No. B295935

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

City of Santa Monica,
Appellant-Defendant,
v.
Pico Neighborhood Association, et al.,
Respondents and Plaintiffs.

Appeal from the Superior Court for the County of Los Angeles
The Hon. Yvette M. Palazuelos, Judge
Presiding
Superior Court Case No. BC616804

RESPONDENTS' CONSOLIDATED RESPONSE TO THE AMICUS CURIAE BRIEFS OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND SANTA MONICA TRANSPARENCY PROJECT

Kevin I. Shenkman (SBN 223315)
kishenkman@shenkmanhughes.com
Mary R. Hughes (SBN 222662)
mrhughes@shenkmanhughes.com
Andrea A. Alarcon (SBN 319536)
aalarcon@shenkmanhughes.com
SHENKMAN & HUGHES
28905 Wright Road
Malibu, CA 90265
(310) 457-0970

Robert Rubin (SBN 85084)
robertrubinsf@gmail.com
LAW OFFICE OF ROBERT RUBIN
237 Princeton Avenue
Mill Valley, CA 94941
(415)298-4857

Additional Counsel Listed on the Following Page

Morris J. Baller, Of Counsel (SBN 048928)
mballer@gbdhlegal.com
Laura L. Ho (SBN 173179)
lho@gbdhlegal.com
Anne P. Bellows (SBN 293722)
abellows@gbdhlegal.com
Ginger L. Grimes (SBN 307168)
ggrimes@gbdhlegal.com
GOLDSTEIN, BORGEN, DARDARIAN & HO
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
Tel: (510) 763-9800
Fax: (510) 835-1417

R. Rex Parris (SBN 96567)
rrparris@parrislawyers.com
Ellery S. Gordon (SBN 316655)
egordon@parrislawyers.com
PARRIS LAW FIRM
43364 10th Street West
Lancaster, CA 93534
Tel: (661) 949-2595
Fax: (661) 949-7524

Milton Grimes (SBN 59437)
miltgrim@aol.com
LAW OFFICES OF MILTON C. GRIMES
3774 West 54th Street
Los Angeles, CA 90043
(323) 295-3023

Paul Hoffman (SBN 71244)
John Washington (SBN 315991)
SCHONBRUN SEPLOW HARRIS & HOFFMAN, LLP
11543 W. Olympic Blvd
Los Angeles, CA 90064
(310) 396-0731

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I. INTRODUCTION

Though given several opportunities to do so, Appellant failed to propose a district map, or any remedy at all other than to indicate its preference for a district-election remedy – even when the Superior Court ordered the parties to propose remedies. The Superior Court then did exactly what the law requires in that circumstance – it "implement[ed] appropriate remedies" designed to promptly and completely remedy Appellant's violation of the voting rights of Respondents and the thousands of other Latino voters in Santa Monica. (Elec. Code § 14029).

Neither Appellant nor its Amici allies[1] take issue with the district map adopted by the Superior Court. As the Superior Court found, and nobody disputes, that map adheres to the criteria mandated by Section 21620 of the Elections Code, governing the development of council districts for charter cities like Appellant, and "neither race nor the residences of incumbents was a predominant factor in drawing any of the districts." (24AA10733 [Statement of Decision, p. 65].) Rather, Appellant and Amici take issue only with the procedure by which the Superior Court adopted that map. The procedure employed by the Superior Court was perfectly appropriate – consistent with the CVRA and the uniform direction from the federal courts: the Superior Court afforded Appellant multiple opportunities to propose a map, and when it

[1] League of California Cities ("League"), California Special Districts Association ("CSDA") and Santa Monica Transparency Project ("Transparency Project")

failed and refused each of those opportunities, the Superior Court adopted the map developed by expert demographer David Ely.

Elections Code section 10010 does not dictate a different procedure; that statute speaks only to the procedure to be employed by a "political subdivision" in adopting a district map itself or formulating a "proposal" to a court that is ultimately responsible for "implement[ing] appropriate remedies … tailored to remedy the violation." (Elec. Code § 14029). Section 10010 of the Elections Code does not limit, nor was it intended to undermine, the broad remedial authority granted to the courts by Section 14029, or the courts' inherent authority to promptly and completely remedy violations of the Equal Protection Clause like the one found by the Superior Court in this case.

II. AMICI LEAGUE AND CSDA'S ARGUMENT CONCERNING CVRA LIABILITY MERELY PARROTS THE ARGUMENT IN APPELLANT'S BRIEFS.

Amici League and CSDA begin their argument by stating their agreement with Appellant that the Superior Court's judgment that Appellant's at-large elections violate the CVRA should be reversed. (Amicus Curiae Brief of League and CSDA, pp. 10-13). But, other than its lengthy discussion that some people like district elections and other people like at-large elections (even recognizing that at-large elections may dilute minority vote), Amici League and CSDA merely parrot the arguments of Appellant on the issue of

CVRA liability. (*Id.* at p. 10).[2] The arguments concerning CVRA liability made by Appellant in its Opening Brief are amply rebutted in Respondents' Brief, and so there is no need to repeat that discussion here.

III. THE SUPERIOR COURT PROPERLY IMPLEMENTED A PROMPT AND APPROPRIATE REMEDY.

Upon finding Appellant in violation of the CVRA, the Superior Court did exactly as the CVRA mandates – "implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." (Elec. Code. §14029). In *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, this Court held that the remedial authority of California trial courts in CVRA cases is at least as broad as that set out in federal jurisprudence under the federal Voting Rights Act. As the federal jurisprudence requires, the remedies implemented by the trial court must be designed to fully and promptly remedy the violation, because "the court has not merely the power, but the duty, to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (*Louisiana v. United States* (1965) 380 U.S. 145, 154; see also *Harvell v.*

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[2] That is not an appropriate use of an amicus brief. (See *Ryan v. Commodity Futures Trading Com'n* (7th Cir. 1997) 125 F.3d 1062, 1063 ["The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse."].)

Blytheville School Dist. No. 5 (8th Cir. 1997) 126 F.3d 1038, 1040 [affirming trial court's rejection of defendant's plan because it would not "completely remedy the violation."]; *Dillard v. Crenshaw Cnty.* (11th Cir. 1987) 831 F.2d 246 ["The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."].)

California law similarly dictates that a Superior Court's equitable powers are to broadly construed to afford complete and prompt relief under the circumstances presented in each case. (*People ex rel. Mosk v. Nat'l Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 775 ["We find no abuse of discretion or excess in the use of equitable remedies in the decree as granted. Equity is not limited in the scope or type of relief which may be granted. Its decrees are molded in accordance with the exigencies of each case and the rights of the persons over whom it has acquired jurisdiction."].)

The Superior Court's implementation of a complete and prompt remedy was also mandated by the law concerning Equal Protection violations affecting voting rights. (See *N. Carolina NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239 [where intentional racial discrimination associated with elections is shown, "the racial discrimination must be eliminated root and branch" by "a remedy that will fully correct past wrongs."], quoting *Green v. Cty. Sch. Bd.* (1968) 391 U.S. 430, 437-439, *Smith v. Town of*

Clarkton (4th Cir. 1982) 682 F.2d 1055, 1068.)). The Superior Court acted well within its considerable discretion in ordering equitable remedies, and none of the various complaints asserted by Appellant's allies warrant interfering with the Superior Court's exercise of that discretion.

A. All Three Amici Fail to Recognize That Appellant Had Multiple Opportunities to Hold Public Meetings and Propose a Remedy, But Refused to Do So.

Amici's argument that the Superior Court erred in implementing a remedy it determined was appropriate, rests entirely on their incorrect assertion, which the record belies, that Appellant never had an opportunity to propose a district map. Amici League and CSDA omit any discussion of those trial court proceedings, and Amicus Transparency Project provides only a misleading recitation of only a portion of those proceedings. As explained below, the Superior Court afforded Appellant multiple opportunities to propose a district map, or any other remedy for that matter; Appellant refused, and so the Superior Court did exactly what the law demands in that circumstance – the Superior Court implemented an appropriate remedy. (Elec. Code § 14029; see also *Williams v. City of Texarkana* (8th Cir. 1994) 32 F.3d 1265, 1268 ["If [the] appropriate legislative body does not propose a remedy, the district court must fashion a remedial plan."]; *Bone Shirt v. Hazeltine* (D.S.D. 2005) 387 F.Supp.2d 1035, 1038 [same])).

1. Appellant Refused to Offer Any Remedy At Trial Even Though Remedies Issues Were Not Bifurcated.

On April 12, 2016, Respondents filed their Complaint. (1AA70-86).[3] Trial was originally scheduled to commence on October 31, 2017, but was continued, at Appellant's request, and began August 1, 2018. ***The trial was not bifurcated between liability and remedies***. Appellant never requested that the trial be bifurcated.

At trial, through the testimony of their experts and in their closing briefs, Respondents presented extensive evidence concerning a range of potential remedies, including a district map. (RT2330:14-2331:27; RT2430:11-2432:3; RT6812:17-6819:16; RT6919:14-6980:22; RT7051:27-7073:21; 22AA9750-9754; 22AA9946). Although Appellant extensively cross-examined

[3] Appellant was first notified of its violation of the CVRA on December 15, 2015 - even before Respondents filed their Complaint (1AA72-73), and had long since known that its at-large system violated the Equal Protection Clause because it was adopted with discriminatory intent (RA77-95; 25AA10952). As Amici League and CSDA concede, numerous cities have adopted district elections consistent with Elections Code section 10010 when similarly notified of a potential CVRA violation. (Amicus Curiae Brief of League and CSDA, p. 5 ["Numerous League and CSDA members have followed the procedures of [Section 10010] in converting their at-large elections to district elections" outside the context of litigation].) Appellant did not. Appellant did not even hold any public hearings to explore what a district map might look like.

Respondents' demographics expert, David Ely, about his proposed district plan (which was ultimately adopted by the Superior Court) (RT2567:19-2580:2), Appellant offered no district map, or any other remedy, of its own suggestion.

Nothing prevented Appellant from seeking bifurcation, or from holding all of the public meetings specified in Section 10010 during the 2+ years of litigation in this case before the trial even began. In fact, Appellant could have done so at a leisurely pace – the Legislature has indicated that process should take no more than 90 days, and can be completed much more quickly than that. (See Elec. Code § 10010(e)(3)(B)). As Appellant did in the Superior Court, Amicus Transparency Project argues that there was no reason "why [Appellant] would begin the process of proposing and holding public hearings" prior to the trial. But, as the Superior Court explained, Appellant had every reason to comply with Section 10010 – so it could propose a remedy to the Superior Court in case the Superior Court found in favor of Respondents:

> [Appellant's Counsel]: … we certainly wouldn't commence the process before the City made a determination about taking an appeal. Because we wouldn't even have a final judgment in this Court as to that point. Why would we do that before?
>
> The Court: Because otherwise the only remedy proposed is for Plaintiffs. That's why.

(RT9906:8-9906:14). The Superior Court correctly analogized Appellant's options in this case to the options of a defendant in a more typical civil case dealing with money damages:

> The Court: Why wouldn't you be able to [propose a remedy while contesting liability]? Defendant can [] say, "You know what? I am not liable, but if I am, I only want to pay this much." That is what you could have done. Right? Something similar. (RT9916:8-9916:11).

At the conclusion of the trial, the Superior Court found that Appellant's at-large elections violate both the CVRA and the Equal Protection Clause of the California Constitution. At that point, with Appellant having failed to propose any remedy, the Superior Court would have been justified in implementing an appropriate remedy. (See *Williams, supra*; *Bone Shirt, supra*). Still, as explained below, the Superior Court gave Appellant another opportunity to propose a district map or any other remedy.

2. Appellant Declined to Initiate the Public Input Gathering It Claims Is Required, Even After the Superior Court Ordered Appellant to Propose a Remedy:

On November 8, 2018, the Superior Court indicated that it would rule in favor of Respondents on both of their claims – for violation of the CVRA and the Equal Protection Clause. (22AA9966). At the same time, the Superior Court issued its ***order*** concerning the proceedings moving forward:

> "The Court also orders as follows:
> a) A post-trial hearing regarding the appropriate/preferred remedy for violation of the California Voting Rights Act on December 7, 2018, 9:30 a.m., Dept. 28. All counsel are ordered to appear."

(22AA9966-9967). The Superior Court's order went on to specify the briefs the Superior Court wanted in advance of the December 7, 2018 hearing. (22AA9967.) While Amicus Transparency Project claims the Superior Court never ordered Appellant to submit a proposed remedy (Amicus Curiae Brief of Transparency Project, pp. 18-19), that is plainly false. (22AA9966-9967.) The Superior Court's November 8, 2018 Order set a hearing "regarding the appropriate/preferred remedy," not regarding the appropriate/preferred *procedure for deciding on a* remedy years down the road.[4]

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[4] Attempting to read some non-existent ambiguity into the Superior Court's order, Amicus Transparency Project claims that "neither party understood the trial court's order to request or require a City proposal for district elections." That is also plainly false. While Respondents can only speculate about the understanding of Appellant, Respondents clearly understood the November 8, 2008 Order to require both sides to propose remedies in their briefing and at the December 7, 2018 hearing. That Respondents understood the November 8, 2018 Order that way – because that is what it says – is clear from Respondents' opening brief regarding remedies (in which they proposed remedies), Respondents' reply brief regarding remedies (in which they criticized Appellant for not proposing any remedy) and the transcript of the December 7, 2018 hearing (in

Yet, again, Appellant did not propose a remedy in its briefing to the Superior Court or at the December 7, 2018 hearing, other than to say that it preferred the implementation of district-based elections over the less-common at-large remedies discussed at trial. (23AA10181; RT9602:5-9635:13). Ultimately, the Superior Court honored Appellant's preference for a district-election remedy, and ordered exactly that. (24AA10736 [Statement of Decision, p. 68].)

Even ignoring the 2+ years of litigation Appellant had prior to the trial to develop a remedy proposal, the Superior Court's November 8 Order provided Appellant sufficient time to propose a remedy. Even counting from the time Appellant received the November 8 Order (November 13) to the date it filed its "Answering Brief Regarding Remedies" (November 30) – the 17 days it had was perfectly in line with what other courts have afforded defendants to propose a remedy following a determination that voting rights have been violated. (See, e.g., *Williams v. City of Texarkana* (W.D. Ark. 1992) 861 F.Supp. 756, 767 [requiring the defendant to submit its proposed remedy 16 days after finding Texarkana's at-large elections violated the FVRA], aff'd (8th Cir. 1994) 32 F.3d 1265; *Larios v. Cox* (N.D. Ga. 2004) 300 F.Supp.2d 1320, 1356-1357 [requiring the Georgia legislature to propose a satisfactory apportionment plan and seek Section 5 preclearance from the U.S. Attorney General within 19 days]; *Jauregui v. City of Palmdale*

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which Respondents again criticized Appellant for not proposing any remedy). (23AA10072-10088; 23AA10205-10212; RT9608:2-9609:13).

(Aug. 27, 2013) 2013 WL 7018376, *3 [setting a hearing on remedies 24 days after the court *mailed* its decision finding a violation of the CVRA].) While Amicus Transparency Project points out that the defendants in these cases were not constrained by Section 10010, the hurdles faced by the Georgia Legislature in *Larios* were *more* onerous than what Appellant had to deal with in this case. In *Larios*, it was not just a seven-member city council that needed to agree on a district map proposal, it was the entirety of the Georgia Legislature, consisting of 236 members; and that district map proposal also had to be simultaneously precleared by the United States Attorney General pursuant to Section 5 of the federal Voting Rights Act. (*Larios, supra,* 300 F.Supp.2d at 1356-1357).[5]

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[5] Amicus Transparency Project also attempts to distinguish the procedure employed by the trial court in *Jauregui*, by pointing out that court held a series of hearings regarding remedies. But, unlike counsel for Transparency Project, the undersigned counsel was also lead counsel for the plaintiffs in *Jauregui*, and knows the circumstances of those hearings. The trial court in *Jauregui* castigated the defendant for not proposing a remedy on the schedule ordered by that court: "You didn't meet the Court's calendar. We were supposed to do this a month ago, but I gave you additional time because you didn't submit anything last time. … You didn't follow the rules. You were supposed to do this a month ago." (Case No. B253713, Reporter's Transcript 3609:23-26; 3610:7-8). Much like in this case, the trial court in *Jauregui* held a series of hearings 1-2 months from its order setting a briefing and hearing schedule on the issue of remedies, and ultimately considered but declined to give deference to the defendant's map proposal because it had not been voted on by the defendant's city council, before adopting the district

Nor does section 10010 of the Elections Code excuse Appellant's failure to propose a remedy when ordered by the Superior Court. Even if Defendant had started the process of drawing districts upon receiving the Superior Court's November 8 Order on November 13, it could have adopted a district plan by November 30, with time to spare. Defendant could have had both of the initial public meetings required by section 10010(a)(1) that same week (November 14, 15 or 16) or even Monday of the following week (November 19). (See Gov't Code § 54956 [24 hours notice required for a special council meeting]). Then, after waiting the 7 days specified by section 10010(a)(2), Defendant could have had the two additional public hearings required by section 10010(a)(2) the week of November 26, completing the process in advance of its November 30 brief. This would have been a tight schedule, but it was possible, so if Appellant had wanted to propose a district plan in compliance with section 10010, even after waiting for the Superior Court's order to propose remedies, it could have; it chose not to.

When confronted with the Superior Court's November 8, 2018 Order, Appellant also could have started the public meetings specified by Section 10010, and asked the Superior Court for a few more weeks to complete the process. Or, Appellant could have

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map proposal from David Ely – the same demographics expert who developed the map adopted by the Superior Court in this case. (*Jauregui v. City of Palmdale* (Dec. 23, 2013) 2013 WL 7018375, *2-3)

started the public meetings, and explain in its November 30, 2018 brief that the process would be completed by the December 7, 2018 hearing, and thus give itself an extra week. Or, Appellant could have proposed a remedy without having any public meetings at all. (See *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 776 [district map proposed by certain members of the defendant's governing board, but not voted upon by the entire board at a public meeting was properly considered by the court, but not given the deference that a proposal endorsed by the board might have been given].)

Appellant did none of that. Instead, Appellant proposed no remedy at all – only a plan to thwart any effective relief by delaying the implementation of a remedy for years. Appellant refused to even start the public meeting process until, in its counsel's words at the December 7, 2018 hearing, "after the judgment is final here, after the appeal is over." (RT9604:21-9604:22).

3. Appellant Refused to Initiate Public Meetings or Propose Any Remedy Even After the Superior Court Began the Remedy Proceedings.

As it turned out, the Superior Court issued an amended decision on December 12, 2018 addressing remedies, but that decision required clarification, so the parties were back in court on January 2, 2019, again addressing the issue of remedies – yet another opportunity for Appellant to propose a remedy. (RT9901:12-9939:13). Yet again, Appellant failed to propose any remedy at all. (*Id.*) In fact, on at least five (5) occasions at the

January 2, 2019 hearing, the Superior Court invited Appellant to propose a remedy or at least commit to holding public meetings in a *reasonable* time period following the January 2, 2019 hearing (not after all appeals are exhausted years later):

> "Why shouldn't it be done now?" (RT9904:11)
>
> "Why can't it be done in short order, a public hearing?" (RT9904:22-9904:23)
>
> "Sure. Is that going to take two years? Six months? Why can't you set that a month, two months out? … In other words I agree that the other residents should have some input in some way. But why is it going to take so long, is the question?" (RT9905:5-9905:11)
>
> "Why don't you submit the [district] plan earlier, is the question … You had two opportunities: during the trial and then during the remedies hearing." (RT9915:10-9915:14)
>
> "How many times do I need to ask for it?" (RT9920:20)

But, Appellant refused, and insisted that it would not begin any public meeting process or propose any remedy until a judgment had been entered and all its appeals had been exhausted. (RT9914:7-9915:9).

Even since the January 2, 2019 hearing, Appellant has taken no actions at all to develop a district map or propose any remedy. The Superior Court did not enter judgment until February 23, 2019, and though Appellant found time to craft voluminous objections to

the Superior Court's Statement of Decision, Appellant didn't bother to begin the public meeting process of Section 10010 or present the Superior Court with a plan for promptly holding public meetings and proposing a district map. It is now more than a year since the Superior Court ordered the parties to propose remedies, and nearly four years since Respondents filed their Complaint, and still Appellant has taken no steps at all to formulate a district map of its own, or to seek public input concerning such a map.

B. The Superior Court Did Exactly What the Law Requires When Faced With a Defendant That Has Failed to Propose a Remedy.

1. The Superior Court Had the Power and the Duty to Implement a Remedy Without the Long Delay That Amici's Proposed Rule Would Have Entailed.

Faced with Appellant's repeated failures and refusals to propose a remedy, the Superior Court did exactly what Section 14029 of the CVRA and the federal caselaw concerning the federal Voting Rights Act required the Superior Court to do – "implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation," without Appellant's input. (Elec. Code § 14029; see also *Williams v. City of Texarkana* (8th Cir. 1994) 32 F.3d 1265, 1268 ["If [the] appropriate legislative body does not propose a remedy, the district court must fashion a remedial plan."]; *Bone Shirt v. Hazeltine* (D.S.D. 2005) 387 F.Supp.2d 1035, 1038 [same])).

The Superior Court unquestionably had the authority to enter its remedial orders without further delay. In *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, the court confirmed that Section 14029 of the CVRA grants the courts broad remedial authority, and that authority extends at least to taking the remedial actions that the federal courts have taken in FVRA cases. (*Id.* at 807 [In enacting the CVRA, "the Legislature intended to expand the protections against vote dilution provided by the federal Voting Rights Act of 1965. It would be inconsistent with the evident legislative intent to expand protection against vote dilution to narrowly limit the scope of … relief as defendant asserts. Logically, the appropriate remedies language in section 14029 extends to … orders of the type approved under the federal Voting Rights Act of 1965."].) Federal courts have implemented district elections with a map proposed by plaintiffs where a defendant either fails to propose a district map in the time set by the court, or where a defendant's proposal is either not legally permissible or would not completely remedy the voting rights violation; it follows that the Superior Court had the power to do the same in this CVRA case.

Amicus Transparency Project even concedes the point – if "a CVRA defendant refuse[s] to conduct the public meetings contemplated in section 10010 after being ordered to do so, a court … would have the authority to implement a remedy without the public entity's input." (Amicus Curiae Brief of Transparency Project, p. 27 (citations and quotation marks omitted).) That is exactly what Appellant did here – it refused to conduct the public

meetings, even after the Superior Court ordered the parties to propose remedies, leaving the Superior Court no option other than to implement remedies without Appellant's input (other than its stated desire for a district-election remedy).

2. Elections Code Section 10010 Does Not Limit the Court's Power or Eliminate Its Obligation to Grant a Timely Remedy.

Nothing in the text or legislative history of Section 10010 indicates an intent to limit the remedial power and duty of a court that has found a violation of the CVRA. Nothing in Section 10010 requires courts to order political subdivisions to conduct public meetings. Rather, as even Appellant acknowledges, "[s]ection 10010 ... mandates that *a public entity*" "solicit[] broad public input" before "*propos[ing]* a districting plan." (AOB p. 82 (emphasis added).) Indeed, the rest of section 10010 makes the point even clearer: all of the directing language in section 10010 applies expressly, and solely, to "political subdivision[s]," a term defined by both section 10010 and the CVRA to encompass cities, counties, school districts, and special districts – not the courts. (Elec. Code §10010(a), (b) & (d)(1), §14026(c).) Section 10010 mandates that the "*political subdivision*" changing to district based elections "shall hold at least two hearings" to gather initial input, "*the political subdivision* shall publish and make available for release at least one draft map," and subsequently "*[t]he political subdivision* shall also hold at least two additional hearings," (Elec. Code §10010(a) (emphasis added).). Here, the Superior Court recognized, "section

10010 speaks to what a political subdivision must do (e.g. a series of public meetings) in order to ... propose a legislative plan remedy in a CVRA case", but correctly reasoned that the court is not responsible for conducting those meetings for Appellant. (24AA10736-37.) Accordingly, the Superior Court ordered the parties' remedies proposals to be submitted in briefing and at a hearing; what remedies Appellant was to propose, how to propose those remedies, or even whether to make any proposal at all, were left to Appellant's choice; Appellant chose not to propose any remedy at all.

To give the impression that the Legislature's enactment of Section 10010 in 2014 was intended to restrain the broad remedial power afforded by Section 14029 of the CVRA, Amicus Transparency Project claims that Section 10010 was "added to the CVRA." (Amicus Curiae Brief of Transparency Project, p. 13). Section 10010 was not "added to the CVRA," which consists only of sections 14025-14032 of the Elections Code, nor did the Legislature give any indication that in enacting Section 10010 it sought to amend Section 14029 of the CVRA, or the CVRA's scheme for identifying when remedies are to be implemented. On the contrary, the provision upon which Amici (and Appellant) rely, section 10010(c), is expressly applicable only to a "***proposal*** that is required due to a court-imposed change from an at-large method of election to a district-based election" (emphasis added). Courts do not make proposals; courts make orders. Therefore, section 10010(c) merely provides that in order for a political subdivision's

proposal to a court to be deemed a "legislative plan," and thus perhaps be afforded some level of deference, it must have been the result of the process specified in paragraph (a) of Section 10010. (See *Williams v. City of Texarkana* (8th Cir. 1994) 32 F.3d 1265, 1268 [affirming trial court's consideration of, but refusal to give deference to, the defendant's remedial plan because it was "not a legislative plan," because the defendant's governing board did not follow required legislative process to endorse that plan]; *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 776 [county supervisors' remedial proposal "entitled to consideration along with the other suggestions that had been received" by the court, but not entitled to deference because it was not enacted by the Board under legally required procedures], cert. denied 111 S.Ct. 681 (1991)). Even if there were some ambiguity in Section 10010 as to whether it limits the remedial authority of the courts under Section 14029 (there isn't), that ambiguity should be resolved in favor of preserving the broad remedial authority of Section 14029, consistent with the purpose of the CVRA. (See *Jauregui*, 226 Cal.App.4th at 807 ["remedial legislation is to be liberally or broadly construed. Sections 14025 through 14032 in general and section 14029 specifically fall within the definition of remedial legislation."].)

The position taken by League and CSDA actually illustrates the problem with interpreting Section 10010, as Appellant and Amici do, to constrain the courts' power to "implement appropriate remedies" as commanded by Section 14029. Specifically, League

and CSDA contend that courts "may never undertake [drawing districts] themselves." (Amicus Curiae Brief of League and CSDA, p. 17). What then should a court do if, as here, the defendant refuses to undertake the public meetings specified in Section 10010(a), even when the court orders the submission of proposed remedies? According to Appellant and Amici League and CSDA, the answer is the court should do nothing.

C. The Sequence Suggested By Appellant and Its Allies Is Impractical and Is Contrary to the Law.

Unhappy with the Superior Court's "implement[ation] of appropriate remedies" promptly "upon [] finding [] a violation of the [CVRA]" (Elec. Code § 14029), Appellant and its Amici allies insist that the Superior Court was powerless to consider any remedies proposals until after Appellant had exhausted all of its appeals. That view is not only impractical, it is also contrary to the law.

In contrast to the practical procedure followed by the Superior Court, the plan Appellant and its Amici allies insist was required would result in nearly endless delay – all the while, denying the Latino residents of Santa Monica their voting rights. Under that plan: upon finding a violation of the CVRA and the Equal Protection Clause, the Superior Court would have spent the next few months preparing a proposed statement of decision, addressing Appellant's objections and preparing what Appellant called a "judgment of liability"; ***then*** as much as two months after notice of entry of judgment, Appellant would initiate the appeal process by filing a

notice of appeal; ***then*** between waiting for the docketing statement, submitting appellate briefs, oral argument, and the Court of Appeal's decision, another year will have passed; ***then*** the losing side would likely seek review from the California Supreme Court, consuming at least a few more months (if the petition for review is denied) and perhaps more than a year (if the petition is granted); only ***then*** would the Superior Court direct Appellant to contemplate a district map for another four months[6]; ***then*** the parties would argue to the Superior Court about whether that district map and election timing are appropriate; ***and then*** either side could appeal the court's decision on the selection of remedies, requiring the whole appellate process to repeat. All of that would take at least 3 years, and perhaps as much as 6 years or more; all the while, according to Appellant, it could continue to impose the same at-large election system that the Superior Court found violates the CVRA and the Equal Protection Clause of the California Constitution, or have no election at all.

That proposal, which Appellant and its Amici allies insist is what the Elections Code mandates, defies commonsense and the consistent authority that mandates that voting rights violations be remedied promptly. (See, e.g., *Williams v. City of Dallas* (N.D. Tex. 1990) 734 F.Supp. 1317 ["*In no way will this Court tell African-Americans and Hispanics that they must wait any longer for their*

[6] Appellant insisted that the public meetings of Section 10010(a) would take 120 days, even though Section 10010(e) contemplates that process should take no more than 90 days. (RT9914:8-9914:14)

voting rights in the City of Dallas."], emphasis in original). Moreover, just as a judgment for a plaintiff on a claim for breach of contract includes not just a finding that the defendant breached the contract but also the amount of damages, the judgment for a plaintiff in a voting rights case should include not just a finding that the defendant's election system violates the law but also the remedy for that violation, lest the case be subject to serial appeals. Of course, neither Appellant nor its Amici allies cite any authority for their proposed two-stage judgment designed to force the Court of Appeal to hear an interlocutory appeal addressing only liability; there is none. Rather, the courts addressing this issue have uniformly rejected the view espoused by Appellant and its Amici allies that a "judgment of liability," without specifying a remedy, is appealable. (See, e.g., *Groseclose v. Dutton* (6th Cir. 1986) 788 F.2d 356, 359 [citing several cases - "This court has consistently rejected attempts to obtain review of orders requiring the submission of remedial plans"]; *In re City of Springfield, Ill.* (7th Cir. 1987) 818 F.2d 565, 566-568 [holding that a district court's decision that at-large elections violate the federal Voting Rights Act is not appealable until the district court decides the remedy, despite the apparent efficiency and economy of deciding the issue presented to the appellate court through an interlocutory appeal]; *Cousin v. McWherter* (E.D. Tenn. 1994) 845 F.Supp. 525, 527 [holding that an order finding defendant liable under the federal Voting Rights Act, but not yet specifying a remedy, is not a final appealable order]

Section 14029 commands the Superior Court to "implement appropriate remedies" "[u]pon a finding of a violation of the CVRA," not upon having its finding of a violation of the CVRA affirmed on appeal. Elections Code Section 10010 does not dictate a different result. Rather, as discussed above, Section 10010 speaks only to what a political subdivision must do in order to propose a legislative plan to the court; Section 10010 does not curtail the power of the court to promptly and completely remedy violations of the CVRA or the California Constitution. To the extent that Section 10010 might impede the prompt remedy of violations of the Equal Protection Clause of the California Constitution, Section 10010 must yield to the Constitution. (See *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 [invalidating a state statute because it impinged upon rights guaranteed by the California Constitution].).

D. The Superior Court Was Not Required to Defer to Appellant.

Amici's argument that the Superior Court erred in implementing a remedy it determined was appropriate, also rests on their view that the Superior Court was required to defer to Appellant. The Superior Court was not required to defer to any proposal by Appellant, even if Appellant had proposed a remedy. Unlike with the federal Voting Rights Act, which has no similar provision, Section 14029 commands the *court* to implement appropriate remedies upon finding a violation of the CVRA; the CVRA does not command the defendant political subdivision to do

anything. While the federal courts addressing federal Voting Rights Act violations afford defendants some level of deference when they timely propose a "legislative plan" that promptly and completely remedies the violation, that deference is based on principles of federalism not applicable to a state court applying state law. (See *Large v. Fremont County* (10th Cir. 2012) 670 F.3d 1133, 1145-48 ["Our deference must run first and foremost to the legislative decision-making of the sovereign State and, only through it, to its subordinate political subdivision."].

To support its view, contrary to the plain text of Section 14029 ("the court shall implement appropriate remedies"), that the offending defendant enjoys the unfettered privilege of selecting remedies of its choosing, Amicus Transparency Project relies entirely on a legislative districting case – *Nadler v. Schwarzenegger* (2006) 137 Cal.App.4th 1327. In that case, the court had not found a violation of any law before undertaking the task of examining district maps. Rather, the *Nadler* court adjudicated a challenge to the routine decennial reapportionment of the State Assembly following the 2000 Census. Because Article XXI, section 1 of the California Constitution expressly conferred the task of statewide reapportionment to the Legislature, the *Nadler* court reviewed the Legislature's map under "the standard applicable to constitutional challenges generally, i.e. deference to the Legislature's judgment." (*Id*. at 1339). There is, of course, no such broad constitutional delegation of the task of local reapportionments to city councils upon a finding of a violation of the CVRA; on the contrary, that task is

explicitly delegated to the trial court. (Elec. Code §14029 ["Upon a finding of a violation of [the CVRA], ***the court*** shall implement appropriate remedies."") (emphasis added).

The California Constitution properly guides this Court's analysis. The Legislature enacted the CVRA, including section 14029, in order to assure all citizens the enjoyment of their constitutional rights to equal protection of the laws (article I, section 7(a) and the right to vote (article II, section 2), and specifically to provide a "constitutionally based protection against dilution of minority voting rights." (*Jauregui,* 226 Cal. App. 4th at 800). Thus, even to the extent that courts should follow the touchstone of deference to a legislative decision, following the finding of a CVRA violation that standard is better satisfied by the court exercising the broad authority given by the Legislature in section 14029 than by abdicating judicial responsibility to whatever proposal the offending CVRA defendant desires.

The federal cases cited by Amicus Transparency Project for its view that the courts should generally defer to a defendant political subdivision's preferences in crafting a remedy, do not actually help Appellant's cause here. In *McGhee v. Granville County* (4th Cir. 1988) 860 F.2d 110, the court affirmed that although the legislative body should have "the first opportunity to devise an acceptable remedial plan," if it "fails to respond or responds with a legally unacceptable remedy, 'the responsibility falls on the [trial court].'" (*Id*. at 115). The same is true in *Westwego Citizens for Better Gov't v. City of Westwego* (5th Cir. 1991) 946 F.2d

1109. (*Id.* at 1124 [reversing district court's judgment in favor of defendant, finding in favor of plaintiff, and remanding the case back to the district court to implement a remedy – "If Westwego fails to develop such a plan in a timely manner, or fails to develop a plan which fully remedies the current vote dilution, the responsibility for devising a remedial plan will devolve onto the federal district court."].) *Williams v. City of Texarkana* (8th Cir. 1994) 32 F.3d 1265 is even less helpful to Appellant's cause. In *Williams*, after reciting the general rule that "[i]f … an appropriate legislative body does not propose a remedy, the district court must fashion a remedial plan," the appellate court affirmed the district court's adoption of its own remedial plan over the defendant's objection, because the defendant's proposal was not a "legislative plan," as it was never actually voted on by the defendant's governing board even though it had been proposed to the district court by a majority of the governing board members. (*Id.* at 1268.) Here, Appellant failed to submit a duly adopted plan, or any district plan at all, so the Superior Court fulfilled its duty in fashioning its own remedial plan.

Indeed, even if the deference federal courts afford to states in applying federal law applied to state courts applying state law, where, as here, a defendant fails to propose a remedy, the court ***must*** fashion a remedy without the defendant's input. (See *Williams, supra*; *Bone Shirt, supra*). And, it is not particularly rare for even a federal court to reject a remedial proposal by a defendant, and the appellate courts affirm. (See, e.g. *Large v. Fremont County* (10th Cir. 2012) 670 F.3d 1133 [affirming trial court's rejection of

defendant's proposed districts because that plan did not comply with "state law and also failed to cure the harm [] identified in the original voting scheme."]; *Harvell v. Blytheville School Dist. No. 5* (8th Cir. 1997) 126 F.3d 1038, 1040 [affirming trial court's rejection of defendant's plan because it would not "completely remedy the violation."]; *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 776 [affirming rejection where "the proposal was not an act of legislation" but rather "a suggestion by some members of the Board, entitled to consideration along with the other suggestions that had been received"]; *Williams v. City of Texarkana, Ark*. (8th Cir. 1994) 32 F.3d 1265, 1268 [affirming rejection where there was "no evidence of a resolution or other action by the Board of Directors officially endorsing or recommending the 6-1 plan"].)

IV. THE SUPERIOR COURT'S FINDING THAT APPELLANT'S ELECTION SYSTEM VIOLATES THE EQUAL PROTECTION CLAUSE ALSO PRECLUDES THE PROCESS SUGGESTED BY AMICI.

Finally, the view of Appellant and its Amici allies that Section 10010 requires a years-long process to select a district map, in which the court defers to Appellant's unlawfully-elected city council, defies the law concerning remedies of Equal Protection violations affecting voting rights. Specifically, courts have consistently held that intentional racial discrimination in elections, as the Superior Court correctly found here, is so caustic to our democratic system that once intentional discrimination is shown, "the racial

discrimination must be eliminated root and branch" by "a remedy that will fully correct past wrongs." (*N. Carolina NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239, quoting *Green v. Cty. Sch. Bd.* (1968) 391 U.S. 430, 437-439, *Smith v. Town of Clarkton* (4th Cir. 1982) 682 F.2d 1055, 1068.) Deferring to the unlawfully-elected members of Appellant's council to draw a district map for their continued election, does not eliminate the discrimination "root and branch." (*Id.*) Rather, it allows the branches of that discriminatory at-large election system (the councilmembers who were elected only by virtue of the discriminatory system) to leave their stamp on any future election system. Only a clean break from that discriminatory at-large election system, including all its effects, can fully "correct [the] past wrongs" of the at-large system "root and branch." (*Id.*)

Amici entirely ignore the Superior Court's finding that Appellant's at-large election system violates the Equal Protection Clause of the California Constitution, and also ignore the palpable harm to the Latino community that the Superior Court found is attributable to the at-large system. (24AA10705-10706, 24AA10713-10727 [Statement of Decision, pp. 37-38, 45-59].) Perhaps recognizing the irony of having the unlawfully-elected councilmembers draw their own districts, privileged to have that power only by virtue of the previous discriminatory system, Amici portray Section 10010 as giving the public the power to determine district boundaries; it does no such thing. On the contrary, while Section 10010 calls for a series of public meetings, nothing prevents a city council from ultimately disregarding the preferences of the

public. The ultimate selection of a district map under Section 10010, whether part of a proposal to a court or an ordinance adopting district elections outside the context of litigation, is left to the self-interested city council members. Where, as here, the councilmembers still insist that the at-large election system is not discriminatory, how can that city council remedy a problem it refuses to acknowledge exists? Remedying a violation of the Equal Protection Clause requires something more than calling upon the fox to guard the henhouse.

Respectfully submitted,

Dated: February 10, 2020 **SHENKMAN & HUGHES**

/s/Kevin Shenkman
Kevin Shenkman

Attorneys for Plaintiffs and Respondents

CERTIFICATE OF WORD COUNT

I, the undersigned appellate counsel, certify that this brief consists of 7,058 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.204(c)(3), relying on the word count of the Microsoft Word computer program used to prepare the brief.

Dated: February 10, 2020

SHENKMAN & HUGHES

/s/Kevin Shenkman
Kevin Shenkman

Attorneys for Plaintiffs and Respondents

PROOF OF SERVICE

I, Kevin Shenkman, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years, and I am not a party to this action. My business address is 28905 Wight Rd., Malibu, CA 90265, in said County and State. On February 10, 2020, I served the following document(s):

RESPONDENT'S CONSOLIDATED RESPONSE TO AMICUS CURIAE BRIEFS OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND SANTA MONICA TRANSPARENCY PROJECT

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

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

Executed on February 10, 2020, in Malibu, California.

/s/ Kevin Shenkman
Kevin Shenkman

SERVICE LIST

Lane Dilg (277220)
City Attorney
Lane.Dilg@smgov.net
George Cardona (135439)
Special Counsel
George.Cardona@smgov.net
CITY OF SANTA MONICA
1685 Main Street, Room 310
Santa Monica, CA 90401
Tel: (310) 458-8336
(Via TrueFiling electronic service)

Theodore J. Boutrous, Jr. (132099)
TBoutrous@gibsondunn.com
Marcellus A. Mcrae (140308)
MMcrae@gibsondunn.com
*Kahn A. Scolnick (228686)
KScolnick@gibsondunn.com
Tiaunia N. Henry (254323)
THenry@gibsondunn.com
Daniel R. Adler (306924)
DAdler@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Tel: (213) 229-7000
(Via TrueFiling electronic service)

Hon. Yvette M. Palazuelos (Judge Presiding)
LOS ANGELES COUNTY SUPERIOR COURT
312 North Spring Street
Los Angeles, CA 90012
Tel: (213) 310-7009
(Via USPS)