No. S263972

In the

Supreme Court

of the

State of California

Pico Neighborhood Association, *et al.,*
Plaintiffs and Petitioners,
v.
City of Santa Monica,
Defendant and Respondent,

PETITIONERS' OPPOSITION TO RESPONDENT CITY OF SANTA MONICA'S MOTION FOR JUDICIAL NOTICE

After a Decision of the Court of Appeal
Second Appellate District, Division Eight
Case No. BC295935 (DEPUBLISHED)

Appeal from the Superior Court of Los Angeles
Case No. BC616804
Honorable Yvette M. Palazuelos

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I. INTRODUCTION

Respondent's motion for judicial notice seeks to improperly admit post-judgment evidence to attack the trial court's judgment, affording Petitioners no meaningful opportunity to respond to that evidence and no opportunity for the trial court to weigh that evidence in its factual findings. As Respondent concedes, the evidence relating to its November 2020 election for which Respondent seeks judicial notice "postdate[s] the trial court's judgment." Yet, Respondent does not, and cannot, establish the "exceptional circumstances" this Court has held are required for any appellate court to consider such post-judgment matters. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405-406.)

Treating this appeal as a trial *de novo*, as Respondent invites this Court to do, complete with new post-judgment evidence never presented to the appropriate fact-finder – the trial court – would be both disrespectful of the trial court's role and greatly prejudicial to Petitioners. Petitioners have had no opportunity to respond to the post-judgment evidence by, for example, presenting witness testimony and documents to show that the November 2020 election results were influenced by "special circumstances" that justify disregarding that election. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 57 fn. 26.) And, even if Petitioners had that opportunity now, appellate courts like this Court are ill-suited to make factual findings about the circumstances of an election and determine the

weight, if any, to be assigned to a post-judgment election. Fact finding is the role of the trial court, not to be usurped by the appellate courts.

Respondent's attempt to have this Court further take judicial notice of 2020 candidates' ethnicities and residence addresses is flawed for additional reasons. Not only are the candidates' ethnicities and residence addresses reasonably subject to dispute, in many instances there is no competent admissible evidence supporting Respondent's suppositions about those ethnicities and residence addresses.

Respondent's attempt at an end-run around the trial court should be rejected. Its motion for judicial notice should be denied.[1]

II. ARGUMENT

A. Materials Related to the 2020 City Council Election Are Improper Post-Judgment Evidence, and Should Not Be Considered by This Court.

1. Absent Exceptional Circumstances, Post-Judgment Evidence May Not Be Considered on Appeal.

The role of an appellate court is to "review[] the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*Zeth, supra,* 31 Cal.4th at p. 405, quoting *In re James V.* (1979) 90 Cal. App. 3d 300, 304.) That rule reflects the "essential distinction between the trial and the appellate court

[1] Though it is not particularly relevant to the issues in this appeal, Petitioners do not oppose Respondent's request for judicial notice of the transcript it prepared of the oral argument in the Court of Appeal below.

… that it is the province of the trial court to decide questions of fact and the appellate court to decide questions of law." (*Ibid.,* quoting *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-63.) "The rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal." (*Ibid.*; see also *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 fn. 3 [denying request for judicial notice of post-judgment deposition testimony]; *People's Home Sav. Bank v. Sadler* (1905) 1 Cal.App. 189, 193-94 ["It is therefore manifest that error on the part of the [trial] court cannot be predicated by reason of any matter occurring subsequent to its rendition of the judgment, and it is equally evident that it would be irrelevant for the appellate court to entertain any evidence of such subsequent matters."].)

This Court's decision in *Zeth* illustrates both the rationale and firmness of the rule against consideration of post-judgment events. In *Zeth*, this Court considered whether an exception to this "generally applicable rule[] of appellate procedure" should be made for appeals of orders terminating parental rights—a proposition that it conclusively rejected, reversing a series of decisions by the Fourth District Court of Appeal which had invited and relied on post-judgment evidence. (See *Zeth*, *supra*, 31 Cal.4th at pp. 407-08, 413-14.) This Court reasoned that "however well intentioned" an appellate court's consideration of events and evidence

developed during the pendency of the appeal may have been, it "effectively substitutes the reviewing court's own post hoc determination of whether termination of parental rights remains in the minor's best interests" for the judgment of the trial court. (*Id*. at pp. 409-10.) It is hard to imagine a case in which the equities more favor consideration of post-judgment evidence than one involving the termination of parental rights, yet this Court still held firm in prohibiting the consideration of any post-judgment evidence. (*Id*. at pp. 405-414.)

The rule has also been upheld in voting rights cases, in circumstances almost identical to those presented here. In the leading California Voting Rights Act ("CVRA") case of *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, the appellate court was reviewing the trial court's September 30, 2013 issuance of a preliminary injunction prohibiting the certification of the 2013 election. (*Id.* at p. 791.) The November 2013 "election was held, the votes were tabulated, but the results were not certified." (*Id.* at p. 792.) Both sides averred to the results of that election, in which the first African-American was elected to the Palmdale City Council, but the court refused to consider that election (as well as the parties' briefing concerning the results of that election) because it occurred after the preliminary injunction was issued, and post-injunction events were not "properly before" the court. (*Id.* at p. 793, citing *Zeth*, *supra*, 31

Cal.4th at pp. 405-414 and *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 442.)

The entry of new evidence on appeal is particularly inappropriate where it is introduced to justify reversing a trial court's judgment. (*Deyoung v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 863 n.3, citing *First. Nat. Bank v. Terry* (1930) 103 Cal.App. 501, 509.) Though post-judgment evidence has occasionally been taken by appellate courts for the purpose of further supporting affirmance of a judgment, post-judgment evidence may not be used to argue for reversal. (*Ibid.*; *Bassett v. Johnson* (1949) 94 Cal.App.2d 807, 812 ["normally, additional evidence will be taken by an appellate court only for the purpose of affirmance and not for the purpose of reversal."].) It is also inappropriate to consider new evidence where it would require the appellate court to resolve factual conflicts. (*Butt v. State of Cal.* (1992) 4 Cal.4th 668, 697 n.23.)

Only in "exceptional circumstances" should an appellate court consider post-judgment events, or make factual findings of its own. (*Zeth, supra,* 31 Cal.4th at pp. 405-406; see also *Cal. School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 803 ["It is a fundamental principle of appellate law that our review of the trial court's decision must be based on the evidence before the court at the time it rendered its decision. The School Districts have not cited any exceptional circumstances that would justify a deviation from this rule in this appeal."] (internal citations

omitted).) The most typical circumstance justifying consideration of post-judgment events is where those events may render the appeal moot. (See *People's Home Sav. Bank*, *supra*, 1 Cal.App. at pp. 193-194 [collecting cases]). But, even where post-judgment events are considered to evaluate mootness, they are then disregarded when considering the merits of the appeal. (See *Center for Biological Diversity v. Department of Conservation* (2018) 26 Cal.App.5th 161, 170-171 ["We conclude that resolving the mootness question constitutes exceptional circumstances warranting our taking the additional documentary evidence for this limited purpose. Appellant also relies on this additional evidence in arguing the judgment should be reversed. We find no extraordinary circumstances warranting our consideration of the evidence for such purposes, and we thus do not consider it in determining the merits of the appeal."] (internal citations omitted).)

In the two cases cited by Respondent in which an appellate court took judicial notice of post-judgment election materials, they did so to evaluate mootness, not the merits. *Edelstein v. City & County of San Francisco* (2002) 29 Cal.4th 164 involved the constitutionality of the City and County of San Francisco's prohibition of write-in voting in runoff elections for municipal offices. After the Court of Appeal granted review, San Francisco voters adopted a proposition amending San Francisco's charter to adopt instant runoff voting. In considering whether the question

before the court was moot, the court took judicial notice of information in the voter information pamphlet about the proposition and the results of the election on the proposition. (*Id.* at p. 171.) Mootness is an inquiry that necessitates post-judgment evidence about whether the circumstances of the dispute have changed such that an active case or controversy is no longer presented. Similarly, *Chambers v. Ashley* (1939) 33 Cal.App.2d 390 involved a writ to prohibit the name of a candidate for office from being placed on a ballot. The election came and went, and the Court of Appeal judicially noticed the results of the election in concluding that the appeal had become moot. (*Id.* at p. 392 ["Our conclusion that the question presented on this appeal is moot makes it unnecessary for us to consider the second ground for the dismissal of the appeal."].)[2]

Respondent makes much of the admission of post-*filing* election results at the trial in this case, and the CVRA's contemplation that those

[2] The other cases cited by Defendant in which a court took judicial notice of election results, did not involve post-judgment elections at all. (See *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1425-1427; *Dudum v. Arntz* (9th Cir. 2011) 640 F.3d 1098, 1101-1103). Respondent does not cite *Yumori Kaku v. City of Santa Clara* (2020) 59 Cal.App.5th 385 in its request for judicial notice, but Petitioners believe it would be helpful to distinguish the Court of Appeal's judicial notice of the post-judgment election results in that case. In *Yumori Kaku*, the request for judicial notice was unopposed (see *id.* at p. 399 fn.5), and the election results were introduced in support of affirmance of the trial court's judgment, not reversal. (See *Deyoung*, *supra*, 159 Cal.App.3d at p. 863 fn.3.) Ultimately, the *Yumori-Kaku* court did not refer to or cite the post-judgment election results in its analysis of the trial court's actions.

elections may have some probative value. (See Elec. Code §14028(a).) But that is far different than post-*judgment* elections. As with the 2016 election in this case, post-*filing* elections can be addressed by the litigants at trial, and given appropriate weight by the trial court in making findings of fact. Post-*judgment* elections, in contrast, cannot be addressed or given context by witness testimony and other evidence, or weighed by the trial court.

2. There Are No Exceptional Circumstances Here That Would Make Judicial Notice of a Post-Judgment Election Appropriate.

Respondent fails to point to any exceptional circumstance that would warrant admission of post-judgment evidence in this appeal. Respondent does not claim its appeal, or this case more generally, is moot. Nor could Respondent argue this case is moot; Respondent persists in utilizing a racially discriminatory at-large election system.

Rather, Respondent contends the 2020 election results are relevant to the merits – "whether Santa Monica's at-large election system dilutes the voting strength of Latino voters in City Council elections" (Request for Judicial Notice, p. 10). Respondent would have this Court disregard the trial court's factual finding – that "as a result [of racially polarized voting], though Latino candidates are generally preferred by the Latino electorate in Santa Monica, only one Latino has been elected to the Santa Monica City Council in the 72 years of the current election system – 1 out of 71 to serve

on the city council" (24AA10680-10681 [Statement of Decision, pp. 12-13]) – because at one snapshot in time, and after the trial court's judgment, two other candidates Respondent identifies as Latino were elected. That consideration of post-judgment events to attack the factual findings of the trial court, is exactly what this Court and countless other courts have repeatedly cautioned is inappropriate.

Nor is there anything exceptional about the fact that another election has occurred while this case was pending on appeal. Indeed, permitting new evidence of electoral results to be raised every two years during the pendency of often-prolonged appellate proceedings in voting rights cases would make finality elusive for litigants, the public and the courts.

Respondent seeks to do with post-judgment events exactly what this Court and many other courts have held is inappropriate – use post-judgment evidence to attack the factual findings of the trial court. (See Section II.A.1, *supra*.) Therefore, the results of the November 2020 election and any discussion of the November 2020 election results should be rejected as "not properly before the Court." (*Jauregui, supra*, 226 Cal. App.4th at p. 793.)

3. Appellate Courts Are Ill-Suited to Determine the Probative Value of Election Results Never Subjected to Examination at Trial.

Though there are no exceptional circumstances that would justify consideration of the 2020 election, there are numerous additional reasons specific to this case why it should not be considered by this Court.

The question of vote dilution requires "an intensely local appraisal of the design and impact of the [contested electoral mechanisms]." (*Gingles*, *supra*, 478 U.S. at p. 79 (quoting *White v. Register* (1973) 412 U.S. 755, 769-70); *see also Yumori Kaku v. City of Santa Clara* (2020) 59 Cal. App. 5th 385, 410.) Each election must be viewed in context to determine, for example, whether the election involved "special circumstances" that warrant disregarding minority success in that election (*Gingles*, supra, 478 U.S. at p. 57 & fn. 26), as the trial court found with the 2012 election in this case. (24AA10686-10687 [Statement of Decision, pp. 18-19.) At trial, Petitioners elicited testimony from four city council candidates (Tony Vazquez, Maria Loya, Steve Duron and Oscar de la Torre) and an expert historian (Dr. J. Morgan Kousser) to provide context for each of the elections analyzed by the trial court.

That inquiry is especially important for elections held while voting rights litigation is pending. (See *Collins v. Norfolk* (4th Cir. 1987) 816 F.2d 932, 938 ["[A] trial court must consider, for example, whether [a minority candidate's] success was prompted by an attempt to forestall

Voting Rights Act litigation."]; *United States v. Vill. of Port Chester* (S.D.N.Y. 2010) 704 F. Supp. 2d 411, 442 [finding that a post-lawsuit election, in which the lawsuit was a central campaign issue, was a "special circumstance" that created an outlier in the defendant's election history].) While a trial court can admit and assess qualitative and statistical evidence, including witness testimony, submitted by both sides of a case to weigh and contextualize the results of an election, an appellate court cannot.

Respondent's request for judicial notice does not present this Court with any evidence about the November 2020 election – aside from the numeric results and where some of the candidates said they resided. To properly evaluate the implications of the 2020 election, a court would have to consider all of the contextual evidence, and more, bearing on the weight, if any, to be afforded to that election. To consider the 2020 election without affording Petitioners an opportunity to elicit and present contextual evidence, as Respondent seeks to have this Court do through its judicial notice motion, would be greatly prejudicial to Petitioners. (Evid. Code §§ 352; 454(a)(2) [appellate courts may decline to take notice of otherwise judicially noticeable facts if their probative value is substantially outweighed by the probability that their admission will create a substantial danger of undue prejudice to the adverse party].)

Because the Parties disagree about the implications of the November 2020 election, the admission of such evidence would require this Court to

resolve a "factual conflict," and therefore it should not be considered by this Court. (*See Butt, supra*, 4 Cal.4th at p. 697, fn. 23.)

B. The Ethnicities and Residence Addresses of Candidates Is Not Subject to Judicial Notice.

Through its motion, Defendant seeks judicial notice of not just the 2020 election results, but also the ethnicities of the candidates and their residence addresses. Even if the post-judgment election results were properly subject to judicial notice (they're not), the purported ethnicities and residence addresses of the candidates still would not be.

This Court summarized the relevant principle in *Mangini v. R.J. Reynolds Tobacco* (1994) 7 Cal.4th 1057:

> While courts may notice official acts and public records, "we do not take judicial notice of the truth of all matters stated therein." [Citations.] "[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom."

(*Id.* at pp. 1063-1064, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276; see also *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal.App.4th 514, 519.)

Respondent seeks to have this Court notice not just the 2020 candidates' statements, but also the truth of those statements – specifically, where those candidates resided at some time after the judgment in this case.

(Motion, pp. 12-13.) The existence of the candidates' statements might be "not reasonably subject to dispute" (Evid. Code §452(h)), but the truth of those statements is another matter altogether. Politicians, including city council candidates, have been known to misrepresent their residence addresses, and Santa Monica residents have questioned whether one particular councilmember even resides within the city at all. (See, e.g., Merl, *State Sen. Roderick Wright Found Guilty of Perjury, Voter Fraud*, Los Angeles Times (Jan. 28, 2014).) The candidates' statements about their residence addresses, being offered for the truth of those statements, is inadmissible hearsay. (Evid. Code §1200.)

Respondent also seeks to have this Court take judicial notice of the ethnicities of several of the 2020 candidates, even though there is no evidence at all of some of those candidates' ethnicities, and the ethnicity of at least one of those candidates is very much in dispute. Specifically, while Respondent asks this Court to take judicial notice that Gleam Davis is Latina, the trial court provided important context and explanation for Ms. Davis' ethnicity:

> One of Defendant's city council members, Gleam Davis, testified that she considers herself Latina because her biological father was of Hispanic descent (she was adopted at an early age by non-Hispanic white parents). Though that may be true, the Santa Monica electorate does not recognize her as Latina, as demonstrated by the telephone survey of registered voters conducted by Jonathan Brown; even her fellow council members did not realize she considered herself to be Latina until after the present case was filed. Consistent with the

> purpose of considering the race of a candidate in assessing racially polarized voting, it is the electorate's perception that matters, not the unknown self-identification of a candidate.

(24AA10684-10685 [Statement of Decision, pp. 16-17 fn. 7].)

Respondent's identification of Zoe Muntaner as Latina, for example, is similarly dubious, and lacks any evidentiary support. Ms. Muntaner did not testify at trial; no witness identified Ms. Muntaner as Latina; and, unlike with other historical candidates, there was no survey evidence to measure the Santa Monica electorate's recognition of Ms. Muntaner or what her ethnicity might be. (RA50-52.) The candidates' ethnicities are far from being "not reasonably subject to dispute." (Evid. Code §452(h).)

C. The Transcript of the Oral Argument in the Court of Appeal Below Is Not Relevant to the Issue on Appeal.

Petitioners do not oppose this Court taking judicial notice of the transcript Defendant prepared from an audio recording of the oral argument in the Court of Appeal below. However, Petitioners feel compelled to address Defendant's mischaracterization of that oral argument and point out that neither that oral argument, nor any other arguments by counsel, could be "relevant to the question whether plaintiffs have proven dilution," or "whether plaintiffs' proposed test for dilution is judicially manageable," as Defendant contends. (Request for Judicial Notice, pp. 8-9.)

Respondent points specifically to an exchange between Petitioners' counsel and one of the Court of Appeal justices. That justice demanded

that Petitioners' counsel specify a precise minimum percentage of a single-member district at which CVRA liability could be established. Petitioners' counsel declined to do so, because, as explained more fully in Petitioners' Opening Brief: 1) the CVRA provides "the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of … a violation" (Elec. Code §14028(c)); and 2) factors other than the minority proportion of a remedial district also impact the likely effectiveness of a district remedy. (Opening Brief, pp. 20-21, 35-56.) Nothing about what Petitioners' counsel stated in oral argument is inconsistent with that position, or the proper interpretation of the CVRA. In any event, nothing said by either counsel or any justice in the oral argument below could affect the proper interpretation of the CVRA, or whether, under that proper interpretation, the trial court's factual findings support its conclusion that Respondent's at-large elections violate the CVRA. (See *People v. Castillo* (2010) 49 Cal.4th 145, 171 ["When a particular legal conclusion follows from a given state of facts, no stipulation of counsel can prevent the court from so declaring it."], collecting cases.)

III. CONCLUSION

For all the reasons above, Respondent's motion for judicial notice should be denied.

Dated: April 6, 2021

Respectfully submitted,

SHENKMAN & HUGHES

/s/ Kevin Shenkman
Kevin Shenkman

Attorneys for Petitioners

PROOF OF SERVICE

I am a citizen of the United States, am over the age of 18 years, and not a party to the within entitled action. My business address is 155 Grand Avenue, Suite 900, Oakland, CA 94612. I declare that on the date hereof I served the following documents:

PETITIONERS' OPPOSITION TO RESPONDENT CITY OF SANTA MONICA'S MOTION FOR JUDICIAL NOTICE

☒ **By Electronic Service:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service address(es) as set forth below

Via Electronic Filing/Submission:
(Via electronic submission through the TrueFiling web page at www.truefiling.com)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 6th day of April 2021, at Oakland, California.

Scott G. Grimes