

No. B295935

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

CITY OF SANTA MONICA,

Appellant-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION and MARIA LOYA,

Respondents-Plaintiffs.

**APPELLANT'S MOTION FOR CALENDAR PREFERENCE;
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT**

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

Gov't Code, § 6103

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APPELLANT'S MOTION FOR CALENDAR PREFERENCE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Appellant City of Santa Monica hereby moves this Court for preference on the hearing calendar. Calendar preference is warranted under Code of Civil Procedure sections 35 and 44, which permit calendar preference in actions that, like this one, involve election contests. Calendar preference would also serve the “interests of justice” (Code Civ. Proc., § 36, subd. (e)), as it would minimize uncertainty about the future of the method of election for the Santa Monica City Council, especially with respect to the next regularly scheduled Council election in November 2020. To the extent possible, that election should be held as currently scheduled, with both candidates and voters confident that the method under which it is conducted is legally valid, that all votes matter, and that the candidates elected will be able to serve out their terms. If this appeal is not promptly heard and decided by July 10, 2020, the City will be unable to hold an election in November 2020 without compromising the democratic principles that the City has brought this appeal to defend.

This Motion is based on the accompanying Memorandum, the concurrently filed Declaration of Kahn A. Scolnick and accompanying exhibits and the concurrently filed Proposed Order.¹

¹ Counsel for the City reached out to counsel for respondents-plaintiffs on April 24, 2019, to ask whether respondents-plaintiffs would oppose this motion. (Scolnick Decl., ¶ 15.) Counsel for respondents-plaintiffs stated, among other things, that

DATED: April 29, 2019

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
Theodore J. Boutrous, Jr.

*Attorneys for Appellant-Defendant,
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“Plaintiffs too would like to see a prompt resolution of Defendant’s appeal,” but did not state whether respondents-plaintiffs would oppose this motion. (*Ibid.*) On April 26, 2019, counsel for the City sent counsel for respondents-plaintiffs a draft of this motion. (*Ibid.*) As of the date of this filing, respondents-plaintiffs have not indicated whether they will oppose this motion or file anything in response. (*Ibid.*)

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The City of Santa Monica respectfully seeks calendar preference so that this appeal may be heard and decided by July 10, 2020. This schedule would make it more likely that the City will be able to hold its next Council election on the next regularly scheduled election date, in November 2020. Following the regular election schedule would increase voter engagement and turnout, provide voters with their expected opportunity to regularly select their Council members, and avoid the expenditure of public funds on a special election on a different date.

This appeal concerns the lawfulness of the City's at-large method of electing the members of its City Council. The key provisions of the trial court's judgment—i.e., an order requiring the City to hold a district-based election on July 2, 2019, and an order requiring Council members to step down on or before August 15, 2019—are automatically stayed pending appeal. (Scolnick Decl., Exs. A, B.) As a result, Council members duly elected in 2016 and 2018 will continue to serve on the Council pending the disposition of this appeal.

Although it is now clear that the City need not hold a district-based Council election this summer, it is unclear when the City will be able to hold its next Council election. To maximize voter turnout, maintain the expected regular opportunity for voters to select their Council members, and minimize disruption to City government, the City would prefer to hold its next election—whether at-large or district-based—on the next regular

election date, in November 2020. That is when the terms of the four Council members elected in 2016 (a majority of the Council) will expire.

Accordingly, if it is practicable to do so, the City asks that the Court resolve this appeal by no later than July 10, 2020. A decision by that date would, barring further review by the California Supreme Court, allow the City to, in accordance with its regular election schedule, notice a Council election for the same date in November 2020 as the presidential election. (See Elec. Code, § 12101 [requiring notice of municipal election at least 113 days before election date].)

Calendar preference is appropriate in this case for two reasons:

First, two statutes require preference for cases that, like this one, concern elections. This case involves “election contests,” as the trial court’s judgment expressly addresses the method by which the City may hold future elections, and such cases “shall be given precedence” under Code of Civil Procedure section 35. This case is also a “contested election case[],” insofar as there is a dispute as to who should be seated on the Council, and such cases likewise “shall be given preference” under Code of Civil Procedure section 44.

Second, even if sections 35 and 44 did not squarely apply, the “interests of justice” would still warrant calendar preference. (Code Civ. Proc., § 36, subd. (e).) This case implicates Santa Monica residents’ fundamental right to vote and will determine how the City’s leaders will be elected in the future. The Court

should resolve this appeal swiftly so that the City may notice and hold an election according to the regular schedule, in November 2020, without any question that a decision of this Court would require or allow a second election, under a different method of election, to be held shortly thereafter. Calendar preference would thus minimize voter confusion and the City's election-related expenses and would promote the smooth functioning of City government.

II. STATEMENT OF FACTS

The City of Santa Monica has used the same at-large method of election for seats on its City Council since 1946.

Plaintiffs filed this action in April 2016, alleging that the at-large method of electing Council members violated the California Voting Rights Act and the Equal Protection Clause of the California Constitution.

The case went to trial on August 1, 2018. After post-trial briefing, the trial court issued a tentative decision in favor of plaintiffs. (Scolnick Decl., Ex. C.) The City timely requested a statement of decision, which the trial court ordered plaintiffs to prepare. (*Id.*, Exs. D, E.) In response to plaintiffs' proposed statement of decision and judgment, the City timely filed extensive objections. (*Id.*, Exs. F, G, H.)

The trial court issued a final judgment and statement of decision on February 13, 2019, summarily overruling the City's objections to the proposed judgment and sustaining only a handful of the City's objections to the proposed statement of decision. (*Id.*,

Exs. A, I, J.) The final judgment and statement were substantively identical to plaintiffs’ proposals. (See *id.*, Exs. A, F, G.)

The judgment, *inter alia*, ordered the City to hold a special district-based election on July 2, 2019, for all seven Council seats, and prohibited any current Council member from serving after August 15, 2019. (*Id.*, Ex. A, ¶¶ 8,9.)

The City timely appealed from the judgment on February 22, 2019. (Scolnick Decl., Ex. K.) After the trial court declined to confirm that the order prohibiting Council members from serving after August 15, 2019, was automatically stayed pending appeal, the City filed a petition for a writ of supersedeas in this Court on March 8, 2019. (*Id.*, L, M.) This Court granted the City’s petition on March 27, 2019. (*Id.*, B.) As a result, both the trial court’s order requiring the City to conduct a special district-based election and its order prohibiting Council members from serving after a date certain will remain stayed pending resolution of this appeal.

III. ARGUMENT

Calendar preference results in an “expedited appeal schedule, which may include expedited briefing and preference in setting the date of oral argument.” (Cal. Rules of Court, rule 8.240.)

The Code of Civil Procedure requires calendar preference for certain categories of appeals—including “contested election cases” and cases involving “election contests.” (Code Civ. Proc., §§ 35, 44.) Preference is thus required for this appeal, which concerns

the method by which Santa Monica’s City Council members will be elected. And even if preference were not required by the Code, the Court should nevertheless exercise its discretion to grant calendar preference to ensure “that the interests of justice will be served.” (*Id.*, § 36, subd. (e).)

A. Sections 35 and 44 of the Code of Civil Procedure provide for preference of appeals relating to elections.

Section 35 of the Code of Civil Procedure provides that “[p]roceedings in cases involving . . . election contests . . . shall be given precedence.” Similarly, section 44 provides that “[a]ppeals . . . in contested election cases . . . shall be given preference.” This appeal qualifies for calendar preference under both provisions, as it places directly at issue the lawfulness of elections held in the City over the last seven decades.

The trial court’s judgment also contains injunctions directly relating to election contests to be held in the City—among other things, the judgment orders the City to hold a special district-based Council election and to refrain from holding any further at-large Council elections. Expedition of the appeal is therefore warranted under the Code. (See *Malibu Comm. for Incorporation v. Bd. of Supervisors* (1990) 222 Cal.App.3d 397, 401 [noting appeal was expedited under section 35 “[d]ue to the precedence given election matters”].)

B. Alternatively, the Court should exercise its discretion to grant calendar preference.

In addition to the statutes requiring preference, section 36(e) of the Code of Civil Procedure also gives courts the

“discretion [to] grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference.” (See, e.g., *Warren v. Schechter* (1997) 57 Cal.App.4th 1189, 1199 [noting that section 36(e) applies in appellate context].)

Courts have exercised discretion to grant calendar preference when, for example, a party seeks a decision in advance of a certain deadline that would subject that party to irreparable harm. (See, e.g., *Giraldo v. Dep’t of Corr. & Rehab.* (2008) 168 Cal.App.4th 231, 240–241 [noting that court had granted calendar preference to appellant who requested a trial date before her date of parole because the injunctive portions of her action would “arguably become moot”].)

The City of Santa Monica currently faces such a deadline. The next regularly scheduled City Council election is set to occur as part of the general election on Tuesday, November 3, 2020. The City needs to know approximately four months in advance of that date whether it can hold any Council election at all and, if so, by what method its new Council members will be elected. (See Elec. Code, § 12101 [City must notice election at least 113 days before election date].) Absent a decision from this Court well before the November 2020 election, the City, potential candidates, and voters will face unacceptable uncertainty.

Without guidance from this Court, it would not be clear whether the City would hold any Council election at all. To be sure, the City could, consistent with the trial court’s judgment, hold a district-based Council election in accordance with a

districting map drawn by plaintiffs' expert without the public input required by section 10010 of the Elections Code. But the purpose of the City's appeal is to prevent that very outcome—to defend the City's fair and inclusive electoral system and avoid the erroneous judicial imposition of a district-based Council election system in a city to which it is poorly suited, using district boundaries established in violation of the Elections Code. The City would have no interest in holding a district-based Council election in advance of a decision on the question whether such elections are legally required in the first place.

It is not clear, however, whether the City could proceed with any other type of Council election. The trial court's judgment forbids the City from holding or certifying any further at-large Council elections (Scolnick Decl., Ex. A, ¶ 5)—a prohibition that, unless it is mandatory in effect, was not stayed by the taking of the City's appeal. As a consequence, there is a risk that without a prompt decision from this Court—specifically, one no later than July 10, 2020—the City Council will be left out of the 2020 election cycle altogether.

Yet the City would strongly prefer to hold an on-cycle election in November 2020, which will almost certainly increase voter engagement and turnout. (See, e.g., Elec. Code, § 14052 [prohibiting off-cycle elections in jurisdictions that experience a “significant decrease in voter turnout”]; David Schleicher, *Federalism and State Democracy* (2017) 95 *Tex. L. Rev.* 763, 818 [“there is substantial evidence that holding elections off cycle radically reduces turnout, even in cities with high turnout in

presidential election years”].) Moreover, holding a subsequent, special election just for the Council, independent of the regularly scheduled general municipal election, would be an expensive proposition. For example, the Los Angeles County Clerk estimated that holding such an election this summer would have cost nearly \$1 million. (Scolnick Decl., Ex. N.)

In sum, a swift resolution of this appeal would allow the City to proceed with the regularly scheduled Council election in November 2020, with both candidates and voters confident that it is being conducted using a legally valid method, that all votes matter, and that the candidates elected will be able to serve out their terms. It is possible that Respondents or the City would pursue review of this Court’s decision in the California Supreme Court, delaying a final judgment until after the window to call a November 2020 Council election has closed. But it is also possible that a timely decision from this Court would finally resolve this dispute. If so, it would minimize voter confusion, conserve taxpayer resources that otherwise might be squandered on multiple elections, and ensure the smooth functioning of City government.

IV. CONCLUSION

The City respectfully requests that this Court grant its motion for calendar preference and set an oral argument schedule that would allow the Court to issue a decision on or before July 10, 2020.

DATED: April 29, 2019

Respectfully Submitted,
GIBSON, DUNN & CRUTCHER LLP

By: 
Theodore J. Boutrous, Jr.

*Attorneys for Appellant-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 the foregoing Motion for Calendar Preference and accompanying Memorandum are in 13-point New Century Schoolbook font and approximately 2,305 words, according to the word count generated by the computer program used to prepare them.

DATED: April 29, 2019

A handwritten signature in blue ink, appearing to read 'Kahn A. Scolnick', is written above a solid blue horizontal line.

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 April 29, 2019, I served the following document(s):

APPELLANT CITY OF SANTA MONICA'S MOTION FOR CALENDAR PREFERENCE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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

SEE ATTACHED SERVICE LIST

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

Executed on April 29, 2019, in Los Angeles, California.



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