No. B295935

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

CITY OF SANTA MONICA,
Petitioner-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,
Respondents and Plaintiffs.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS

APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES
THE HON. YVETTE M. PALAZUELOS, JUDGE PRESIDING
SUPERIOR COURT CASE NO. BC616804
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RETURN BY ANSWER TO PETITION FOR WRIT OF SUPERSEDEAS

Respondents Pico Neighborhood Association and Maria Loya (collectively "Respondents"), in answer to Petitioner City of Santa Monica's ("Petitioner") Petition for Writ of Supersedeas, admits, denies, and alleges as follows:

A. Parties

1. Respondents admit the allegation of paragraph 1.

2. Respondents admit the allegation of paragraph 2.

B. Factual Background

3. Respondents admit that Santa Monica is a City. Respondents further admit that, in 1946, Petitioner adopted its current Charter, which calls for the "at-large" election of seven council members. Respondents deny the remaining allegations in paragraph 3. Specifically, Respondents deny that the City is "small, progressive, and inclusive." Furthermore, Respondents deny that every voter "has a say" as to who sits on the Council and that "Council members are accountable to every voter." Rather, as the Trial Court found, Latino residents *are* in fact excluded from meaningful participation in the City's political process as a result of Petitioner's at-large election system which impairs the ability of Latinos to elect candidates of their choice or influence the outcome of elections.

4. Respondents admit that Petitioner adopted its at-large electoral system in the 1946 Charter and that the 1946 Charter had other provisions. Respondents deny the remaining allegations of paragraph 4. The 1946 Charter

was proposed and drafted by fifteen "Freeholders" who were all white, and all but one lived on the wealthier white side of Wilshire Boulevard—sometimes described as Santa Monica's Mason-Dixon line. (Respondent's Exhibits, Vol. 1, Ex. A, at p. 3–4; Id., Ex. B, at p. 6.) Newspaper articles and advertisements from 1946 as well as the election data show that proponents and opponents of at-large elections alike understood that at-large elections would prevent minorities from electing their chosen candidates because it would "starve out minority groups," leaving "the Jewish, colored [and] Mexican [no place to] go for aid in his special problems" "with seven councilmen elected AT-LARGE…mostly originat[ing] from [the wealthy white neighborhood] North of Montana [and] without regard [for] minorities." (Respondent's Exhibits Vol. 1, Ex. C, at pp. 29:23–41:1, 42:3–43:13; Id., Ex. D, at pp. 79–80; Id., Ex. E, at pp. 82–83; Id., Ex. F, at pp. 85–86.) And, the racial attitudes of those in favor of at-large elections evinced a desire for precisely that result, arguing that Santa Monica "can and should develop into a remarkably homogenous community." (Respondent's Exhibits Vol. 1, Ex. C, at pp. 44:25–49:12; Id., Ex. G, at p. 88.) Additionally, at the same time as the 1946 Charter was approved, another ballot measure involving a pure racial issue was on the ballot—Proposition 11 which would have outlawed racial discrimination in employment. Statistical analysis demonstrates a strong correlation between voting in favor of the at-large charter provision and against the contemporaneous Proposition 11, further demonstrating the understanding that at-large elections would prevent minority representation. (Statement of Decision, at p. 27.)

5. Respondents deny the allegations of paragraph 5. In both 1975 and 2002 voters were presented with confusing, convoluted and multi-faceted propositions, the results of which do not demonstrate disapproval of district elections. In fact, the evidence at trial demonstrated Santa Monica voters prefer their city council be elected through district elections over the at-large election system by a margin of more than 2:1. (Respondent's Exhibits Vol. 1, Ex. G, at pp. 90–92.)

6. Respondents deny the allegations of paragraph 6. Specifically, Respondents deny that "the at-large system has served the City well for 73 years" and that the "candidates elected . . . are accountable to every last resident in the City." Rather, as the Trial Court found, for the past 73 years, the City has failed to serve all of its residents, particularly its Latino residents largely concentrated in the Pico Neighborhood. (Vol. 5, Ex. BB. pp. 1064-1065 [Statement of Decision, at ¶¶ 50-51].)

Respondents also specifically deny that "under the current at-large election system, candidates preferred by Latino voters have consistently prevailed at the polls." In fact, as the Trial Court found, the analyses of both the Petitioner's and Respondents' experts reveal that the City's at-large elections over the past twenty-four years evince a consistent pattern of racially-polarized voting where the Latino preferred candidates lose. (Vol. 5, Ex. BB. pp. 1039-1053 [Statement of Decision, at ¶¶ 21-34].)

C. Procedural Background

7. Respondents admit they filed the underlying action on April 12, 2016, and that the operative complaint was filed on February 23, 2017. Respondents further admit that they alleged two causes of action: (1) violation of California Voting Rights Act of 2001 (CVRA); and (2) violation of California Equal Protection Clause. Respondents deny the remaining allegations of paragraph 7, specifically Petitioner's characterization of Respondents' allegations.

1. The Court Trial and Subsequent Proceedings

8. Respondents admit the allegations of paragraph 8.

9. Respondents admit the allegations of paragraph 9.

10. Respondents admit that in its closing brief, Petitioner advanced several arguments, all of which were ultimately rejected by the Trial Court. Respondents deny the remaining allegations of paragraph 10 of the Petition.

11. Respondents admit that on November 8, 2018, the Trial Court issued a Tentative Decision finding in favor of Respondents. Respondents further admit that the Trial Court's Tentative Decision did not contain citations to evidence or caselaw, because such citations and explanation is not required in a tentative decision, and also instructed the parties to submit further briefing in advance of a hearing "regarding the appropriate/preferred remedy for violation of the California Voting Rights Act."

12. Respondents admit the allegation of paragraph 12.

13. Respondents admit the allegation of paragraph 13.

14. Respondents admit that their opening and reply briefs regarding remedies included several arguments. Respondents deny the remaining allegations of paragraph 14 of the Petition, specifically Petitioner's characterization of Respondents' arguments.

15. Respondents admit that in its brief regarding remedies, Petitioner advanced several arguments, all of which were ultimately rejected by the Trial Court. Respondents deny the remaining allegations of paragraph 10 of the Petition.

16. Respondents deny the allegations of paragraph 16 of the Petition. Specifically, paragraph 16 mischaracterizes Petitioner's own arguments in its brief regarding remedies.

17. Respondents admit the allegation of paragraph 17.

18. Respondents admit the allegation of paragraph 18.

19. Respondents admit the allegation of paragraph 19.

20. Respondents admit the allegation of paragraph 20.

21. Respondents admit that on January 2, 2019 they filed an ex parte application for clarification of the court's December 12, 2018, First Amended Tentative Decision. Respondents deny the remaining allegations in paragraph 21 as they misstate Respondents' request for clarification, and omit the rationale for that request for clarification. Respondents' ex parte application for clarification speaks for itself.

22. Respondents admit that Petitioner opposed the January 2, 2019 ex parte application and advanced several arguments in its opposition. Respondents deny the remaining allegations of paragraph 22 of the Petition, specifically because Petitioner mischaracterizes the arguments advanced in its opposition.

23. Respondents admit that at the hearing on Plaintiffs' ex parte application, held on January 2, 2019, the court directed Plaintiffs to propose a statement of decision and judgment calling for the seven districts drawn by Plaintiffs' expert and a special election in 2019. Though Petitioner's counsel stormed out of the courtroom before the hearing was concluded, at the conclusion of that hearing the Trial Court extended Respondents' time to submit a proposed judgment and proposed statement of decision by one day.

24. Respondents admit the allegations of paragraph 24 of the Petition, except Petitioner's characterization of the proposed statement of decision as "closely follow[ing]" Respondents' closing brief.

25. Respondents admit that Petitioner filed objections to the proposed judgment and proposed statement of decision on January 18, 2019. Respondents deny the remaining allegations contained in paragraph 25. Specifically, as the Trial Court confirmed, the proposed statement and proposed judgment were not, as Petitioner contends, "in almost every respect contrary to the factual record and the law." Moreover, as demonstrated by the Trial Court's response to Petitioner's objections, the Trial Court carefully considered those objections in the course of preparing its Judgment and Statement of Decision.

2. The Judgment, the City's Appeal, and the City's Efforts to Seek Confirmation of the Automatic Stay

26. Respondents admit the allegation of paragraph 26.

27. Respondents admit the allegation of paragraph 27.

28. Respondents admit the allegation of paragraph 28.

29. Respondents deny the allegation of paragraph 29 of the Petition. At the February 21, 2019 meeting of Petitioner's city council, Petitioner's mayor clarified that the resolution (which was subsequently adopted by the council) is limited to the filing of a notice of appeal.

30. Respondents admit that Petitioner filed its notice of appeal on February 22, 2019. Respondents deny the remaining allegations of paragraph 30 of the Petition.

31. Respondents admit that Petitioner filed an ex parte application (though not on February 28, 2019, as Petitioner alleges), contending that paragraph 9 of the Judgment is automatically stayed pending Petitioner's appeal.

32. Respondents deny the allegations of paragraph 32 of the Petition, as Petitioner mischaracterizes Respondents' arguments in opposition to Petitioner's ex parte application and omits several arguments advanced by Respondents in their opposition.

33. Respondents deny the allegations of paragraph 33 of the Petition, as Petitioner mischaracterizes Respondents' arguments at the March 4, 2019 hearing. Importantly, Respondents made clear that Petitioner could do absolutely nothing

and be in compliance with paragraph 9 of the Judgment, and what the Governor may or may not do is irrelevant to the question of whether paragraph 9 is a prohibitory injunction.

34. Respondents admit that the Trial Court took the matter under submission and, on March 6, 2019, issued an order denying Petitioner's ex parte application. Respondents further admit that the Trial Court struck the declaration of Dr. Jeffrey Lewis. Respondents deny the remaining allegations of paragraph 34.

35. Respondents admit that Petitioner filed the instant Petition on March 8, 2019. Respondents lack sufficient information to either admit or deny why Petitioner filed its petition, and, on that basis, Respondents deny the remaining allegations of paragraph 35.

D. Statement of the Case

36. Respondents object to the purported factual allegations in paragraph 36 insofar as the statements therein are improper opinions and legal argument, rather than verifiable facts. (*Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 205.) Subject to the foregoing objection, Respondents respond to paragraph 36 as follows:

Respondents admit that a petition for writ of supersedeas must show "that substantial questions will be raised upon appeal." Respondents deny the remaining allegations made in paragraph 36. Respondents specifically deny that

the City's appeal raises, "substantial questions with respect to both of plaintiffs' causes of action."

37. Respondents object to the purported factual allegations in paragraph 37 insofar as the statements therein are improper opinions and legal argument, rather than verifiable facts. (*Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal. App. 3d 201, 205.) Subject to the foregoing objection, Respondents respond to paragraph 37 as follows:

Respondents admit that the CVRA has been addressed in published appellate decisions. The CVRA has also been addressed by at least one federal court—*Higginson v. Becerra* (S.D. Cal. Feb. 4, 2019) Case No. 3:17-CV-02032-WQH-MSB; the *Higginson* court rejected some of the same arguments Petitioner states it will make in its appeal. Respondents deny the remaining allegations made in paragraph 37, and specifically Petitioner's erroneous characterization of *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660. In *Sanchez*, the court held that the CVRA is not unconstitutional, and cases concerning racial gerrymandering, such as *Shaw v. Reno* (1993) 509 U.S. 630 and its progeny, have no application to the CVRA. (*Sanchez*, at pp. 680–688.)

38. Respondents deny the allegations of paragraph 38 of the Petition. The Trial Court's thoughtful and detailed analysis, reflected in its Statement of Decision, is correct and well supported by the evidence and the law.

E. Basis For Relief

39. Respondents admit that *some* mandatory injunctions are automatically stayed by the taking of an appeal. Respondents deny the remaining allegations of paragraph 39.

40. Respondents admit that the writ of supersedeas is a procedure for seeking a stay from an appellate court. Respondents deny the remaining allegations of paragraph 40.

41. Respondents admit that they do not agree with Petitioner's position that paragraph 9 of the Judgment is automatically stayed by Petitioner's appeal. Respondents further admit that the Trial Court did not confirm that the automatic stay applies to Paragraph 9. Respondents deny the remaining allegations contained in paragraph 41 because they misstate and mischaracterize Respondents' contentions.

42. Respondents admit the allegation of paragraph 42.

43. Respondents admit the allegation of paragraph 43.

44. Respondents deny the allegations contained in paragraph 44. Respondents specifically deny that, "Paragraph 9 is mandatory in effect."

45. Respondents deny the allegations contained in paragraph 45. Specifically, Respondents deny that Paragraph 9 effectively compels the City to conduct a district-based election in advance of August 15, 2019. Paragraph 9 does not require Petitioner to *do* anything; only that its unlawfully-elected officers *refrain* from certain activities.

46. Respondents deny the allegations contained in paragraph 46.

47. Respondents deny the allegations contained in paragraph 47.

48. Respondents deny the allegations contained in paragraph 48.

49. Respondents deny the allegations set forth in paragraph 49. Respondents specifically deny that irreparable harm will result if this Court denies the Petition. Rather, irreparable harm will be caused if Petitioner's unlawfully-elected councilmembers were to remain in office, thereby, denying the Latino citizens of Santa Monica their voting rights and inflicting irreparable damage to the Latino-concentrated Pico Neighborhood.

F. The Court Has Jurisdiction, And This Petition Is Timely

50. Respondents admit the allegation of paragraph 50.

51. Respondents admit the allegation of paragraph 51.

G. Authenticity of Exhibits

52. Respondents admit that Exhibits A-FF and HH-JJ are true and correct copies of original documents on file with the Trial Court or certified reporters' transcripts. Respondents deny that Exhibit GG is on file with the Trial Court; rather, a portion of that exhibit was stricken by the Trial Court.

53. Respondents deny the allegations of paragraph 53 of the Petition. Specifically, Respondents deny that anything in Exhibit GG bears on the issue of irreparable harm. Further, as explained more fully in Respondent's motion filed concurrently with this Opposition, the declaration of Dr. Lewis (part of Exhibit GG) was stricken by the Trial Court (see Petitioner's Exhibit JJ, at p. 1208),

Petitioner does not challenge that ruling, and so it is improper for Petitioner to now reference and rely upon Dr. Lewis' declaration in its Petition.

54. Respondents admit that Petitioner's exhibits are paginated consecutively from page 1 through 1208.

Prayer

Respondents pray that:

1. This Court deny the Petition for Writ of Supersedeas;

2. Award Respondents costs pursuant to the California Court Rules; and

3. Grant Respondents such further relief as to which they may be entitled.

DATED: March 21, 2019

Respectfully submitted

SHENKMAN & HUGHES

_____

Kevin Shenkman
Attorneys for Respondents

VERIFICATION

I, Kevin I. Shenkman, declare as follows:

I am one of the attorneys for Respondents Pico Neighborhood Association and Maria Loya. I have read the foregoing Return by Verified Answer to Petition for Writ of Supersedeas and know its contents. The facts alleged therein are within my knowledge and I know them to be true. Because of my familiarity with the rulings and relevant facts pertaining to the trial court's proceedings, I, rather than Respondents, verify the return.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on March 21, 2019 at Malibu, California.

_____
Kevin Shenkman

AUTHENTICITY OF EXHIBITS

All exhibits accompanying this opposition to petition for writ of supersedeas are true copies of original documents on file with the respondent court or transcripts of proceedings in the respondent court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Petitioner City of Santa Monica has now filed four dispositive motions, three writ petitions, an appeal and a petition for review to the California Supreme Court, and had all of its arguments heard over the course of a six-week trial followed by extensive briefing, and even further briefing and hearings concerning appropriate remedies to address Petitioner's racially discriminatory election system. At each and every stage, Petitioner's arguments have been rejected, and its council members were found to have never been lawfully elected.

Petitioner's unfortunate response to its lack of success in convincing any court that it should be permitted to impose its racially-discriminatory brand of at-large elections, has been to prolong this case by any means possible, believing that as long as it maintains some appeal in some court somewhere, its unlawfully-elected council members can persist in denying the Latino citizens of Santa Monica their voting rights and inflicting irreparable damage to the Latino-concentrated Pico Neighborhood. That delay is antithetical to decades of jurisprudence in voting rights cases, and the principles of justice that underlie the civil rights movement. (See *Williams v. City of Dallas* 734 F.Supp. 1317 (N.D. Tex. 1990) ["*In no way will this Court tell African-Americans and Hispanics that they must wait any longer for their voting rights in the City of Dallas.*"], italics in original; Dr. Martin Luther King, Jr. (1963) *Letter From a Birmingham Jail* ["[J]ustice too long delayed is justice denied."].) The instant writ petition, the

latest in Petitioner's efforts to prolong its unlawful council members' stranglehold on the levers of power in Santa Monica, should be denied for a host of reasons.

First, as its language suggests, the paragraph 9 of the Judgment ordering "that any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019" is prohibitory. It does not require Petitioner to affirmatively do anything; it merely requires that Petitioner, and its officers, refrain from certain activities.

Second, the Trial Court adjudged that the members of the Santa Monica City Council were "unlawfully holding a public office." (Code Civ. Proc., § 917.8, subd. (a).) Therefore, pursuant to Section 917.8, even if paragraph 9 of the Judgment were deemed to be mandatory, not prohibitory, it is not stayed by Petitioner's filing of a notice of appeal.

Third, a discretionary stay is not justified. The Trial Court applied well-settled law in weighing the evidence presented at trial, carefully considered all of the arguments, and issued a detailed 71-page Statement of Decision, addressing and rejecting each of the arguments Petitioner presents here to undermine confidence in the Trial Court's decision. Petitioner's mischaracterization of the Trial Court's analysis is no reason to doubt the wisdom of the Judgment. Regardless, in the unlikely event that this Court ultimately reverses the Judgment, this Court can "direct that the parties be returned so far as possible to the positions

they occupied before the enforcement of or execution on the judgment or order." (Code Civ. Proc., § 908.) All of Petitioner's purported harms could be remedied by this Court in the event the Judgment is reversed, so none of those purported harms are "irreparable."

II. PROCEEDINGS IN THE TRIAL COURT.

Though Petitioner attempts to cast doubt on the Trial Court's findings—insisting that every decision of the Trial Court over the entire three-year litigation, six-week trial and post-trial proceedings was horribly wrong—all of those findings are supported by the overwhelming evidence, and the correct application of the law. And those findings compel the denial of the instant writ petition.

A. Petitioner's Violation of the CVRA

The evidence establishing Petitioner's violation of the CVRA was overwhelming. Based on the methods accepted by the federal courts in federal Voting Rights Act ("FVRA") cases, both sides' experts found consistent "racially polarized voting" in the elections the CVRA directs the courts to evaluate—"elections for [Defendant's] governing body . . . in which at least one candidate is a member of a protected class." (Elec. Code, § 14028, subds. (a) and (b); Vol. 5, Ex. BB, at pp. 1039-1053 [Statement of Decision, at ¶¶ 21-34].) The Trial Court summed it up:

> Analyzing elections over the past twenty-four years, a consistent pattern of racially-polarized voting emerges. In most elections where the choice is available, Latino voters strongly prefer a Latino candidate

> running for Defendant's city council, but, despite that support, the preferred Latino candidate loses. As a result, 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. . . . This is the prototypical illustration of legally significant racially polarized voting – Latino voters favor Latino candidates, but non-Latino voters vote against those candidates, and therefore the favored candidates of the Latino community lose. (See *Gingles*, *supra*, 478 U.S. at pp. 58–61 ["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."]). All of this led Dr. Kousser to conclude: "[b]etween 1994 and 2016 [] Santa Monica city council elections exhibit legally significant racially polarized voting" and "the at-large election system in Santa Monica result[s] in Latinos having less opportunity than non-Latinos to elect representatives of their choice" to the city council. This Court agrees.

(Vol. 5, Ex. BB, at pp. 1039-1040, 1045 [Statement of Decision, at ¶¶ 21, 26.) The evidence of racially polarized voting was so strong that Professor Levitt concluded, as the Trial Court noted and agreed, "all of the relevant elections . . . exhibit racially polarized voting, including in some instances racial polarization that is so 'stark' that it is similar to the polarization 'in the late '60s in the Deep South." (Vol. 5, Ex. BB, at p. 1039 [Statement of Decision, fn. 4].)

Although not necessary, Respondents demonstrated the "other factors" enumerated in sections 14028(c) and 14028(e) which are probative of a CVRA violation, as the Trial Court confirmed. (Vol. 5, Ex. BB. pp. 1059-1065 [Statement of Decision, at ¶¶ 42-52].) "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 [at-large] election system—1 out of 71 to serve on the city council." (Vol. 5, Ex. BB. pp. 1039-1040 [Statement of Decision, at ¶ 21].) Latinos have suffered a history of discrimination in Santa Monica (Vol. 5, Ex. BB. pp. 1060-1061 [Statement of Decision, at ¶¶ 43-44]); the "staggering of [Respondent's] city council elections enhances the dilutive effect of its at-large election system" (Vol. 5, Ex. BB. p. 1062 [Statement of Decision, at ¶ 45]); the Latino community in Santa Monica suffers from the effects of past discrimination in education and employment, which hinders its ability of participate effectively in Santa Monica's political process (Vol. 5, Ex. BB. pp. 1062-1063 [Statement of Decision, at ¶¶ 46-47]); Respondent's elections have been marred by racial appeals (Vol. 5, Ex. BB. pp. 1063-1064 [Statement of Decision, at ¶¶ 48-49]); and Respondent's city council has been generally unresponsive to the Latino community and excluded Latinos from its commissions (Vol. 5, Ex. BB. pp. 1064-1065 [Statement of Decision, at ¶¶ 50-52].)

B. Petitioner's Violation of the Equal Protection Clause of the California Constitution

Petitioner's at-large election system diluting the vote of racial minorities is no accident; as the Trial Court determined, it was intended to do exactly that. (Vol. 5, Ex. BB. pp. 1075-1086 [Statement of Decision, at ¶¶ 65-83].) That at-large system was adopted in 1946 and maintained in 1992, instead of a district-based election system, for the purpose of preventing racial minorities from achieving representation on Respondent's city council. (*Ibid*.) Under the rubric of the *Arlington Heights* factors[1], The Trial Court evaluated the extensive historical record, including video of Petitioner's 1992 council meeting at which it refused to allow Santa Monica voters the opportunity to adopt district elections, and reached the inescapable conclusion that Respondent's adoption and maintenance of the at-large election system in both 1946 and 1992 was marred by discriminatory intent. (*Ibid.*)

In each instance, Petitioner's decision to adopt and maintain the at-large system has had the intended result—denying racial minorities a voice in their city government. As the Trial Court determined, that discriminatory impact is evidenced by the nearly unbroken string of losses by Latino candidates for Petitioner's city council,[2] as well as Respondent's neglect of the minority-

[1] *Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252.

[2] As discussed above, the Trial Court also found that Latino voters in Santa Monica prefer the Latino candidates when they run for Respondent's city council. (See also *Bolden v. City of Mobile* (S.D. Ala. 1982) 542 F.Supp. 1070, 1076 [relying on the lack of success of black candidates over several decades to show discriminatory impact, even without a showing that black voters voted for each of the particular black candidates going back to 1874]; *Jenkins v. Red Clay Consol. School Dist.* (3d Cir. 1993) 4 F.3d 1103, 1126 ["[E]xperience does demonstrate that minority candidates will tend to be candidates of choice among the minority community."].)

concentrated Pico Neighborhood over the 72 years of at-large elections. (Vol. 5, Ex. BB. pp. 1077, 1084 [Statement of Decision ¶¶ 67, 79].) Accordingly, the Trial Court found that Petitioner's at-large system of electing its city council members violates the Equal Protection Clause of the California Constitution, in addition to the CVRA.

C. Adoption of Appropriate Remedies

After finding in favor of Plaintiffs on both of their claims, the Trial Court turned to the selection of appropriate remedies. The Trial Court acknowledged that it had been presented with a number of election systems that would improve Latinos' voting power in Santa Monica and thus remedy the intentional vote dilution caused by the at-large system. (Vol. 5, Ex. BB. p. 1092 [Statement of Decision, at ¶ 91].) As many courts addressing dilutive at-large election systems have done, the Trial Court ultimately decided that the implementation of district elections is best suited for Santa Monica city council elections, and particularly to remedy the demonstrated history of vote dilution. (*Id*.) Since Petitioner refused to propose a district map or any remedy at all (even after the Trial Court indicated its at-large elections are illegal), the Trial Court was left only with the district map proposed by Respondents' expert demographer. (Vol. 5, Ex. BB. pp. 1092, 1094-1095 [Statement of Decision, at ¶¶ 92, 95].) Finding that map to be legal and appropriate, the Trial Court ordered that all future elections be conducted consistent with that district map. (Vol. 5, Ex. BB. pp. 1092-1095 [Statement of Decision, at ¶¶ 92-94].)

Recognizing that voting rights violations should be remedied promptly, the Trial Court ordered a special election be held on July 2, 2019. And, to ensure that the current members of the city council do not continue to hold their seats unlawfully, the Trial Court declared "[a]ny person, other than a person who has been duly elected to the Santa Monica City Council through a district based election . . . is prohibited from serving on the Santa Monica City Council after August 15, 2019." (Vol. 4, Ex. AA, p. 1017 [Judgment, at p. 13].) The Trial Court recognized that it has the authority to immediately remove all of those council members, because federal courts addressing FVRA violations have done exactly that, but chose instead to delay that relief to give Petitioner an opportunity to hold a lawful election if it chooses to do so. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 807 *review denied, en banc,* Aug. 20, 2014 [the "appropriate remedies" that may be implemented by a court that has found a violation of the CVRA includes at least those remedies employed by federal courts in federal Voting Rights Act ("FVRA") cases; *Williams v. City of Texarkana,* 861 F.Supp. 771, 773 (W.D. Ark. 1993) *aff'd* 32 F.3d 1265 (8th Cir. 1994) ["[T]he Court hereby reaffirms its earlier orders that the present plan be abandoned and that the present board members cease to be such."]; *Hellebust v. Brownback* (10th Cir. 1994) 42 F.3d 1331, 1335–1336 [upholding district court's decision to "declare[] the terms of members of the Board to be expired" to remedy voting rights violation].)

Important to the instant writ petition, the Trial Court found that the current members of Petitioner's council, selected in a manner intended to discriminate against racial minorities, were never lawfully elected, and thus are unlawfully holding office:

> The current members of the Santa Monica City Council were elected through unlawful elections. The residents of the City of Santa Monica deserve to have a lawfully elected city council as soon as is practical. The residents of the City of Santa Monica are entitled to have a council that truly represents all members of the community. Latino residents of Santa Monica, like all other residents of Santa Monica, deserve to have their voices heard in the operation of their city. This can only be accomplished if all members of the city council are lawfully elected. To permit some members of the council to remain who obtained their office through an unlawful election may be a necessary and appropriate interim remedy but will not cure the clear violation of the CVRA and Equal Protection Clause. (Vol. 4, Ex. AA, pp. 1009-1010 [Judgment, at pp. 5-6].)

D. Petitioner's Ex Parte Application

Nearly three weeks after entry of the Judgment, Petitioner filed an *ex parte* application seeking, in its words, to "confirm" that paragraph 9 of the Judgment is stayed by its filing of a notice of appeal. That *ex parte* application presented essentially the same arguments as the instant writ petition. The Trial Court took the matter under submission on March 4, 2019, and then denied Petitioner's *ex parte* application on March 6, 2019. (Vol. 5, Ex. JJ, p. 1208 [order denying

Defendant's ex parte application].) The Trial Court also struck the declaration of Jeffrey Lewis, filed by Petitioner in support of its *ex parte* application.[3] (*Ibid.*)

III. PARAGRAPH 9 OF THE JUDGMENT IS A PROHIBITORY INJUNCTION, AND THUS IS NOT STAYED BY PETITIONER'S FILING OF A NOTICE OF APPEAL.

While mandatory injunctions are generally stayed pending an appeal, it is well settled that prohibitory injunctions are not stayed. (*Wolf v. Gall* (1916) 174 Cal. 140, 142 ["By a line of decisions beginning with the early history of the state, the rule has been settled that an appeal does not stay the force of a prohibitory injunction."].) Over the years, California courts have not deviated from this rule that a prohibitory injunction must be respected, even while an appeal challenging that injunction is pending. (See *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 482 ["A prohibitory injunction is not stayed by an appeal."]; *Union Pacific R. Co. v. State Bd. of Equalization* (1989) 49 Cal.3d 138, 158 ["The writ was prohibitory and was thus not stayed by [defendant]'s appeal."]; *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709 ["Prohibitory portions of an order are not automatically stayed pending appeal."]; *People v. Lynam* (1968) 261 Cal.App.2d 490, 499 ["The injunction was prohibitory and, hence, was not stayed by an appeal."].)

Where an injunction has both mandatory and prohibitory features, the

[3] Ignoring the fact that the declaration of Jeffrey Lewis was stricken, Petitioner nonetheless cites that declaration in the instant petition. (See Petitioner Brief, at pp. 20, 29; Petitioner's Exhibit JJ [trial court order striking Lewis Declaration].) That is inappropriate, and is addressed more fully in Respondent's motion to strike, filed concurrently with this Opposition.

prohibitory portions are not stayed. (*Ohaver v. Fenech* (1928) 206 Cal. 118, 123 ["An injunction may grant both prohibitive and mandatory relief, and when it is of this dual character, and an appeal is taken, such appeal will not stay the prohibitive features of the injunction . . . ."]; *Agric. Labor Relations Bd. v. Tex-Cal Land Management* (1985) 192 Cal. App. 3d 1530, 1539, aff'd 43 Cal.3d 696 [ordering trial court to move forward with contempt proceedings as to the defendant's violation of the prohibitory portions of the injunction].)

While a prohibitory injunction can be phrased in mandatory terms, and vice versa, the test is whether compliance with the injunction requires an affirmative act or merely refraining from some act. (See *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80, 85, citing Civ. Code, § 3368 [defining preventive relief as "prohibiting a party from doing that which ought not be done" and Code Civ. Proc., § 525 [defining a prohibitory injunction as "a writ or order requiring a person to refrain from a particular act"] and quoting *Merced Mining Co. v. Fremont* (1857) 7 Cal. 130 ["A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done."]; *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1048 [finding an injunction commanding that the defendant "not transfer any assets other than for normal business and necessities of life" to be prohibitory because "[i]t directs affirmative inaction by defendant, not affirmative action."]; Yale Law J. Vol. 25, No. 7, at pp. 591-592 ["the question whether the injunction is prohibitory or mandatory will depend on whether the defendant, in order to perform specifically what the court says is his

temporary duty, will have to do *affirmative acts* . . ., or whether he will merely have to abstain from continuing certain physical acts."].) Even where an otherwise prohibitory injunction has "some minor mandatory feature," it remains prohibitory in character. (*United Railroads*, at p. 88.) And, where "the essential feature of [an injunction] is to restrain," the injunction is prohibitory even though "in yielding obedience to the restraint the defendant may incidentally be compelled to perform some act." (*Id.*, at pp. 88–89.) Nor does an otherwise prohibitory injunction transform into a mandatory injunction because, as a practical matter, it compels affirmative acts to avoid an undesirable result of refraining from the enjoined activity. (See *Ohaver v. Fenech* (1928) 206 Cal. 118, 123 [injunction prohibiting the defendants from feeding garbage to their hogs was prohibitory in nature, and therefore not stayed by the subsequent appeal, even though the practical effect was to require the defendant to choose between undesirable options—remove the hogs from their then-current location, or feed them a more expensive diet different than what they had been fed up to that time]; *United Railroads*, at pp. 88–89 ["[T]o comply with this injunction requires him either to shut down his head gate or fill in the diverting ditch. Here is compulsion upon him to do an affirmative act. Yet the supreme court of Georgia, like this court, found no difficulty in declaring that this incidental fact did not change the [prohibitory] character of the injunction."].)

Here, the prohibition against unlawfully-elected council members serving beyond August 15, is a prohibitory injunction—it does not require Defendant, or

anyone else, to *do* anything; only that its unlawfully-elected officers *refrain* from certain activities. (See *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1048 [finding an injunction commanding that the defendant "not transfer any assets other than for normal business and necessities of life" to be prohibitory because "[i]t directs affirmative inaction by defendant, not affirmative action."]; see also *United Railroads*, *supra*, 172 Cal. at p. 85.) That Defendant has previously held at-large elections every two years and its unlawfully-elected council members are currently serving in that capacity, does not change the prohibitory nature of the injunction embodied in paragraph 9 of the Judgment; restraining a continuing wrong is still a prohibitory injunction. (See, e.g. *United Railroads*, at pp. 85-87 [rejecting the defendant's argument that injunction prohibiting the defendant from operating more than a certain number of trains over the plaintiff's railroad was mandatory because the defendant had continuously operated trains in excess of that number prior to issuance of the injunction and thus the injunction would require the defendant to alter its practices]; *Jaynes v. Weickman* (1921) 51 Cal.App. 696 [injunction prohibiting a firm from using a disputed name held to be prohibitory even though in order to comply it was necessary for the defendant to remove the offending name].)

Petitioner fails to identify even a single action that paragraph 9 of the Judgment *requires* Defendant to take. Rather, Petitioner claims that "paragraph 9 [] *impliedly* require[s] affirmative action—the City must strip the Council members of their seats and hold a district-based election." (Petitioner's Brief, at p.

43, italics added.) In fact, paragraph 9 requires nothing of the sort. Though Petitioner could choose to hold a district-based election so it has council members authorized to serve past August 15, 2019, it could also take no action at all and still be in compliance with paragraph 9 of the Judgment. Petitioner would not have to "strip the Council members of their seats"—just as when an incumbent council member loses her re-election bid, that council member is not required to resign or take any other affirmative action, nor is the city required to "strip" anything; she simply ceases to be a member of the council. Paragraph 9 of the Judgment is no different.

Petitioner complains about what it believes would be the consequences of paragraph 9 of the Judgment if it were to take no action at all—leaving it with no governing board. But, the consequences of complying with a prohibitory injunction, no matter how undesirable they may be to the enjoined party, do not turn a prohibitory injunction into a mandatory one. (See *United Railroads*, *supra*, 172 Cal. at pp. 88–89; *Ohaver v. Fenech* (1928) 206 Cal. 118, 123.) Petitioner could comply with paragraph 9 of the Judgment by holding a district-based election for the seats on its city council, or Defendant could opt to exist with no quorum on its city council. Though it is rare for a city to go without a quorum on its city council, it is not without precedent. (See *Elliott v. Pardee* (1906) 149 Cal. 516 [describing how the City of Compton ceased to have a quorum on its governing body].) Perhaps there are other options as well, but one thing is clear: what Petitioner chooses to do as a result of complying with the prohibitory

injunction is another matter unrelated to the issue here—whether it must comply with paragraph 9 of the Judgment because it is a prohibitory injunction. The answer to that question is dictated simply by whether Petitioner could do nothing at all and be in compliance with that paragraph—it can, and so it is a prohibitory injunction. Although Petitioner's options or consequences may be undesirable to Petitioner, Petitioner's perception of those options as being undesirable does not change the prohibitory character of paragraph 9 of the Judgment. (See *Ohaver v. Fenech* (1928) 206 Cal. 118, 123 [injunction prohibiting the defendants from feeding garbage to their hogs was prohibitory in nature, and therefore not stayed by the subsequent appeal, even though the practical effect was to require the defendant to choose between undesirable options - remove the hogs from their then-current location, or feed them a more expensive diet different than what they had been fed up to that time]; see also *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1048 [the prohibitory/mandatory character of an injunction turns on whether the enjoined party can comply with the injunction through inaction].)

Nor does Petitioner's reference to the "status quo" change the simple fact that compliance with paragraph 9 of the Judgment does not require any affirmative act by Petitioner, and thus paragraph 9 of the Judgment is a prohibitory injunction. As the California Supreme Court adeptly noted in *United Railroads*, "[t]here is no magic in the phrase 'maintaining the status quo' which transforms an injunction essentially prohibitive into an injunction essentially mandatory." (*United Railroads*, *supra*, 172 Cal. at p. 87.) While the "status quo" may be a useful way

of differentiating prohibitory and mandatory injunctions in some contexts where the identification of the status quo is simple and straightforward—such as a contract claim seeking specific performance—it is not particularly useful in cases like this one about voting rights, elections and municipal government; it only serves to invite debate over what the status quo is exactly. This case demonstrates the point. While Petitioner argues that the status quo is the continued operation of its unlawfully-elected city council, the status quo is actually preserved only by prohibiting any further actions by that unlawfully-elected council. Every time that unlawfully-elected council adopts an ordinance or passes a resolution affecting the Latino community, the status quo is altered, and yet another wrong is perpetrated on Latino voters as they have no voice in the city council's actions. This is particularly problematic because, as the Trial Court found, Petitioner's city council has been unresponsive to the Latino community, and hostile to the Latino-concentrated Pico Neighborhood. (Vol. 5, Ex. BB, pp. 1064-1065 [Statement of Decision ¶ 51].) If anything, the status quo is preserved by paragraph 9 of the Judgment—it prohibits the unlawfully-elected council members from further harming the Latino community and the Pico Neighborhood after August 15, 2019 by, for example, altering the zoning regulations applicable to the Pico Neighborhood to encourage further gentrification.

Moreover, Petitioner's identification of the status quo, and reliance on what it calls the status quo to argue that paragraph 9 of the Judgment is mandatory in character, runs contrary to the California Supreme Court's holding in *United*

Railroads. In that case, the City and County of San Francisco was ordered to cease its use of railroads in excess of a particular number of cars. (*United Railroads*, *supra*, 172 Cal. at pp. 81–82.) Claiming that the order was a mandatory injunction, and thus stayed by its appeal, the City and County of San Francisco continued operating its railroad cars in excess of the limit set by the court, just as it had been doing prior to the initiation of the case, and the trial court agreed, refusing to issue a citation of contempt. (*Id.*, at p. 82.) But the California Supreme Court mandated that the trial court issue the citation for contempt. (*Id.*, at p. 90.) The California Supreme Court explained that the order was a prohibitory injunction regardless of the fact that the City and County of San Francisco had been operating its excess cars over the tracks even prior to United Railroads initiating its case, and rejected the City and County of San Francisco's argument that its operation of the excess number of cars was the "status quo." (*Id.*, at pp. 85–87.) Just as in *United Railroads*, in this case Petitioner governing the Latino community of Santa Monica without affording that community a fair voice in its government is a "continuous wrongful act," and the Trial Court's order prohibiting that wrongful act from continuing beyond August 15, 2019 is a prohibitory injunction. (*Id.*, at p. 86.)

Petitioner's argument about maintaining the status quo also ignores the rationale and purpose of maintaining the status quo pending appeal—specifically, "aid[ing] appellate jurisdiction" by "protecting the appellant from having his right of appeal rendered nugatory or merely nominal if he should succeed." (*Martin v.*

Rosen (1934) 2 Cal.App.2d 450, 453-454) In this case, there is no question that if Petitioner ultimately prevails in its appeal it can revert to its racially-discriminatory at-large election system, and section 908 of the Code of Civil Procedure even authorizes this Court to order any other relief to "return [the parties] so far as possible to the positions they occupied before the enforcement of or execution on the judgment" if the judgment is ultimately reversed. This Court's jurisdiction and authority could not be affected by anything Petitioner does or doesn't do to comply with paragraph 9 of the Judgment.

The cases cited by Defendant do not support its contrary view. Petitioner relies heavily on *Clute v. Superior Court* (1908) 155 Cal. 15, and claims that case is "directly on point." But, just as it did in the trial court below, Petitioner confuses the issues addressed by the *Clute* court. Petitioner quotes *Clute* and its discussion regarding the surrendering of a "position" to suggest that the portion of the injunction at issue in that case related to the removal from office. However, in *Clute,* the portion of the injunction that related to removal from office was not even alleged to have been violated. Rather, the "position" that the *Clute* court discusses is the defendant's possession of certain tangible property, not his position as an officer of the company. (*Id.*, at p. 20.)

In *Clute,* the injunction was directed to several acts, but the actions at issue in the contempt proceedings were "prevent[ing] . . . an employee of the corporation[] from entering the office of the hotel [and] taking possession of certain property" then in the defendant's possession. (*Id.*, at p. 18.) The court

reasoned that "[i]f Clute was in the actual possession of the hotel and the personal property in it, an order punishing him for preventing another person from entering and taking charge of the books, keys, and other property could have no other purpose or effect than to compel him to turn over his to such other, or at least to surrender his theretofore exclusive jurisdiction." (*Id.*, at p. 19.) It was for that reason that "the effect of the order appealed from was to require the possession of the corporate property to be transferred," *i.e.*, an affirmative action, not affirmative inaction. (*Ibid*.) The "position" discussed by the *Clute* court had nothing to do with the defendant's position as an officer, but rather pertained to the defendant's possession of certain tangible property. (*Id.*, at p. 20.) That fact is made clear by the ultimate disposition of the *Clute* court —that the order at issue "require[ed] the delivery of real and personal property," and thus posting of a bond pursuant to sections 943 and 945 of the Code of Civil Procedure would stay the enforcement pending appeal. (*Ibid*.) Petitioner's discussion of *Clute* ignores the acts that were at issue in the contempt proceedings—interfering with someone taking possession of property. The contempt proceedings addressed in *Clute* had nothing to do with the defendant maintaining his role as a corporate officer, and so the courts had no reason or occasion to address whether that portion of the injunction was mandatory or prohibitory.[4]

Eight years after its decision in *Clute*, the California Supreme Court

[4] Cases are not authority for propositions not therein considered. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

confirmed that the import of *Clute* is limited to injunctions that operate to compel a party to relinquish possession of real or personal property, and in the process the Court rejected the exact argument advanced by Petitioner here. (*United Railroads*, *supra*, 172 Cal. at p. 82.) In *United Railroads*, the plaintiff secured an injunction prohibiting the City and County of San Francisco from operating more than an agreed number of cars upon the plaintiff's railroad tracks, and sought to punish the mayor and other public officials of San Francisco for contempt for violation of that injunction. (*Ibid.*) The trial court refused to issue the requested citation for contempt because it viewed the injunction as being mandatory and thus stayed by the defendant's appeals, and the plaintiff sought a writ of mandate directing the trial court to institute contempt proceedings. (*Ibid*.) The California Supreme Court granted plaintiff that writ and ordered contempt proceedings. (*Id.*, at p. 90.) The *United Railroads* court reasoned that even though the injunction commanded the defendant to not continue what it had been doing prior to the injunction, the injunction was still prohibitory, rejecting the defendant's view that allowing it to continue as it had been doing would "maintain[] the status quo." (*Id.*, at pp. 83–90.) In explaining its decision, the California Supreme Court addressed its previous opinion in *Clute*, as that case was heavily relied upon by the defendant, and made clear that *Clute* is only applicable to injunctions that order the surrender of the possession of property. (*Id.*, at pp. 89–90; see also *id.*, at p. 92 ["It is only upon the theory that the injunction here involved requires something in the nature of a surrender of real or personal property that such cases as the *Clute* Case can be

held to apply."].) Concurring in the Court's decision, Justice Sloss summed it up at page 91 of *United Railroads*:

> An injunction which prohibits a defendant in possession of tangible real or personal property from interfering with the plaintiff's taking of possession is mandatory, because it compels the defendant to turn over his possession to the plaintiff. Clute v. Sup. Ct., 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54. The Clute Case is the one upon which the respondents place their main reliance, but I do not think the doctrine of that decision can be extended to fit the requirements of the present situation. Here the defendant is not required to transfer the possession of tangible real or personal property. The defendant was claiming the right to run its cars over certain tracks. This right was disputed, and its exercise enjoined. If we take words in their ordinary meaning, it is difficult to see that any affirmative action is required by an order which merely prohibits a defendant from operating cars over a certain route. The fact that the defendant had for some time been enjoying its asserted right to so run cars does not change the character of the order. If this were not so, almost any injunction against the doing of repeated acts would be mandatory if the performance of the acts had begun and been carried on for any considerable time prior to the application for the injunction.

While the concurring opinion in *United Railroads* certainly put the point in better focus, the majority opinion of the California Supreme Court in *United Railroads* made the very same point—that the import of *Clute* is limited to injunctions seeking to require the turnover of real or personal property. (*United Railroads, supra*, 172 Cal. at p. 90 ["The conclusion which this court reached [in *Clute*] was so plain and impregnable that there was no dissent from it, and that conclusion was that the defendant by this injunction was, in effect, ordered to surrender possession and management of the hotel property to plaintiff. It was a most manifest case of a mandatory injunction couched in prohibitive terms. To find in this case authority for holding the injunction in the present case to be

mandatory passes comprehension."].) The California Supreme Court's view of its own decision in *Clute*, expressed in both the majority and concurring opinions in *United Railroads* is controlling. Indeed, the concurring opinion of Justice Sloss in *United Railroads* must carry great weight concerning what the Court decided in *Clute* because *it was Justice Sloss himself who wrote the Court's previous opinion in Clute*.

Petitioner also cites a couple contract cases, where the courts held that injunctions requiring the defendants to breach existing contracts with a third-parties are mandatory in nature—*Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827 and *Ambrose v. Alioto* (1944) 62 Cal.App.2d 680. But there is no contract at issue in this case, and neither *Paramount Pictures* nor *Ambrose* helps Petitioner. Indeed, the injunction in *Paramount Pictures* was held, in large part, to be prohibitory and therefore not stayed pending appeal. (*Paramount Pictures*, at p. 839 ["To the extent that the order restrains any further services by defendant in connection with any motion picture photoplay, other than those to be performed under the Aldrich contract, the order is prohibitory and is not stayed by the appeal."].) The restraint on Ms. Davis from working on any other motion picture was held to be prohibitory even though it likely would, as a practical matter, compel her to comply with the mandatory features of the injunction—requiring her to fulfill her contract with Paramount Pictures. Moreover, with respect to the portion of the injunction that the *Paramount Pictures* court found to be mandatory, its decision hinges on the fact that the injunction was preliminary and would have

effectively granted the plaintiff all of the relief it sought in the underlying case. (*Id*. at pp. 838–839.)

Moreover, *Paramount Pictures* did not have any legal basis to prevent Ms. Davis from fulfilling her existing contract with another studio; that was just (transparently) used to compel Ms. Davis to fulfill her contractual obligation to Paramount Pictures. In contrast here, Petitioner has already had a full trial and an appeal—the injunction is not preliminary —and Petitioner can certainly refrain from having individuals not lawfully elected serve on its city council without indefinitely submitting to district-based elections. If Petitioner were to hold a district-based election (or if Petitioner does not hold a district-based election and instead chooses to go without a quorum on its city council) and then wins its appeal, it could revert to its discriminatory at-large election system. Ms. Davis, on the other hand, could not undo any work she did for Paramount if she later won at trial or appeal.

Ambrose v. Alioto (1944) 62 Cal.App.2d 680 is the same. The *Ambrose* court merely followed *Clute*. And just as in *Clute*, the injunction in *Ambrose* involved the transfer of property—an injunction that effectively compelled the transfer of property from the defendant to a third party. (*Id.*, at p. 685.) Because the defendant had a contract for the sale of fish to one company at the time the court ordered that it must instead sell its fish to another company, the injunction would compel the defendant to breach its contract. It was on that basis that the *Ambrose* court found the injunction to be mandatory. (*Id.*, at p. 686.) It is hard to

imagine how a case regarding the sale of fish could have any bearing on the injunction in this case prohibiting unlawfully-elected council members from serving beyond August 15, 2019.

Feinberg v. Doe (1939) 14 Cal. 2d 24, which Petitioner cites in passing, is inapposite. In *Feinberg*, the International Ladies' Garment Workers' Union ("ILGWU") obtained an arbitration award directing the defendant "to release Amelia Greenwood from further employment"—obviously a mandatory injunction because it required the defendant to take an affirmative action, *i.e.*, terminate an employee. (*Id.*, at p. 26.) The ILGWU confirmed the arbitration award in court, and obtained an injunction seemingly couched in terms of a prohibitory injunction—"enjoining and restraining the defendants 'from employing or continuing to employ, or hereafter employing the said Amelia Greenwood . . .'," but the effect of the injunction was still mandatory because terminating an employee requires "affirmative action" by an employer. (*Id.*, at pp. 26–27; see e.g., Lab. Code, § 201.) That the injunction in *Feinberg* was mandatory was even revealed by the "order to show cause why [the defendants] should not be punished for contempt in refusing and failing to obey the order of said court to *discharge* the said Amelia Greenwood as an employee . . . ." (*Id.*, at p. 27.) In contrast to the discharge of an employee at issue in *Feinberg*, to comply with paragraph 9 of the Judgment in this case, neither Petitioner nor its unlawfully-elected council members are required to do anything – they are simply required to *refrain from* serving on the city council after August 15, 2019. Unlike in *Feinberg*, Petitioner is not

required to discharge or fire anyone; no affirmative act is required at all. Rather, the unlawfully-elected council members are simply prohibited after August 15, 2019 from taking official action on behalf of the City of Santa Monica and binding the citizens who did not lawfully elect them. Petitioner is no more required to "strip the Council members of their seats" (Petitioner's Brief, at p. 43) by the Judgment, than a political subdivision is required to remove a public official who is defeated in an election—i.e. not at all.

And, finally, Petitioner cites to *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872. However, that case adds nothing to the analysis here. Rather, the *URS Corp.* court merely decided the unique question of whether an order disqualifying the counsel of a corporate litigant is mandatory or prohibitory. There, the court held that the disqualification order was mandatory because it required affirmative action by the enjoined party (the hiring of new counsel because a corporation cannot litigate *pro se*), and because any appeal would likely be mooted if the disqualification order were not stayed. (*Id.*, at p. 886.) Neither of those concerns apply here—paragraph 9 of the Judgment does not require any action by Petitioner, as discussed above, nor would enforcement of that portion of the Judgment moot any appeal, as Petitioner would be free to continue its appeal (and revert to at-large elections if it prevails) regardless of the composition of its city council.

IV. SECTION 917.8(a) OF THE CODE OF CIVIL PROCEDURE DIRECTS THAT PARAGRAPH 9 OF THE JUDGMENT IS NOT

STAYED PENDING APPEAL EVEN IF IT WERE CONSTRUED TO BE A MANDATORY INJUNCTION.

Even if the prohibition against unlawfully-elected council members serving beyond August 15 were a mandatory injunction (it is not), it would still not be stayed by Petitioner's appeal, pursuant to section 917.8(a) of the Code of Civil Procedure. The Trial Court explicitly held that the current members of the Santa Monica City Council were not lawfully elected, thus, pursuant to section 917.8(a), paragraph 9 of the Judgment is not stayed by Defendant's appeal.

While Section 916 of the Code of Civil Procedure sets forth the general rule that "[t]he perfecting of an appeal stays [certain] proceedings in the trial court," that general rule is explicitly limited by the preceding language: "[e]xcept as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810." (Code Civ. Proc., § 916, subd. (a).) One of those exceptions, provided in Section 917.8, is directly applicable here. Section 917.8(a) provides that "[t]he perfecting of an appeal does not stay proceedings" where there is an adjudication that someone is "unlawfully holding a public office . . . within this state." As the Trial Court explicitly ruled, none of the current Santa Monica council members have been lawfully elected; they were chosen through an unlawful and unconstitutional election system. (See Vol. 4, Ex. AA, p. 1009 [Judgment p. 5 - "The current members of the Santa Monica City Council were elected through unlawful elections. The residents of the City of Santa Monica deserve to have a lawfully elected city council as soon as is practical"]; see also Vol. 5, Ex. BB, pp. 1097-

1098 [Statement of Decision ¶ 98 - Only by prohibiting those not lawfully elected from serving past August 15, 2019 "can the stain of the unlawful discriminatory at-large election system be promptly erased."].)

Section 917.8(a) reflects the Legislature's intent that those who are not lawfully in public office not be permitted to maintain the public office by prolonging appeals, regardless of the reason their holding of public office is unlawful—whether because they were not lawfully elected, or they are not qualified to hold a particular public office because of where they reside, or they were convicted of a felony disqualifying them from holding public office. That policy is also consistent with what federal courts have recognized in FVRA cases—the fundamental right to a lawfully-elected representative government is too important to allow a defendant to delay the implementation of a remedial plan. (See, e.g., *Williams v. City of Dallas* (N.D. Tex. 1990) 734 F.Supp. 1317)

A. CCP Section 917.8(a) Is Not Limited to Actions Brought In *Quo Warranto*

In the hope of escaping the plain text of Section 917.8(a), Defendant would have this Court read language into section 917.8(a) that is simply not there. Specifically, Defendant would prefer that section 917.8(a) read "The perfecting of an appeal does not stay proceedings, . . . [i]f a party to the proceeding has been adjudged guilty of . . . unlawfully holding a public office . . . within this state *through quo warranto proceedings*," but that is <u>not</u> what section 917.8 says.

Rather, section 917.8 has no such qualification, or even any reference to *quo warranto* proceedings; if a court determines, as the Trial Court did in this case, that someone is holding public office unlawfully, the order removing that officeholder is not stayed by the filing of an appeal, just as the plain language of section 917.8(a) provides. If the Legislature had intended to limit section 917.8 to only *quo warranto* actions, it easily could have done so; indeed, where the Legislature intended to limit a provision to only *quo warranto* proceedings it has expressly done so. (See e.g., Govt. Code, § 1770, subd. (b).) The Legislature did not so limit section 917.8, so neither should this Court. Section 917.8 reflects the Legislature's recognition that a public official should not be allowed to use the appeals process to prolong his time in an office he holds unlawfully, and that holds equally true regardless of the reason that office is unlawfully held.

To support its view, Petitioner cites two cases decided long before the civil rights era, and even longer before the CVRA was enacted—from 1899 and 1903, respectively—that hold it is beyond "the power of the court" except in a *quo warranto* proceeding "to pronounce" that someone "unlawfully holds a public office." (*Day v. Gunning* (1899) 125 Cal. 527, 528.) At the time those cases were decided, it very well may have been that the only way a public officeholder could be determined to be "unlawfully holding a public office" was through a *quo warranto* action. But that has changed in the 120 years since *Day*. As the Second District Court of Appeal discussed in the leading case on the breadth of the remedial powers granted to the Trial Court by the CVRA—*Jauregui v. City of*

Palmdale (2014) 226 Cal.App.4th 781, *review denied, en banc,* Aug. 20, 2014—the "appropriate remedies" that may be implemented by a court that has found a violation of the CVRA includes at least those remedies employed by federal courts in FVRA cases. (*Jauregui*, at p. 807.) Upon finding a violation of the FVRA, federal courts have acted quickly, implementing their selected remedial plans immediately, and recognized that minorities should not be forced to wait for their voting rights. (See e.g., *Williams v. City of Dallas*, *supra*, 734 F.Supp. 1317.) As part of those remedial plans, some courts have even *immediately* removed all of the unlawfully-elected members of the defendant's governing board. (See e.g., *Williams v. City of Texarkana* (W.D. Ark. 1993) 861 F.Supp. 771, 773. aff'd 32 F.3d 1265 (8th Cir. 1994) ["[T]he Court hereby reaffirms its earlier orders that the present plan be abandoned and that the present board members cease to be such."]; *Hellebust v. Brownback* (10th Cir. 1994) 42 F.3d 1331, 1335–1336 [upholding district court's decision to "declare[] the terms of members of the Board to be expired" to remedy voting rights violation].) To say that the CVRA—"remedial legislation [that] is to be liberally or broadly construed"—does not afford the Trial Court the same ability to remedy vote dilution through prompt action as the FVRA does, would be inconsistent with the Second District Court of Appeal's well-reasoned decision in *Jauregui*. (*Jauregui*, at p. 807.)

That the CVRA grants the Trial Court the authority to declare that someone is unlawfully holding a public office is not, as Petitioner claims, "beside the point" (Petitioner's Brief, at p. 45); it is the point. The CVRA, enacted more than 100

years after *Day*, grants that authority; the Trial Court did exactly that; and therefore section 917.8(a) applies by its express terms.

V. NO DISCRETIONARY STAY IS WARRANTED.

Disregarding the unchallenged principle that violations of voting rights should be remedied promptly, Petitioner nonetheless argues that this Court should stay the prohibitory injunction embodied in paragraph 9 of the Judgment. (See Vol. 5, Ex. BB, p. 1091 [Statement of Decision, ¶ 90 - "It is also imperative that once a violation of voting rights is found, remedies be implemented promptly, lest minority residents continue to be deprived of their fair representation"], citing *Williams v. City of Dallas* (N.D. Tex. 1990) 734 F.Supp. 1317; Vol. 4, Ex. AA, p. 1009 [Judgment, p. 5 - "The current members of the Santa Monica City Council were elected through unlawful elections. The residents of the City of Santa Monica deserve to have a lawfully elected city council as soon as is practical"].) There is simply no reason to forestall the vindication of voting rights in this case.

A. The Judgment Is Not Likely To Be Reversed.

In its attempt to deny Latino citizens their voting rights for a few more years, Petitioner argues "there is a substantial likelihood of reversal" because its "appeal raises substantial issues, several of first impression." But Petitioner's assertion belies the facts that: (1) Respondents prevailed on both of their claims, either one of which justifies the remedy adopted by the Trial Court (including

paragraph 9 of the Judgment); and (2) all of Petitioner's arguments have been previously rejected by the California and federal courts, and ignore the findings and rationale in the Trial Court's detailed and thorough Statement of Decision.

The Trial Court's findings, rejecting the same contentions Petitioner makes in the instant petition, should not be set aside lightly, either in the appeal of the Judgment or in considering the instant writ petition. (See *Kendall v. Foulks*, 180 Cal. 171, 174 ["It is a rule so universally followed and so often stated as to need only to be referred to that the granting, denial, dissolving or refusing to dissolve a permanent or preliminary injunction rests in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case."]. Injunctions will not be modified or dissolved on appeal except for an abuse of discretion. (*People v. Black's Food Store* (1940) 16 Cal. 2d 59, 61; *McCoy v. Matich* (1954) 128 Cal. App. 2d 50, 52; *Wilms v. Hand* (1951) 101 Cal. App. 2d 811, 815. "A trial court will be found to have abused its discretion only when it has exceeded the bounds of reason or contravened the uncontradicted evidence." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69). "Further, the burden rests with the party challenging the injunction to make a clear showing of an abuse of discretion." (*Ibid.*; *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1047.) In reviewing the Trial Court's ruling for abuse of discretion, this Court does not reweigh the evidence or evaluate the credibility of witnesses; that is the province of the Trial Court. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625 ["[T]he trial court is the judge of the credibility of the [witnesses] and it

is that court's province to resolve conflicts. Our task is to ensure that the trial court's factual determinations, whether express or implied, are supported by substantial evidence. [Citation.] Thus, we interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order."].)

Given the extensive factual record presented to the Trial Court, upon which the Trial Court relied in making its findings, this Court should accord special deference to the Trial Court's findings. Petitioner was afforded every opportunity to present any evidence and arguments it desired, through a series of dispositive motions, the six-week trial, closing briefs, and post-trial hearings regarding the selection of remedies. Based on the extensive proceedings below, the Trial Court weighed the evidence and reached certain findings that are dispositive of any appeal of the Judgment:

- Petitioner's elections are consistently plagued by racially polarized voting. "In most elections where the choice is available, Latino voters strongly prefer a Latino candidate running for Defendant's city council, but, despite that support, the preferred Latino candidate loses." (Vol. 5, Ex. BB, p. 1039 [Statement of Decision, ¶ 21]; compare *Thornburg v. Gingles* (1986) 478 U.S. 30, 58–61 ["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."]);

- The "probative but not necessary" factors (Elec. Code § 14028, subd. (e)) further support a finding of racially polarized voting in Santa Monica and a violation of the CVRA: 1) The Latino community in Santa Monica has borne the effects of a history of discrimination, including discrimination perpetuated by Petitioner, 2) The staggering of Petitioner's city council elections enhances the dilutive effect of its at-large election system, 3) The Latino community in Santa Monica bears the effects of past discrimination in areas such as education, employment, and health, which hinders their ability to participate effectively in the political process, 4) Caustic racial appeals have infected Petitioner's elections, and 5) Petitioner has been unresponsive and hostile to the needs of the Latino community. (Vol. 5, Ex. BB, pp. 1059-1065 [Statement of Decision, ¶¶ 42-52);
- Several available remedies (district-based elections, cumulative voting, limited voting and ranked choice voting), would each enhance Latino voting power over the current at-large system, and thus the at-large election system dilutes the Latino vote in Petitioner's council elections. (Vol. 5, Ex. BB, pp. 1065-66 [Statement of Decision, ¶¶ 53-54]);

- In 1946 and 1992, Petitioner adopted/maintained its at-large election system with the intention of discriminating against racial minorities. (Vol. 5, Ex. BB, pp. 1075-1086 [Statement of Decision, ¶¶ 65-83]); and
- Petitioner's at-large election system has had a discriminatory impact on the Latino community, felt immediately after its adoption in 1946 and maintenance in 1992. (Vol. 5, Ex. BB, pp. 1077, 1084 [Statement of Decision, ¶¶ 67, 79]);

Ignoring all of these findings by the Trial Court, and ignoring the correct standard of review, Petitioner nonetheless argues that it is likely to prevail on its appeal. It is hard to imagine that this Court is likely to find the Trial Court abused its discretion. Still, each of Petitioner's arguments is addressed below.

1. The Trial Court's Finding of Racially Polarized Voting Is Correct.

First, Petitioner argues "[t]he trial court erred in focusing exclusively on the performance of Latino candidates, ignoring the preferences of Latino voters." But the Statement of Decision demonstrates otherwise – that the Trial Court engaged in precisely the same analysis endorsed by the U.S. Supreme Court and the Ninth Circuit Court of Appeals for identifying racially polarized voting, giving the race of each candidate only the importance those courts have instructed. (Vol. 5, Ex. BB, pp. 1056-1059 [Statement of Decision, ¶¶ 39-41], citing *Gingles*, *supra*, 478 U.S. at pp. 58–61; *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 550-

554; *Garza v. County of Los Angeles,* 756 F. Supp. 1298, 1335-1337 (C.D. Cal. 1990), aff'd, 918 F.2d 763 (9th Cir. 1990). As the Trial Court explained, the rigid "mechanical approach suggested by [Petitioner]—treating a Latino candidate who receives the most votes from Latino voters (and loses, based on the opposition of the non-Hispanic white electorate) the same as a white candidate who receives the second, third or fourth-most votes from Latino voters (and wins, based on the support of the non-Hispanic white electorate)—has been expressly rejected by the courts." (Vol. 5, Ex. BB, pp. 1056-1059 [Statement of Decision, ¶¶ 39-41], citing *Ruiz v. Santa Maria* (1998) 160 F.3d 543, 553–554; *Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, 1318, aff'd, 488 U.S. 988 (1988) and *Clarke v. City of Cincinatti* (6th Cir. 1994) 40 F.3d 807, 812.)

2. The Trial Court's Finding of Vote Dilution Is Correct.

Next, Petitioner argues the Trial Court "erred in holding that plaintiffs proved vote dilution." (Petitoner's Brief, at p. 50.) But Petitioner fails to mention that the Trial Court expressly found vote dilution *by the standard proposed by Petitioner*. (Vol. 5, Ex. BB, pp. 1065-1066 [Statement of Decision, ¶¶ 53-54].) Specifically, Petitioner argued that to show vote dilution Respondent must show "that some alternative method of election would enhance Latino voting power." (Vol. 5, Ex. BB, p. 1065 [Statement of Decision, ¶ 53]; Vol. 2, Ex. E, p. 281 [Defendant's Closing Brief, p. 9]) Applying that standard, the Trial Court expressly found several alternative methods of election—district-based elections, cumulative voting, limited voting and ranked choice voting—would each enhance

Latino voting power over the current at-large system. (Vol. 5, Ex. BB, pp. 1065-1066 [Statement of Decision, ¶¶ 53-54].) The Trial Court reached that conclusion by examining the plentiful evidence presented during the six-week trial, including the national, state and local experiences with district elections, particularly those involving districts in which the minority group is not a majority of the eligible voters, other available remedial systems replacing at-large elections, and the precinct-level election results in past elections for Santa Monica's city council. (*Ibid.*) Petitioner may disagree with the Trial Court's conclusion based on the evidence, but that is a decision left to the Trial Court.

Perhaps recognizing the frailty of its argument, Petitioner seeks to change the standard from what it proposed to the Trial Court—now insisting that the CVRA requires that "a plaintiff must show that a protected class would have greater opportunity to elect candidates of its choice" (Petitioner's Brief, at p. 51), citing FVRA cases that do not address the CVRA, which is significantly different in precisely this respect. According to Petitioner, Latinos could not have a greater opportunity to elect candidates of its choice because Latinos are not numerous and compact enough to comprise more than 50% of the voters in a remedial district. But Petitioner's argument disregards the plain text of the CVRA, which prohibits an "at-large method of election . . . that impairs the ability of a protected class to elect candidates of its choice ***or its ability to influence the outcome of an election***. (Elec. Code, § 14027, emphasis added.) And, the CVRA expressly disclaims any

requirement that a plaintiff show that a majority-minority district can be drawn. (Elec. Code § 14028, subd. (c); *Sanchez*, *supra*, 145 Cal.App.4th at p. 669).[5]

3. The Trial Court's Finding That the CVRA Is Not Unconstitutional Is Correct.

Next, Petitioner argues that the CVRA is "unconstitutional to the extent that it authorizes predominantly race-based remedies without a showing of any injury." But Petitioner fails to mention that its argument was not only rejected by the Trial Court in this case, the same argument was also rejected by the Fifth District Court of Appeal in *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 680-688, and even more recently by the United States District Court for the Southern District of California in *Higginson v. Becerra* (S.D. Cal. Feb. 4, 2019) Case No. 3:17-CV-02032-WQH-MSB. Moreover, the Trial Court expressly found that Respondents showed a compelling injury (Vol. 5, Ex. BB, pp. 1068-1072 [Statement of Decision, ¶¶ 59-62]), and explained that the remedial plan it adopted was not "predominantly race-based" or drawn "to maximize the number of Latino voters within" a remedial district (as Petitioner now contends) (Vol. 5, Ex. BB, pp. 1092 [Statement of Decision, ¶ 92].)

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[5] Petitioner's reference to the proportion of the Latino community residing outside the remedial district has even been rejected by the federal courts addressing the more restrictive FVRA. (*Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1414 ["The district court erred in considering that approximately 60% of the Hispanics eligible to vote in Watsonville would reside in five districts outside the two single-member, heavily Hispanic districts in appellants' plan."]; *Campos v. City of Baytown, Texas*, (5th Cir. 1988) 840 F.2d 1240, 1244 ["The fact that there are members of the minority group outside the minority district is immaterial."].)

4. The Trial Court's Adoption of the District Map Is Correct.

Next, Petitioner argues that the Trial Court's selection of a district map violates Elections Code section 10010 because, according to Petitioner, section 10010 restricts the *court's* implementation of appropriate remedies. As the Trial Court explained, section 10010 specifies what a defendant in a CVRA case must do in order to propose a legislative plan for remedying a violation of the CVRA, not what a court must do in order to carry out its duty to "implement appropriate remedies." (Vol. 5, Ex. BB, pp. 1095-1096 [Statement of Decision, ¶ 96]; Elec. Code, § 14029.) The Trial Court gave Petitioner every conceivable opportunity to propose a remedy, but Petitioner refused. (Vol. 5, Ex. BB, pp. 1095-1096 [Statement of Decision, ¶ 96].) Faced with Petitioner's persistent refusal, the Trial Court did exactly what other courts have held is a court's duty when a defendant refuses to propose a remedy—order a remedial plan without the defendant's input. (Vol. 5, Ex. BB, pp. 1094-1095 [Statement of Decision, ¶ 95] citing *Williams v. City of Texarkana* (8th Cir. 1994) 32 F.3d 1265, 1268 ["If [the] appropriate legislative body does not propose a remedy, the district court must fashion a remedial plan."]; *Bone Shirt v. Hazeltine* (D.S.D. 2005) 387 F.Supp.2d 1035, 1038 [same].)

5. The Trial Court's Findings of Discriminatory Intent and Discriminatory Impact Are Correct.

Finally, Petitioner turns to the Equal Protection claim, and argues that the evidence does not support the Trial Court's findings of discriminatory intent and discriminatory impact. (Petitioner's Brief, at pp. 53–56.) But, the Trial Court expressly found the at-large election system has had a discriminatory impact on Latinos. Specifically, the Trial Court found: (1) the at-large election system has resulted in Petitioner being unresponsive to the Latino community, and palpable harm to the Latino-concentrated Pico Neighborhood; and (2) the at-large election system led to the defeat of Latino candidates, which history and the statistical analyses of both sides' experts confirm the Latino electorate in Santa Monica prefers. (Vol. 5, Ex. BB, pp. 1039-1053, 1064-65, 1077, 1084 [Statement of Decision, ¶¶ 21-34, 51, 67, 79].) And, contrary to Petitioner's assertion, the Trial Court expressly found that Latinos would have greater voting power under another method of election. (Vol. 5, Ex. BB, pp. 1065-1066, 1092-1094 [Statement of Decision, ¶¶ 53-54, 93-94].)

Petitioner seems to base its entire argument about discriminatory impact on its erroneous view that if a majority-Latino district cannot be drawn there can be no discriminatory impact. But that view was rejected in *Garza v. County of Los Angeles* (C.D. Cal. 1990) 756 F.Supp. 1298, aff'd (9th Cir. 1990) 918 F.2d 763, cert. denied (1991) 111 S.Ct. 681, and the only case cited by Petitioner to support its view to excuse its intentional racial discrimination—*Johnson v. DeSoto Cty. Bd. of Comm'rs* (11th Cir. 2000) 204 F.3d 1335—actually declined to address the issue because the appellant in that case failed to make the argument to the district

court. (*Garza, supra*, 756 F.Supp. at p. 1319 [finding discriminatory impact where plaintiffs were able to draw a district with a Latino proportion "in the 44 to 46 percent range"]; *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 771 ["the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases"]; *Johnson*, at p. 1346 ["Plaintiffs, on appeal, argue that a black-majority district is not required; according to Plaintiffs, a "black-influence district," where a substantial black minority is coupled with sufficient white cross-over voting so that the black minority in fact can elect candidates of its choice, is sufficient. We, however, need not decide whether Plaintiffs' "influence district" theory is correct. Plaintiffs never argued this theory to the district court."].) Moreover, it would be a particularly odd result to interpret the Equal Protection clause of the California Constitution more restrictively in this respect than its counterpart in the U.S. Constitution, particularly in light of the Legislature, in enacting the CVRA, disclaiming the FVRA requirement that a majority-minority district is possible. (Elec. Code § 14028, subd. (c); *Sanchez, supra*, 145 Cal.App.4th at p. 669.)

Furthermore, Petitioner's argument ignores the Trial Court's finding that Petitioner's unresponsiveness to the Latino community and the Latino-concentrated Pico Neighborhood is a discriminatory impact that is due to the at-large election system. (Vol. 5, Ex. BB, pp. 1064-1065, 1077, 1084 [Statement of Decision, ¶¶ 50-51, 67, 79].) As the Ninth Circuit Court of Appeals confirmed in *Garza*, "the showing of injury in cases involving discriminatory intent need not be

as rigorous as in effects cases." (*Garza*, *supra*, 918 F.2d 763, 771.) When voting rights are implicated "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all . . .'," so any discriminatory impact is sufficient. (*N. Carolina NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239 [surveying Supreme Court cases].) Here, the discriminatory impact is palpable. (Vol. 5, Ex. BB, pp. 1064-1065, 1077, 1084 [Statement of Decision, ¶¶ 50-51, 67, 79].)

Petitioner also refuses to acknowledge the Trial Court's extensive review and weighing of the evidence demonstrating the discriminatory intent in Petitioner's adoption and maintenance of the at-large election system. In its Statement of Decision, the Trial Court detailed the evidence, and its analysis consistent with the U.S. Supreme Court's decision in *Arlington Heights*, supporting its finding of discriminatory intent. (Vol. 5, Ex. BB, pp. 1075-1086 [Statement of Decision, ¶¶ 65-83].) The Trial Court also addressed the evidence that Petitioner now relies on to suggest that there was no discriminatory intent in its adoption or maintenance of the at-large election system, but found that evidence was outweighed by the evidence supporting a finding of discriminatory intent. (Vol. 5, Ex. BB, pp. 1078-1079 [Statement of Decision, ¶¶ 69-70].) Ultimately, the Trial Court considered all of the evidence, giving weight to the evidence it found to be credible and discounting that which it did not believe, applied the appropriate legal test, and found discriminatory intent. It is not the

role of this Court to second-guess the Trial Court's weighing of the evidence. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625)

B. Enforcement of Paragraph 9 Would Not Result In Irreparable Harm.

As unlikely as it is that the Judgment will be reversed, particularly in a manner that would change the end result of requiring district elections, enforcement of paragraph 9 of the Judgment while Petitioner pursues its contemplated serial appeals would not harm Petitioner or the public. On the other hand, staying that portion of the Judgment would inflict precisely the sort of harm that courts have recognized is irreparable. (See *Williams v. City of Dallas* 734 F.Supp. 1317 (N.D. Tex. 1990) ["*In no way will this Court tell African-Americans and Hispanics that they must wait any longer for their voting rights in the City of Dallas.*"], italics in original; *Puerto Rican Legal Defense & Educ. Fund, Inc. v. City of New York* (E.D.N.Y. 1991) 769 F. Supp. 74, 79 ["it is well-settled that the claimed deprivation of a constitutional right such as the right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm."].)

In the Trial Court, and even in its instant petition, Petitioner has confirmed that if paragraph 9 of the Judgment is not stayed by this Court it will hold a district-based election. Unlike Petitioner's at-large election system, there is no question that a district-based election would comply with the CVRA and the Equal Protection clause of the California Constitution. Indeed, no court has ever

scrapped a district-based election system in favor of an at-large system because the district system diluted a minority's vote. While Petitioner points to an inflated estimate of the amount of money it would have to spend on a special election, "monetary harm does not constitute irreparable harm." (*Cal. Pharmacists Ass'n v. Maxwell-Jolly* (9th Cir. 2009) 563 F.3d 847, 851.) And, Petitioner has only itself to blame for the need for a special election; despite the overwhelming evidence showing its at-large election system is illegal, Petitioner insisted on utilizing the at-large method in its two most recent elections (2016 and 2018) while the underlying case was pending. Moreover, its complaint about expending money on a fair election begs the question: how much are democracy and voting rights worth?

On the other hand, staying paragraph 9 of the Judgment would significantly and irreparably harm the Latino community in Santa Monica. In any instance where voting rights are forestalled, there is an expressive harm that cannot be quantified, but is nonetheless very real. (See *Reynolds v. Sims* (1964) 377 U.S. 533, 555.) And, here, allowing Petitioner's unlawfully-elected council members to continue in their roles indefinitely, enacting ordinances and policies that harm the Latino community, would, of course, irreparably harm Respondents and the general public, particularly in light of Petitioner's hostility to the Latino community (Vol. 5, Ex. BB, pp. 1064-1065 [Statement of Decision, ¶ 51 – "The elements of the city that most residents would want to put at a distance – the freeway, the trash facility, the city's maintenance yard, a park that continues to

emit poisonous methane gas, hazardous waste collection and storage, and, most recently, the train maintenance yard – have all been placed in the Latino-concentrated Pico Neighborhood. Some of these undesirable elements – e.g., the 10-freeway and train maintenance yard – were placed in the Pico Neighborhood at the direction, or with the agreement, of Defendant or members of its city council."].)

VII. CONCLUSION

For all of these reasons, this Court should deny the petition for a writ of supersedeas, and not allow Petitioner to continue to deny the Latino community its rightful voice in its municipal government.

DATED: March 21, 2019

Respectfully submitted

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By:_____
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CERTIFICATION OF WORD COUNT

Cal. Rules of Court, rules 8.204(c)(1)

This Opposition to Petition for Writ of Supersedeas contains 13,824 words, as counted by the Microsoft Word version 2010 word-processing program.

DATED: March 21, 2019

Respectfully submitted

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PROOF OF SERVICE

I, Marci Cussimonio, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of l8 and not a party to the within action; my business address is: 43364 10th Street West, Lancaster, California 93534. On March 21, 2019, I served the following documents:

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS

****** See Attached Service List ******

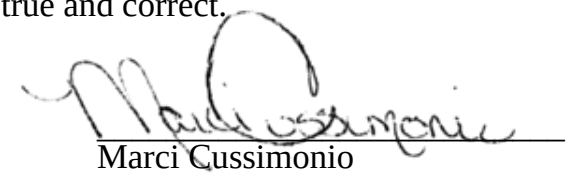
[x] **BY MAIL as follows:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U. S. postal service on that same day with postage thereon fully prepaid at Lancaster, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[x] **BY ELECTRONIC SERVICE: A true and correct copy of the above-titles documents were electronically served on the persons listed on the attached service list**.

[x] I am employed by R. Rex Parris, a member of the bar of this court, and the foregoing documents were printed on recycled paper.

Executed on March 21, 2019, at Lancaster, California.

_X_ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



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