Kevin I. Shenkman (SBN 223315)
Mary R. Hughes (SBN 222662)
Andrea A. Alarcon (SBN 319536)
SHENKMAN & HUGHES
28905 Wight Road
Malibu, California 90265
Telephone: (310) 457- 0970

R. Rex Parris (SBN 96567)
Ellery S. Gordon (SBN 316655)
PARRIS LAW FIRM
43364 10th Street West
Lancaster, California 93534
Telephone: (661) 949-2595

Milton C. Grimes (SBN 59437)
LAW OFFICES OF MILTON C. GRIMES
3774 West 54th Street
Los Angeles, California 90043
Telephone: (323) 295-3023

Robert Rubin (SBN 85084)
LAW OFFICE OF ROBERT RUBIN
131 Steuart St Ste 300
San Francisco, CA 94105
Telephone: (415) 298-4857

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION and MARIA LOYA, Plaintiffs, v. CITY OF SANTA MONICA, and DOES 1 through 100, inclusive, Defendants.	CASE NO. BC616804 **PLAINTIFFS' REBUTTAL CLOSING STATEMENT** Trial Date: August 1, 2018 Dept.: 28 [Assigned to the Honorable Yvette Palazuelos]

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I. INTRODUCTION.

Ultimately, this case is relatively straightforward. When Latino candidates run for Santa Monica City Council those Latino candidates are strongly supported by Latino voters, but they receive significantly less support from non-Latinos and they almost always lose. That is legally significant racially polarized voting. (*Thornburg v. Gingles* 478 U.S. 30, 61 ("*Gingles*") ["We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard."]). And that means Defendant's at-large election system violates the California Voting Rights Act ("CVRA"). (§ 14028(a)[1] ["A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision"])

Unable to rebut the straightforward analysis commanded by *Gingles* and the CVRA's plain language, Defendant raises convoluted theories that shift at every stage of this case. Defendant's latest attempt to invent its own standard, based on its selective citation of out-of-context snippets from federal Voting Rights Act ("FVRA") cases, is contrary to the text of the CVRA and the significant jurisprudence concerning the at-large method of election that courts have long recognized tends to dilute minority vote. Defendant avoids the relevant facts, and seeks to add unwarranted complications by packing the record with irrelevant elections and distorted analyses, many of which would be inappropriate in a FVRA case, and all of which are inappropriate in this CVRA case.

Defendant's argument on Plaintiffs' Equal Protection claim likewise ignores the most direct evidence of discriminatory intent in maintaining at-large elections, like the video recording of the city council meeting at which Defendant's city council chose, contrary to the studied recommendation of the Charter Review Commission, to maintain the at-large system. Defendant also ignores the direct evidence of discriminatory impact – the immediate and consistent lack of Latino candidates to be elected to the city council. Instead, Defendant seeks to divert attention to actions and decisions separated by decades from the relevant discriminatory decisions in 1992 and 1946.

In 1992, Defendant's Charter Review Commission, and even its City Council, recognized that the at-large election system is "inadequate" to "empower[] ethnic communities to choose Council members." (Tr. Ex. 127-40, see also Tr. Ex. 267). Unfortunately, Defendant's city council did not

[1] Statutory citations are to the California Elections Code, unless otherwise indicated.

allow Santa Monica voters to adopt a fair non-discriminatory system. Fortunately though, the CVRA was enacted, providing the opportunity to right the historic wrong of the at-large election system.

Defendant is unable to escape its own expert's analysis revealing consistent racially polarized voting in its at-large council elections, and is unable to mount a legally cognizable defense. Defendant also fails to propose a remedy, leaving it to this Court to decide the remedy most appropriate.

II. PLAINTIFFS HAVE SHOWN RACIALLY POLARIZED VOTING BY THE *CORRECT* LEGAL STANDARD

As explained more fully at pages 6-10 of Plaintiffs' Closing Statement, Dr. Kousser's analysis demonstrates racially polarized voting, and so does the analysis of Defendant's own expert, Dr. Lewis. Those analyses are fatal to Defendant's attempt to state a legally cognizable defense in this case.

Abandoning its expert's opinion that the statistical methods accepted by federal courts and explicitly endorsed by the CVRA are unreliable, and conceding that Latino voters in Santa Monica are politically cohesive, Defendant now criticizes Dr. Kousser (and presumably Prof. Levitt, as well) for focusing on the levels of support for Latino candidates. But that is exactly how courts test whether there is racially polarized voting – focusing on the levels of support for minority candidates from the minority and majority respectively. (See *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1335-37 (C.D. Cal. 1990), aff'd, 918 F.2d 763 (9th Cir. 1990) [summarizing the bases on which the court found racially polarized voting: "The results of the ecological regression analyses demonstrated that for all elections analyzed, Hispanic voters generally preferred Hispanic candidates over non-Hispanic candidates. … Of the elections analyzed by plaintiffs' experts non-Hispanic voters provided majority support for the Hispanic candidates in only three elections, all partisan general election contests in which party affiliation often influences the behavior of voters"]; *Benavidez v. Irving Indep. Sch. Dist.* 2014 WL 4055366, *11-12 (N.D. Tex. 2014) [finding racially polarized voting based on Dr. Engstrom's analysis which the court described as follows: "Dr. Engstrom then conducted a statistical analysis … to estimate the percentage of Hispanic and non-Hispanic voters who voted for the Hispanic candidate in each election. … Based on this analysis, Dr. Engstrom opined that voting in Irving ISD trustee elections is racially polarized."]). That same analytical method was employed by Dr. Kousser to determine whether elections were racially polarized in Palmdale and Santa Clara, and the court in each of those CVRA cases adopted Dr. Kousser's analysis, without criticism. (Tr. 678:3 – 679:22).

Indeed, Appendix A of the opinion in *Gingles* shows that the U.S. Supreme Court considered the levels of support (from black and white voters, respectively) only for black candidates. Defendant argues that the Supreme Court in *Gingles* held that the race of a candidate is "irrelevant," but what

Defendant fails to recognize is that the portion of *Gingles* it relies upon did not command a majority of the Court, and Defendant's reading of *Gingles* has been rejected by federal circuit courts in favor of a more practical race-sensitive analysis. (See *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 550-53 [collecting other cases rejecting Defendant's view and noting that "non-minority elections do not provide minority voters with the choice of a minority candidate and thus do not fully demonstrate the degree of racially polarized voting in the community."]). To the extent there is any doubt about whether the race of a candidate impacts the analysis in FVRA cases, there can be no doubt under the CVRA; the statutory language mandates the approach taken by Dr. Kousser and Prof. Levitt in this case. (§14028(b) ["The occurrence of racially polarized voting shall be determined from examining results of elections in which *at least one candidate is a member of a protected class* … One circumstance that may be considered … is the extent to which *candidates who are members of a protected class* and who are preferred by voters of the protected class … have been elected to the governing body of the political subdivision that is the subject of an action …"]). Dr. Kousser and Prof. Levitt do not, as Defendant contends, *assume* that Latino candidates were preferred by Latino voters. Rather, the data – obtained by the methods approved by the U.S. Supreme Court and the explicit text of the CVRA – *demonstrates* that Latinos in Santa Monica prefer Latino candidates.

The result of the correct analysis is stark and inescapable, and it is shown by Dr. Kousser's estimates as well as those of Defendant's expert, Dr. Lewis: in 2016 Latinos' first choice was Oscar de la Torre and he lost; in 2004 Latinos' first choice was Maria Loya and she lost; in 2002 Latinos' first choice was Josefina Aranda and she lost; in 1994 Latinos' first choice was Tony Vazquez and he lost. (See Plaintiffs' Closing Statement, pp. 7-8). That is the epitome of racially polarized voting.

Now, apparently abandoning the theories it presented in its opening statement, and abandoning the opinions of its expert (who refused to opine that Defendant's elections were not racially polarized), Defendant attempts to avoid the consequence of the straightforward analysis employed by Dr. Kousser, Prof. Levitt and countless federal courts beginning with *Gingles*, by showing that Latinos can elect their second, third or fourth choices as long as they are white, or that Latinos can elect Latino candidates to second-choice offices. But as the Ninth Circuit and other courts have held, and Defendant does not address, that does not undermine a finding of racially polarized voting relevant to the office at issue here; indeed the mechanical approach suggested by Defendant – treating a Latino candidate who receives the most votes from Latino voters (and loses) the same as a white candidate who receives the second, third or fourth-most votes from Latino voters (and wins) - has been expressly

rejected by the courts. (*Ruiz*, 160 F.3d at 554 [rejecting the district court's "mechanical approach" that viewed the victory of a white candidate who was the second-choice of Latinos in a multi-seat race as undermining a finding of racially polarized voting where Latinos' first choice was a Latino candidate who lost: "The defeat of Hispanic-preferred Hispanic candidates, however, is more probative of racially polarized voting and is entitled to more evidentiary weight. The district court should also consider the order of preference non-Hispanics and Hispanics assigned Hispanic-preferred Hispanic candidates as well as the order of overall finish of these candidates."]; see also *id.* at 553 ["But the Act's guarantee of equal opportunity is not met when . . . [c]andidates favored by [minorities] can win, but only if the candidates are white." (citations and internal quotations omitted)]; *Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, 1318, aff'd, 488 U.S. 988 (1988) [it is not enough to avoid liability under the FVRA that "candidates favored by blacks can win, but only if the candidates are white."]).

The case that Defendant relies on for its new approach to identifying Latino-preferred candidates – *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.* (E.D. Mo. 2016) 201 F. Supp. 3d 1006 – actually *undermines* Defendant's position. Specifically, that court agreed with Dr. Engstrom's approach, which it described as follows:

> Dr. Engstrom testified that, where the clear first-choice candidate among Black voters is a Black candidate who has lost, courts should be skeptical of attempts to characterize a winning white candidate as a candidate of choice of minority voters, particularly where Black voters show a preference for candidates within their racial group. An electoral system does not provide equal opportunity if Black voters cannot elect their top candidate(s) of choice and can only elect lesser preferred candidates, and only if they are white. If Black voters prefer Black candidates, they must have an opportunity to elect those candidates. Gingles addresses not only a group's ability to elect a satisfactory candidate (that is a candidate for whom the minority voter is willing to cast a vote), but the group's ability to elect its preferred candidate."]

(*Id.* at 1046-47, quoting *Meek v. Metro. Dade County* (11th Cir. 1990) 908 F.2d 1540, 1547 and citing *Citizens for a Better Gretna v. City of Gretna* (5th Cir. 1987) 834 F.2d 496, 502) And, the *Mo. State Conf. of the NAACP* court went on to explain that, contrary to Defendant's insinuation here, refusing to treat a minority's second, third or fourth choice as a minority-preferred candidate when that candidate is a member of the majority group "does not assume that a candidate is preferred because of their race. Rather, it acknowledges legal guidance that, although the race of a candidate is not dispositive, an electoral system does not truly provide equal opportunity if Black voters cannot elect members of their own group who are their clearly most-preferred candidate(s), and can only elect lesser-preferred candidates who are white." (*Id.* at 1047) Just as Black voters preferred Black candidates in *Mo. State*

Conf. of the NAACP, here Latino voters have preferred Latino candidates; that is not assumed, it is shown by the data. The law requires that they have an opportunity to elect those candidates.

Defendant simply cannot win under the correct legal standard.

III. THE 14028(E) FACTORS FURTHER SUPPORT A FINDING OF RACIALLY POLARIZED VOTING.

Defendant argues that this Court should ignore the factors set out in Section 14028(e) because, in Defendant's view, there is no quantitative evidence of racially polarized voting. (Def. Br. at 12-13). Even putting aside the ample quantitative evidence, Defendant's argument only applies to a FVRA case; it contradicts the express language of the CVRA that a violation "is established" if racially polarized voting is shown (§14028(a)) and the "other factors" of Section 14028(e) "are probative, but not necessary [] to establish a violation" of the CVRA.[2] (See also *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781, 794 ["Section 14028, subdivisions (b), (c) and (e) identify other factors that may be considered in determining whether racially polarized voting has occurred."]).

Defendant's attempt to deflect the import of each of these "other factors" also contradicts the express language of Section 14028(e).[3] First, Defendant attempts to dismiss the history of discrimination impacting Latinos in Santa Monica and throughout Los Angeles County by claiming that it is not "official discrimination." But Section 14028(e) directs this Court to consider "the history of discrimination"; the phrase "official discrimination" is nowhere to be found. In any event, much of the historical discrimination suffered by Latinos in Santa Monica, detailed at pages 14-15 of Plaintiffs' Closing Brief, was "official" – it was inflicted by government, and perpetuated by Santa Monica voters. Second, Defendant attempts to dismiss its use of staggered elections that "enhance the dilutive effects of at-large elections" (§14028(e)) based on its unsupported view that "there are sound, non-discriminatory reasons to stagger elections" (Def. Br. at p. 13). But the existence of non-discriminatory reasons for staggered elections does nothing to change the fact, recognized by the U.S. Supreme Court,

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[2] Under Defendant's reasoning the "other factors" of Section 14028(e) would never be considered – if a plaintiff showed racially polarized voting through quantitative evidence there would be no reason to evaluate those other factors because a violation of the CVRA would already be established, and if a plaintiff did not show racially polarized voting through quantitative evidence then the court would be foreclosed from considering the "other factors." That cannot be correct.

[3] Defendant contends, without any supporting authority, that the factors enumerated in Section 14028(e) should only be considered to the extent that Plaintiffs show they impair Latinos' ability to participate in the political process. That view, however, contradicts the plain text of Section 14028(e). Only one of the 14028(e) factors – "the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health" – is qualified with the limitation proposed by Defendant – "which hinder their ability to participate effectively in the political process." The other 14028(e) factors do not include this limitation.

that staggered elections "enhance the dilutive effects of at-large elections." (§14028(e); Tr. 2885:17 – 2886:21)[4] Third, Defendant attempts to dismiss the disturbing disparities in education and income between Latino and white residents of Santa Monica, claiming those disparities do not affect Latinos' participation in the political process. The unrebutted evidence, however, is that these significant disparities impair Latinos' ability to participate in Defendant's extraordinarily expensive city council elections. (Tr. 263:20–266:16 [objection later overruled at 334:10–334:11], 335:12–337:3, 2922:5–2923:11, Tr. Ex. 295)[5] Fourth, Defendant attempts to minimize overt specific incidents of racial appeals as "limited and dated." (Def. Br. p. 14) While the racial appeals in Defendant's elections have become more subtle, the unrebutted evidence is that they are still prevalent and harmful to Latinos' candidacies. (Tr. 167:11–167:23) One Latino candidate attributed his election loss to such racial appeals. (Tr. Ex. 231-71) Finally, Defendant attempts to dismiss its lack of responsiveness to Latinos, by rationalizing the near-complete absence of Latinos on its commissions, and pointing to its spending of "tens of millions of dollars" in the Pico Neighborhood. (Def. Br, p. 14). But Defendant's argument just underscores its lack of responsiveness. The lack of Latinos on Defendant's commissions is in stark contrast to the significant Latino proportion of Santa Monica residents, and cannot be explained by a lack of Latinos applying to serve (the evidence at trial showed that Latinos did seek appointment to those commissions and were turned away (Tr. 159:23–162:7)). The "tens of millions of dollars" (Def. Br., p. 14) Defendant boasts it has invested in the Pico Neighborhood over several years is only a tiny fraction of its over $500 million annual budget. (Tr. 4393:21–4394:16). The Pico Neighborhood unquestionably has a disproportionate share of the undesirable burdens of the City, and it is largely by Defendant's design. (See, e.g., Tr. Ex. 337-3)

IV. PLAINTIFFS HAVE SHOWN VOTE DILUTION.

Even if "dilution" were an element of a CVRA claim, separate and apart from a showing of racially polarized voting (it's not), the undisputed evidence would still demonstrate dilution by the standard *proposed by Defendant* – "that some alternative method of election would enhance Latino voting power." (Def. Br. at 9). Professor Levitt's unrebutted testimony demonstrates that each of the

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[4] See also *City of Lockhart v. United States* (1983) 460 U.S. 125, 135 ["The use of staggered terms also may have a discriminatory effect under some circumstances, since it . . . might reduce the opportunity for single-shot voting or tend to highlight individual races."]; *City of Rome v. United States* (1980) 446 U.S. 156, 183 [same].

[5] See also *Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, 1317. [Where a minority group has less education and wealth than the majority group, that disparity "necessarily inhibits full participation in the political process" by the minority.]

potential remedies presented by Plaintiffs will enhance Latino voting power in Santa Monica. (Tr. 2980:10–2980:23). As explained at pages 23-24 of Plaintiffs' Closing Statement, national, state and local experiences demonstrate the district map developed by Mr. Ely will likely be effective, improving Latinos' chances of electing their preferred candidate. Likewise, the experiences of other jurisdictions even with small minority proportions, and the comparison of the Latino proportion of eligible voters in Santa Monica to the "threshold of exclusion" applicable to cumulative, limited and ranked choice voting for Defendant's seven-seat council, demonstrate those systems are also likely to be effective and would improve Latinos' chances of electing their preferred candidate. (Tr. 2957:6–2959:7)

In its closing brief, Defendant largely fails to address those unrebutted facts and opinions. Rather, Defendant argues that the size, concentration and voter turnout of Latinos in Santa Monica precludes a finding that Defendant's election system violates the CVRA – reading into the CVRA what is explicitly excluded. (§14028(c) ["The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section"]). Aside from its myopic focus on the size of the Latino community, Defendant attacks only one aspect of Mr. Ely's local analysis of the likely effectiveness of his district map, and attacks Prof. Levitt's analysis of the other potential remedies by arguing that the very voter turnout depressed by their inability to win city council office in the present system should defeat their right to any remedy at all. Neither of Defendant's attacks has any basis in fact or law.

As Defendant concedes, the CVRA recognizes that the ability to draw a majority-minority district is not necessary to show dilution. (Def. Br. At 11).[6] As explained by Prof. Levitt, and unrebutted at trial, experiences in California and other states demonstrate that influence districts, like the Pico Neighborhood District drawn by Mr. Ely, enhance minority voting power, particularly over at-large elections. (Tr. 2927:14–2927:26, 2930:24–2937:20).[7] Mr. Ely's local analysis further supports

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[6] At the same time, Defendant tries to cast doubt on the propriety of influence districts by referring to the holding in *Bartlett v. Strickland* (2009) 556 U.S. 1 that "the lack of [influence] districts cannot establish a sec. 2 violation." (Def. Br. at n. 12) Defendant again neglects to mention the significant difference between sec. 2 of the FVRA and the CVRA. The FVRA is limited in scope to claims involving impairment of the "ability to elect" candidates of choice and sets the possibility of a majority-minority district as a threshold for liability. In contrast, the CVRA allows not only for claims involving the "ability to elect" candidates but also the "ability to influence the outcome of an election." (§14027) This analysis supporting influence districts as an appropriate remedy is, of course, wholly consistent with the California Legislature's "inten[t] to provide a broader basis for relief from vote dilution than available under the [FVRA]." (*Jauregui, supra,* 226 Cal.App.4th at 806)

[7] Defendant argues that districts would somehow dilute the voting power of African Americans and/or Asians in Santa Monica. That is ridiculous. There is no case of which Plaintiffs are aware

that view, confirming that Latino candidates preferred by Latino voters do better in the Pico Neighborhood District than in the city as a whole, and sometimes, though not always, those candidates even receive the most votes in the Pico Neighborhood District while still losing in the current at-large election system. (Tr. 289:7 – 296:19, 299:5 – 301:5; Tr. Exs. 164-168). While Defendant points out that sometimes the Latino candidate preferred by Latino voters does not receive the most votes in the Pico Neighborhood District, that does nothing to undermine Mr. Ely's analysis. (Tr. 413:26–415:1) Everyone agrees that those Latino candidates preferred by Latino voters do better in the Pico Neighborhood District – better enough that they, on some occasions, received the most votes in the Pico Neighborhood District. At trial, Defendant presented no evidence or analysis of the electoral behavior of the Pico Neighborhood District to undermine that conclusion.

Recognizing that the Latino proportion of the citizen-voting-age population in Santa Monica (13.6%) exceeds the threshold of exclusion for a seven-seat race employing cumulative, limited or ranked choice voting (12.5%) – exactly the comparison that courts look to in order to gauge the likely effectiveness of those systems,[8] Defendant nonetheless argues that Latinos should be denied any relief because their voter turnout is lower than that of non-Hispanic whites (Def. Br. At 12). That is precisely what the Ninth Circuit, and other courts, have cautioned against – denying a minority group any relief because of its lower voter turnout than the majority group. (See *United States v. Blaine County* (9th Cir. 2004) 363 F.3d 897, 911 ["[I]f low voter turnout could defeat a Section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on."]; *U.S. v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 427 [ordering cumulative voting and unstaggering of elections – "[I]t would be counterintuitive to determine that depressed turnout among Hispanics – a condition that may very well be a direct byproduct of the existing electoral regime – should be a reason to preclude the creation of a new electoral structure in Port Chester."]). While some courts (e.g. *U.S. v. Euclid City Sch. Bd.* (N.D. Ohio 2009) 632 F. Supp. 2d 740) have recognized that, low minority turnout

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holding that a switch from an at-large system to a district election system dilutes any minority's votes. And Defendant cannot explain how African Americans or Asians in Santa Monica would have less electoral power in districts than they do at present.

[8] See, e.g., *U.S. v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 450-51 [comparing "the threshold of exclusion [of] 14.3 percent [to] the Hispanic percentage of the CVAP [of] 21.9 percent [to conclude] Hispanics would have a genuine opportunity to elect one representative of their choice under [the cumulative voting] plan."])

can be considered in the selection of an appropriate remedy (because district elections, unlike cumulative, limited and ranked choice voting, reduce the effect of turnout disparities), it is well settled that relief cannot be denied outright because a minority group has a lower voter turnout than the majority. Nevertheless, that is precisely what Defendant asks this Court to do in this case.

V. THE CVRA IS NOT UNCONSTITUTIONAL.

As it has done at various other times in this case, Defendant again insists that the CVRA, or alternatively its application in this case, is unconstitutional. In *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, the Court of Appeal held the CVRA passes constitutional muster, rejecting essentially the same theory Defendant advances here. Defendant's argument seems to rest on its view that no "voting system would enhance Latino voting strength," but that view is contrary to the unrebutted evidence that each of several election systems would enhance Latino voting strength over the current at-large system. (Tr. 2980:10–2980:23). In any event, Defendant's misguided assertion that it is immune from the CVRA was addressed at pages 15-19 of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, and, for the sake of brevity, is not repeated here.

VI. DEFENDANT IGNORES THE DIRECT EVIDENCE OF DISCRIMINATORY INTENT AND IMPACT.

In its lengthy recitation of its 100+ year history, Defendant fails to address the most direct evidence of discriminatory intent and impact, and similarly fails to rebut the authority establishing Plaintiffs' Equal Protection claim. On the issue of impact, Defendant does not dispute that Latino candidates for Santa Monica City Council have been largely unsuccessful, particularly in the years immediately following the decisions to maintain the at-large election system – after 1946, Fernandez (1953) and Mendoza (1955) lost; after 1992, Vazquez (1994), Aranda (2002) and Loya (2004) all lost. (Tr. Ex. 268). Indeed, in the 72 years of the current at-large system, only one Latino (out of 71 council members) has been elected to the city council. (*Id.*) Nor does Defendant dispute the legal authority that this lack of success by Latino candidates establishes discriminatory impact. (*Bolden v. City of Mobile* (S.D. Ala. 1982) 542 F.Supp. 1070, 1076). Likewise, on the issue of intent, Defendant does not dispute what the July 1992 council meeting video shows: the city council understood district elections are better for minority representation (see, e.g. Tr. Ex. 267 at 21:35–21:57, 3:35:37–3:37:20); the city council understood that both affordable housing and Latinos were concentrated in the Pico Neighborhood (*Id.* at 1:59:23–1:59:31, 2:09:18–2:09:34, 2:20:14–2:20:28); and Mr. Zane (and other council members as well) understood that, for those reasons, any increased Latino representation would reduce the ability to approve more affordable housing because nobody wants a glut of affordable

housing in their neighborhood (*Id.* at 1:07:36–1:12:29,1:58:54–1:59:20, 2:01:45–2:02:26, 2:09:18–2:09:34). Similar to the circumstances held to demonstrate discriminatory intent in *Garza*, Defendant "chose [minimizing Latino voting power] as the avenue by which to achieve [the] preservation" of its power to dump affordable housing (and a host of other undesirable features) disproportionately on the Pico Neighborhood. (*Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 771). In 1946 too, though Defendant would like to substitute the view of its mouthpiece and trial consultant (Allan Lichtman) for the contemporaneous understanding of the Board of Freeholders, Defendant does not dispute what the newspaper articles and advertisements as well as the election data show: that proponents and opponents of at-large elections alike understood at-large elections would prevent minorities from electing their chosen candidates (Tr. 995:23–1007:1, 1108:3–1109:13, Tr. Exs. 28, 29, 31, 266); and the racial attitudes of those in favor of at-large elections evince a desire for precisely that result (Tr. 1010:25–1015:12, Tr. Ex. 293).[9] Like this direct evidence, the *Arlington Heights* factors also lead to the conclusion that Defendant's maintenance of at-large elections was unlawfully discriminatory. (Tr. 979:8–994:14, 1016:28–1025:13, 1089:7–1094:3, 1096:25–1109:18).

VII. DEFENDANT REFUSES TO PROPOSE A REMEDY.

Defendant chose not to bifurcate this case between liability and remedies. And, Defendant chose not to propose a remedy. Selecting a remedy is therefore entrusted to the sound discretion of the Court without input from Defendant (though the survey Mr. Brown presented (Tr. Ex. 185-2) reflects the desire of Defendant's citizens for district elections). (See *Chapman v. Meier* (1975) 420 U.S. 1, 27 ["If [defendant] fails [to adopt a legally permissible plan], the responsibility falls on the District Court and it should proceed with dispatch."]) Here, the unrebutted testimony of Prof. Levitt establishes that implementation of the district map presented by Mr. Ely (Tr. Ex. 261) is the most appropriate remedy, it will completely remedy the violation, and should therefore be selected by this Court. (See §14029)[10]

Dated: October 25, 2018

By:_____

Kevin Shenkman, Attorney for Plaintiffs

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[9] Rather, without addressing the authority cited at page 20 (fn. 15) of Plaintiffs' Closing Statement that the appropriate comparison is between the chosen system (at-large elections) and the alternative presented at the time (district or hybrid elections), Defendant nonetheless focuses its analysis on a comparison between the chosen system and the preceding system, inviting legal error.

[10] See also *Large v. Fremont County* (10th Cir. 2012) 670 F.3d 1133, 1137 (affirming trial court's rejection of defendant's plan because it "failed to cure the harm [] identified in the original voting scheme); *Havell v. Blytheville Sch. 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."]

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 28905 Wight Rd., Malibu, California 90265.

On October 25, 2018, I served true copies of the following document(s) described as

REBUTTAL CLOSING STATEMENT

on the interested parties in this action as follows:

Marcellus McRae, William Thomson, Kahn Scolnick, Tiuania Henry, Helen Galloway, Michelle Maryott
Gibson Dunn & Crutcher LLP
333 S. Grand Ave.
52nd Floor
Los Angeles, CA 90071

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shenkman & Hughes' practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

AND BY EMAIL

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

Executed on October 25, 2018 at Malibu, California.

Kevin Shenkman