No. S263972

In the

Supreme Court

of the

State of California

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

APPLICATION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE; [PROPOSED] REPLY

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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APPLICATION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

Petitioners and Plaintiffs Pico Neighborhood Association and Maria Loya (collectively, "Plaintiffs") respectfully request that the Court grant it leave to file a reply in support of its pending motion for judicial notice.

The California Rules of Court do not specifically provide for reply briefs in support of motions in the Supreme Court, but they do not preclude them either. (See Cal. Rules of Court, rule 8.54.) The leading practice guide indicates that reply briefs may be permitted if there is good cause. (See Eisenberg et al., Cal. Practice Guide: Civ. Appeals & Writs (The Rutter Group 2020) ¶ 5:254.) Indeed, this Court previously permitted Defendant City of Santa Monica ("Defendant") to file a reply brief in support of its motion for judicial notice. (See April 13, 2021 Order)

Here, good cause exists to permit Plaintiffs to respond to Defendant's "Response" to Plaintiffs' motion for judicial notice. As explained below, rather than address the propriety of taking judicial notice of the legislative history of Senate Bill 976 (2001-2002), which Defendant states it does not oppose, Defendant's "Response" attempts to further argue the merits of the broader appeal. Defendant had its opportunity to argue the merits in its Answer Brief, and Plaintiffs responded to that Answer Brief with their Reply Brief – as provided by the rules of this Court. Defendant's attempt to use its "response" to argue the merits of the case more broadly,

rather than address the motion for judicial notice itself, is improper, and necessitates affording Plaintiffs the opportunity to respond.

[PROPOSED] REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

While the parties are in agreement that the legislative history, gathered by LRI History LLC and attached as Exhibit A to Plaintiffs' motion, is properly subject to judicial notice, Defendant attempts to use Plaintiffs' motion as an opportunity to further argue about the import of that legislative history. As explained in Plaintiffs' Opening Brief (pp. 20-21, 36-39, 43) and Reply Brief (pp. 14-15), the legislative history of Senate Bill 976 overwhelmingly supports Plaintiffs' interpretation of the California Voting Rights Act ("CVRA"), and repeatedly contradicts the interpretation by the Court of Appeals and Defendant that CVRA liability is conditioned on a minority community being geographically concentrated enough to comprise the majority (or "near-majority") of a single-member district.

Defendant claims it "had no opportunity to respond to" the legislative history "in connection with its answer brief on the merits." That is simply not true, and this Court's records prove it. Plaintiffs had extensively discussed the legislative history in their petition for review (pp. 19-20), reply in support of their petition for review (p. 10), and opening merits brief (pp. 20-21, 36-39, 43), all several months before Defendant's answer brief. Moreover, the entire legislative history for which judicial

notice is sought now, was filed with the Court of Appeal and served on Defendant more than a year ago by Amici Curiae Senator Richard Polanco and Councilmembers Juan Carrillo, Richard Loa, Austin Bishop and Richard Loa. There is no excuse for Defendant's failure to address the legislative history in its Answer Brief.

Nonetheless, Defendant attempts to use the motion for judicial notice, which it "does not oppose," to further argue the merits of its appeal. So, Plaintiffs are compelled to respond, and do so in the same order in which Defendant makes its three "points."

1. **Nothing in the Legislative History Supports Defendant's View That Dilution Under the CVRA Depends on a Minority Community's Geographical Concentration.**

First, Defendant cites a legislative analyst's question expressing confusion about "what benefit would result from eliminating at-large elections" if the minority community were "not sufficiently geographically compact." But Defendant omits, and fails to address, Senator Polanco's compelling response to the question:

> The analysis asks: if a minority community is not sufficiently geographically compact to ensure that it can elect one of their members from a district, what is gained by eliminating the at-large system?
> Response
> Two points:

> First, Thornburg v Gingles is limited in its scope. It applies only to applications of the [FVRA]. Any state laws that expand voting rights beyond the federal statutes are not impacted by the case. This Legislature can and does enact laws that provide Californians with better and more specific statutes than those in similar federal legislation. For example, we created the Unruh Civil Rights Act … .
>
> Second, although a particular group may be too small to ensure that its own candidate is elected, the group may still be able to favorably influence the election of a candidate. This influence may only come about with district rather than at-large elections.

(Plaintiffs' Motion for Jud. Notice, Ex. A ("Ex. A"), pp. 112-113 [Statement of Sen. Polanco to Assem. Elections and Reapportionment Com., Apr. 2, 2002].; also see Ex. A, pp. 115-116 [statement by Saeed Ali on behalf of Senator Polanco on May 2, 2001 to the Senate Committee on Elections and Reapportionment).

That the same question appears in the Senate Republican Commentaries is of no consequence. As John Haggerty recently pointed out in his proposed amicus brief, Senate Bill 976 was passed without a single Republican vote. (Haggerty Proposed Amicus Brief, pp. 20-21). And, the explicit purpose of the Senate Republican Commentary on which Defendant relies, was to oppose Senate Bill 976. (Ex. A, p. 97.) The intent of the legislature in enacting the CVRA surely cannot be elucidated by the statements of legislators who *opposed* its enactment. (See *Labor Board v.*

Fruit Packers (1964) 377 U.S. 58, 66 ["[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. … 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.'"], quoting *Schwegmann Bros. v. Calvert Distillers Corp*. (1951) 341 U. S. 384, 394-395.) The response of Senator Polanco, the chief legislative sponsor of the CVRA, to that question is far more important (see *id.*), and despite that compelling response being pointed out in Plaintiffs' Reply Brief, Defendant still omits any mention of it. Defendant's inability to reconcile Senator Polanco's statement with its unduly narrow interpretation of the CVRA speaks volumes.

Moreover, the very documents on which Defendant relies, actually undermine Defendant's position. The Analysis of the Senate Committee on Elections and Reapportionment, for instance, makes clear that a violation of the CVRA is established by showing racially polarized voting, and it is not necessary for a plaintiff to show that the minority community is geographically compact or concentrated:

> [The bill p]rovides that a violation of this prohibition is established if it is shown that racially polarized voting occurs in elections for members of the governing body or in elections incorporating other electoral choices by the voters of the same jurisdiction. …

> Unlike the preconditions established by the Supreme Court in Thornburg v. Gingles , this bill does not require that the minority community be geographically compact or concentrated.

(Ex. A at pp. 37-38.) The same is true of the Senate Bill Analysis, which explains the CVRA:

> Establishes that voter rights have been abridged if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. …
>
> Specifies that … the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting. … and
>
> This bill … does not require that a minority community be sufficiently concentrated geographically to create a district in which the minority community could elect its own candidate.

(Ex. A at pp. 124-126). Even the Senate Republican Commentaries acknowledge that Senate Bill 976 "would provide that a violation of its provisions shall be established if it is shown that racially polarized voting occurs in elections for governing board members of a political subdivision." (Ex. A, p. 97)

Next, Defendant misrepresents Senator Polanco's July 2, 2002 letter to the Governor. In that letter, Senator Polanco used an example of a 49% minority district to demonstrate the failings of the federal Voting Rights Act, and the faulty assumptions that underlie the geographic compactness

requirement established by federal courts interpreting the federal Voting Rights Act. Nothing in Senator Polanco's letter indicates that his extreme example is intended to describe the full scope of the CVRA's protections.

2. The CVRA Does Not Require the Wholesale Abandonment of At-Large Elections, But It Does Prohibit an At-Large Election System in Which Racially Polarized Voting Exists.

Next, Defendant points to the bill analysis of the Assembly Committee on the Judiciary and the Enrolled Bill Report to support its contention that the CVRA does not require the "wholesale abandonment of at-large elections." (Defendant's Response, p. 3.) Plaintiffs do not disagree, and never have. The CVRA requires the abandonment of at-large elections *only* where there is racially polarized voting in those at-large elections. And that requirement is irrespective of whether the minority community is geographically concentrated.

Indeed, the very documents Defendant cites actually support *Plaintiffs'* view. The Bill Analysis of the Assembly Committee on the Judiciary explains that racially polarized voting is the problem the CVRA is meant to combat:

> [The CVRA p]rohibits racially polarized voting, as defined, in elections for members of the governing body of a political subdivision or in elections incorporating other electoral choices by the voters of a political subdivision. …
> SB 976 addresses the problem of racial block voting, which is

particularly harmful to a state like California due to its diversity. (Ex. A, p. 59.) The Committee's analysis further emphasized that geographical concentration of a minority community – what Defendant and the Court of Appeal insist is required to show vote dilution – is not relevant at all to CVRA liability:

> Restrictive interpretations given to the federal act, however, have put the cart before the horse by requiring that a plaintiff show that the protected class is geographically compact enough to permit the creation of a single-member district in which the protected class could elect its own candidate. This bill would avoid that problem. …
>
> This bill would allow a showing of dilution or abridgement of minority voting rights by showing the first two Thornburg requirements without an additional showing of geographical compactness. Under other decisions of the U.S. Supreme Court, the geographical compactness or concentration of the protected class within a political subdivision is a factor in determining whether a district may be drawn to allow that class of voters to elect the candidate of their choice. This bill recognizes that geographical concentration is an appropriate question at the remedy stage. However, geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).

(Ex. A, p. 60.) The same is true of the Enrolled Bill Report, which likewise confirms that vote dilution under the CVRA is established by racially polarized voting, and that it does not depend on the geographic concentration of a minority community:

> [The CVRA would p]rovide that if there is a finding of racially polarized voting, the court shall implement appropriate remedies, including the imposition of district-based elections that would be tailored to remedy the violation. …
>
> One of the three conditions [to show vote dilution under the federal Voting Rights Act] is that the plaintiff must show that the protected class is geographically compact enough that it would be a majority in a single district (and presumably elect its own candidate.) SB 976 would provide that such a finding is NOT necessary and that a protected class need only demonstrate the other two Gingle.factors - i.e., that the minority community is politically cohesive and usually supports minority candidates and that there is racially polarized voting in the majority community.

(Ex. A, p. 85.)

3. The CVRA Was Aimed at Combating the Dilution of Minority Voting Power, and that Dilution Is Shown By Racially Polarized Voting, Not the Geographical Concentration of the Minority Community.

Finally, Defendant contends the "CVRA was aimed at combating the dilution of minority voting power." Again, Plaintiffs do not disagree. But

Defendant and the Court of Appeal fail to recognize that the dilution of minority voting power that the CVRA was aimed at combating, is demonstrated by showing racially polarized voting, not the geographical concentration of the minority community.

As discussed above, the Bill Analysis of the Assembly Committee on the Judiciary, that Defendant cites for its unremarkable contention that the CVRA combats vote dilution, actually support *Plaintiffs'* view of how vote dilution is shown under the CVRA. Indeed, as illustrated by the documents *Defendant* chose to cite from the legislative history, nearly every document in the legislative history confirms that the vote dilution prohibited by the CVRA is established by showing racially polarized voting in at-large elections, and a finding of vote dilution under the CVRA is not dependent on a minority community being geographically concentrated.

Dated: June 3, 2021

Respectfully submitted,

SHENKMAN & HUGHES

/s/Kevin Shenkman
Kevin Shenkman
Attorneys for Plaintiffs Pico Neighborhood Association and Maria Loya (Respondents in the Court of Appeal)

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:

APPPLICATION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE; [PROPOSED] REPLY

☒ **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 3rd day of June 2021, at Oakland, California.

Scott G. Grimes