mem. at pp. 52–53.) And the City's argument, not addressed by either case, is that there cannot be a constitutional basis to find lability and order a remedy absent such dilution. Any such order must reflect an impermissibly predominantly race-based (and ineffective) attempt to maximize the number of Latino voters within a district rather than to advance the compelling state interest of curing vote dilution. *Sanchez* explicitly recognizes that these as-applied constitutional arguments have not been addressed. (See Mem. at pp. 20–21, quoting *Sanchez*, 145 Cal.App.4th at p. 690.)[6]

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[6] As noted above, were the Court to accept plaintiffs' unwarranted argument that the CVRA requires courts to treat only Latino candidates as Latino-preferred for purposes of determining whether there has been racially polarized voting, this too would pose an unresolved constitutional issue with the CVRA. Similar unresolved, as-applied constitutional issues with the CVRA would be posed were the Court to accept plaintiffs' arguments that vote dilution is not an element of the CVRA or that it requires courts to look only at elections in which Latinos are candidates.

d. The City did not "refuse" to propose a remedy, and the judgment violates section 10010.

Section 10010 of the Elections Code, which requires a series of public hearings on potential district maps, "applies to . . . a proposal that is required due to a court-imposed change from an at-large method of election to a district-based election." (Elec. Code, § 10010, subd. (c).) Neither the trial court nor plaintiffs have been able to explain why section 10010 does not squarely apply to this case.

Plaintiffs also contend that the City "refused" to propose a remedy. (Opp. at pp. 31, 62.) This is false. As an initial matter, the City was under no obligation to propose any remedy at all in response to the trial court's tentative ruling on liability. In any event, when the trial court requested briefing on the appropriate remedies, the City *did* propose one: Reserving its positions that no remedy at all was appropriate, and that any order mandating a change in election system would automatically be stayed pending appeal, the City proposed that the Court order a change to a district-based election system, and that the City be ordered to comply with section 10010 of the Elections Code by holding the required series of public hearings to draw a districting plan with residents' input. (Vol. 2, Ex. N, pp. 493–505.) Instead, the trial court rubber-stamped a districting plan drawn by plaintiffs' expert without any public input, in violation of section 10010, and effectively punted the legal question to this Court: "We will let it run and see where it goes in the Court of Appeal." (Vol. 3, Ex. V,

p. 703:11-12.)

e. No evidence supports the trial court's intentional-discrimination ruling.

The factual findings underlying the trial court's Equal Protection ruling are wrong on any standard of review. But even if they were right, they are nevertheless insufficient to demonstrate legally cognizable intentional discrimination. Put simply, there is no evidence whatsoever that the relevant decisionmakers adopted the City's current electoral system in 1946 or maintained that system in 1992 *in order to* discriminate against minority voters. In the absence of such evidence, the trial court's judgment must be reversed. (See, e.g., *Feeney*, *supra*, 442 U.S. at pp. 279–280 [reversing judgment for want of proof that allegedly discriminatory practice was adopted "'because of,' not merely 'in spite of,' its adverse effects upon" women].)

Finally, the parties dispute what must be shown in order to prove a discriminatory impact. The City has argued that plaintiffs were obligated to prove that minority voters could have elected more candidates of their choice under some alternative electoral system—otherwise, plaintiffs cannot trace any supposed harm to an at-large method of election; the result would have been the same under any system. In this case, plaintiffs submitted no evidence at trial demonstrating that it would have been possible for minority voters to elect more candidates of their choice under any system in 1946 or for decades thereafter. Instead, plaintiffs have identified a series of purported wrongs—everything from air pollution to crime and educational disparities—and baselessly laid

them at the feet of the at-large system. It was legal error for the trial court to accept this theory.

3. The City will suffer irreparable harm unless the writ is granted.

If paragraph 9 of the judgment is not stayed and the City prevails on appeal, the City and its voters will have suffered irreparable harm.

One very concrete example of such harm is the nearly one-million dollar expense the City will incur in holding a districted election this summer. (Mem. at p. 58.) Plaintiffs assert that this cost estimate must be "inflated" (Opp. at p. 67), but it was generated by the office of the Los Angeles County Clerk and Registrar-Recorder, not the City itself. (Vol. 5, Ex. GG, p. 1139.)

Plaintiffs also contend that a monetary harm cannot be irreparable, citing a vacated Ninth Circuit decision. (Opp. at p. 67.) Plaintiffs likely have in mind the general rule that monetary loss is not irreparable where it can be reversed on appeal. (See, e.g., *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 890.) But that rule has its limits; the City's memorandum cited multiple supersedeas cases holding that the petitioner had demonstrated irreparable harm because the prospect of repayment was doubtful. (Mem. at pp. 46–47.) More importantly, the rule simply does not apply with respect to the election-related expenses at issue because there is no prospect of repayment at all. If the City prevails on appeal, nearly one million dollars will have been dissipated on a needless election, and plaintiffs surely would not be willing to reimburse the City for those costs.

A second example of irreparable harm (non-monetary) flows from the likely low turnout and voter confusion that would be associated with a return to at-large elections should the Court reverse the trial court's judgment. If the City is required to hold a district-based election for all seven Council seats before August 15, 2019, and if this Court then reverses the judgment, the subsequent at-large election for the seven Council seats would then be the third City Council election in a two-year span. In addition to the unrecoverable monetary costs of the unnecessary district-based election, this rapid sequence of elections would undermine voters' confidence in the electoral system, with the likely, and understandable, result of low turnout and voter confusion at the follow-on at-large election.

Plaintiffs assert that the City, its Council members, and the public will not suffer irreparable harm in the event that paragraph 9 is not stayed and the City prevails on appeal, since district-based elections are, in the abstract, lawful. (Opp. at pp. 66–67.) But the question presented by the City's appeal is not whether the City could have lawfully adopted district-based elections—it is instead whether there was any basis for a court to *order* the City to do so. The City is pursuing this appeal to avoid the prospect of holding *any* district-based elections, which it believes would hamper democratic engagement and the sound governance of the City. The City has defended this lawsuit from the start to guard this principle, and would suffer irreparable harm if compelled to abandon it.

Plaintiffs also contend that "the Latino community in Santa

Monica" would suffer irreparable harm if paragraph 9 were stayed. (Opp. at 67.) But it bears noting that the only two plaintiffs in this case are Ms. Loya and the Pico Neighborhood Association—this is not a class action or otherwise a suit in which the plaintiffs are purporting to represent the interests of all Latinos in Santa Monica. On the contrary, most of Santa Monica's Latinos live *outside* the Pico Neighborhood. (Vol. 4, Ex. X, pp. 849, 852.)

Apart from a vague reference to "expressive harm," plaintiffs speculate that if left in place during the appeal, the current Council will "enact[] ordinances and policies that harm the Latino community," and they point to the placement of the 10 freeway (which occurred in the 1960s), a train maintenance yard, and other facilities. (Opp. at p. 67.) As an initial matter, the record reflects that Santa Monica is a progressive community offering a wide range of financial, civic, and social programs, many of which are specifically aimed at maintaining the City's diversity and ensuring that residents are not forced to move on account of rising rents. (See, e.g., Vol. 4, Ex. X, pp. 849–854.) But even if, as plaintiffs contend without any basis, Santa Monica were "hostil[e] to the Latino community," and even if district-based elections might result in the election of a single Latino-preferred candidate in the one purportedly remedial district, that lone Council member would be unable to do anything about the City's "hostility." Accordingly, even on their own hyperbolic theory, plaintiffs cannot demonstrate that Latino voters will suffer irreparable harm from the maintenance of the current Council.

III. CONCLUSION

For these reasons, this Court should grant the City's petition for a writ of supersedeas, and it should confirm that paragraph 9 of the trial court's judgment is mandatory in effect, and thus automatically stayed during the pendency of the City's appeal. In the alternative, this Court should stay the enforcement of paragraph 9 of the trial court's judgment until the final resolution of this appeal.

DATED: March 25, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: ______________________
Theodore J. Boutrous, Jr.

Attorneys for Petitioner-Defendant
City of Santa Monica

CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1) of the California Rules of Court, the undersigned hereby certifies that this reply contains 8,839 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, and the signature block.

DATED: March 25, 2019

Kahn A. Scolnick

PROOF OF SERVICE

I, Daniel Adler, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State. On March 25, 2019, I served the following documents:

REPLY IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS OR OTHER EXTRAORDINARY RELIEF

on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

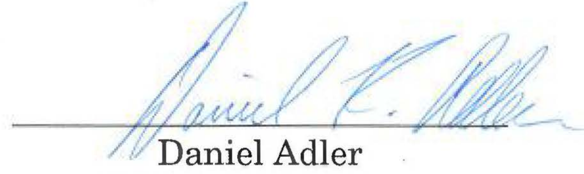
☑ **BY MAIL SERVICE:** I placed a true and correct copy of the above-titled document in a sealed envelope addressed to the persons listed above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

☑ **BY ELECTRONIC SERVICE:** A true and correct copy of the above-titled document was electronically served on the persons listed on the attached service list.

I am employed in the office of Daniel R. Adler, a member of the bar of this court, and the foregoing documents were printed on recycled paper.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 25, 2019.



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