No. B295935

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

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CITY OF SANTA MONICA,

*Petitioner-Defendant*,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

*Respondents and Plaintiffs*.

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# PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE DECLARATION OF JEFFREY LEWIS

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

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**TABLE OF CONTENTS**

## I. INTRODUCTION

Plaintiffs' motion to strike the Declaration of Jeffrey Lewis ("Lewis Declaration") is a sideshow. If this Court agrees with the City of Santa Monica that paragraph 9 of the trial court's judgment is a mandatory injunction—and thus automatically stayed on appeal—then there is no need to consider the Lewis Declaration at all.

If, however, this Court concludes that paragraph 9 was merely prohibitory, and not stayed automatically on appeal, then this Court's analysis of irreparable harm (in determining whether to issue a discretionary stay) should include the facts set forth in the Lewis Declaration—which show that Latino voters' top three choices in the November 2018 City Council election all won. Critically, *plaintiffs do not dispute Dr. Lewis's conclusion*. Nonetheless, they ask this Court to blind itself to the fact that without a stay of paragraph 9 during the appeal, the City will have no choice but to oust its current Council and hold a district-based election before August 15, 2019—thus replacing a governing body that is now made up almost entirely of Council members whom Latino voters preferred and elected, with a new Council that Latinos will have had little say in electing.

Plaintiffs' sole argument for striking the Lewis Declaration is the fact that the trial court struck it (without explanation) at plaintiffs' request when the City moved *ex parte*, after the judgment issued, for relief similar to what the City now seeks in

its Petition.[1] However, plaintiffs are ignoring the fundamental—and dispositive—difference between civil appeals and original writ proceedings.

Here, the City is appealing the trial court's judgment. And the City is *also* seeking a writ of supersedeas to confirm that paragraph 9 of the judgment is automatically stayed, or in the alternative to issue a discretionary stay. In contrast to the City's appeal from the judgment—which is generally limited to a review of the record before the trial court—the determination of the City's writ petition offers this Court wide latitude to consider "all relevant evidence." (*Bruce v. Gregory* (1967) 65 Cal. 2d 666, 670–671.) This includes evidence that did not yet exist when the judgment issued, such as the Lewis Declaration. (*Ibid*.)

The Court should deny plaintiffs' motion to strike.

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[1] The trial court offered no reasoning to support its decision to strike the Lewis Declaration, and there is no legitimate basis for it to have done so. The only reason supplied by plaintiffs below was that they did not have the opportunity to cross-examine Dr. Lewis on the contents of his declaration. But the reality is that both sides' experts agree on the proper *methodology* for calculating the results of an election; indeed, at trial, both sides' experts used the same methodology and largely agreed on the results for each election analyzed. (Vol. 1, Ex. C, pp. 61–63 [plaintiffs' closing briefing, relying on the results of Dr. Lewis's analyses].) The only debate was over which candidates and which elections mattered. The underlying data has not been disputed, and that is all Dr. Lewis supplied with respect to the November 2018 election.

## II. ARGUMENT

As a threshold matter, the Court need not even consider plaintiffs' motion to strike if it agrees with the City that paragraph 9 of the judgment is a mandatory injunction that was automatically stayed upon the City's notice of appeal. (*E.g.*, Pet. at p. 32.) The Lewis Declaration bears only on the City's alternative argument, in which it seeks a discretionary stay based on irreparable harm from the enforcement of paragraph 9 during the appeal. (See Pet. at p. 57.)

Regardless, the premise of plaintiffs' motion is misguided, since the City is asking this Court to consider the Lewis Declaration in support of its writ petition, not in the context of its appeal from the judgment. Plaintiffs also ignore the fundamental relevance of the Lewis Declaration to the issue now before this Court—namely, whether the City and its voters (including Latino voters) would be irreparably harmed absent an order staying paragraph 9 during the appeal.

### A. This Court may consider the Lewis Declaration in adjudicating the City's writ petition.

When adjudicating writ proceedings such as this one, courts have wide discretion to consider "all relevant evidence," even "including facts not existing until after the petition . . . was filed." (*Bruce*, *supra*, 65 Cal.2d at pp. 670–671.) For this reason, Courts of Appeal routinely consider evidence presented in supporting declarations submitted even *after* a petition has been filed. (*E.g.*, *Barri v. Workers' Comp. Appeals Bd.* (2018)

28 Cal. App. 5th 428, 436–437; *McCarthy v. Superior Court* (1987) 191 Cal. App. 3d 1023, 1030, fn.3.)

By contrast, the broad latitude to consider evidence outside of the lower court record is not similarly afforded in regular civil appeals. "As a general rule, documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review." (*Pulver v. Avco Fin. Servs.* (1986) 182 Cal. App. 3d 622, 632.)

This basic difference is rooted in the nature of writ proceedings, which are original proceedings in the Courts of Appeal, "where equitable principles apply," and where "issuance of the writ is frequently a matter for the court's discretion." (*Bruce*, *supra*, 65 Cal. 2d at p. 671.) And in a writ proceeding, unlike a civil appeal, the "factual record is limited to documents and declarations provided by the parties." (*Barri*, *supra*, 28 Cal. App. 5th at p. 436.)

Supersedeas writs, for example, are granted by appellate courts in the *first instance*, in aid of their appellate jurisdiction. (*Quiles v. Parent* (2017) 10 Cal. App. 5th 130, 136.) The Court of Appeal will grant a supersedeas writ when it determines that a "stay of the [trial court's] judgment is necessary to protect the appellants from the irreparable injury they will necessarily sustain in the event their appeal is deemed meritorious." (*Mills v. Cnty. of Trinity* (1979) 98 Cal. App. 3d 859, 861.) Thus, a Court of Appeal evaluating a supersedeas writ petition is not directly reviewing any decision by a trial court as to whether a stay is appropriate; the court instead exercises its own

*independent* judgment as to whether a stay is warranted based on, among other things, considerations of irreparable injury. In this scenario, the Court of Appeal is not constrained by what, if anything, may have been presented in the trial court with respect to a showing of irreparable harm.

Plaintiffs' motion relies on a single California decision—*C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal. App. 4th 664—that is inapposite on its face, since it arose in the context of a civil appeal, not writ proceedings. And *C.J.A.* is doubly irrelevant because the court there struck "several passages" of an opening brief that cited evidence that, unlike here, the *Court of Appeal itself* had previously determined was outside the record and could not be considered on appeal. (*Id.* at p. 673.)

Plaintiffs also rely on Rule of Court 8.204, subdivision (e), which discusses what action a court may take when a brief "does not comply with this rule." But Rule 8.204 governs the "contents and form of briefs" filed with the Court of Appeal. The form and contents of supersedeas writ petitions, however, are governed by an entirely separate rule. (See Rules of Court, rule 8.112.) Rule 8.204(e) thus has no applicability here.

### B. The Lewis Declaration is relevant to the question of irreparable harm that the City raises in its petition.

At bottom, this Court's authority to weigh "all relevant evidence" in considering a writ petition provides ample authority to consider the Lewis Declaration here. (*Bruce, supra*, 65 Cal. 2d at p. 671.) The Lewis Declaration is directly relevant to the

City's alternative argument that, assuming this Court finds paragraph 9 to be merely prohibitory in effect, the Court should issue a discretionary stay because of the irreparable harm that the City and its voters would suffer if paragraph 9 were enforced during the appeal. (Pet. at p. 57.)

The Lewis Declaration demonstrates one specific type (of several) of irreparable harm. Dr. Lewis explained that in the November 2018 City Council election, the top three choices of Latino voters all won, and those three candidates are now serving on the Council. (*Ibid.* [citing Vol. 5, Ex. GG, p. 1142].) Absent a stay of Paragraph 9, the City will be forced to oust its current Council as of August 15, 2019. And if that happens, voters (including Latino voters) will have lost the representation of the candidates they preferred and elected for the duration of the City's appeal.

Notably, plaintiffs do not dispute Dr. Lewis's conclusion that the 2018 City Council election saw the election of Latinos' top three choices. Rather, plaintiffs contend that Dr. Lewis's Declaration is irrelevant because the "November 2018 election included no Latino candidates." (Mot. at p. 5.) This demonstrates one of the key flaws in the trial court's analysis—namely, that Latinos' votes do not matter unless they happen to vote for Latino candidates. As the City will explain in its merits briefing on appeal, every Court to consider this argument has rejected it. (Pet. at pp. 48–50; see also *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 551 [joining eight other

circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority"].)

But for present purposes, plaintiffs' argument is a red herring. In assessing the likelihood of irreparable harm from the enforcement of paragraph 9, the Court should obviously consider what would happen if the City is forced to toss out its current Council as of August 15, 2019. In that scenario, it is highly relevant that the current Council includes all of the Council candidates that Latino voters preferred in the 2018 election. If there is no stay, those Latino-preferred Council members will be forced to leave the Council, and they will be replaced in a district-based election this summer where Latinos will have had little say. (See Pet. at pp. 58–60.) And if this Court ultimately reverses the trial court's judgment, all of the City's voters (including Latino voters) will have lost the representation of the candidates they preferred and elected. (Pet. at p. 57.)

## III. CONCLUSION

This Court has ample authority to consider the Lewis Declaration in evaluating the City's Petition. The Court should deny plaintiffs' motion to strike.

DATED: March 25, 2019

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By: Theodore Boutrous IKAS

Theodore J. Boutrous Jr.,

*Attorneys for Petitioner-Defendant City of Santa Monica*

## PROOF OF SERVICE

I, Daniel Adler, declare as follows:

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

**PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE DECLARATION OF JEFFREY LEWIS**

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

**SEE ATTACHED SERVICE LIST**

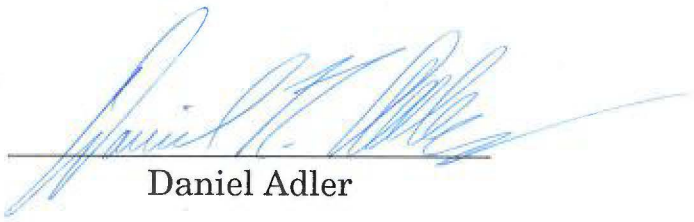
☑ **BY MAIL SERVICE:** I placed a true and correct copy of the above-titled document in a sealed envelope addressed to the persons listed above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this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

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

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

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

Executed on March 25, 2019.



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