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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

I. SUMMARY

The action was tried before the Court on August 1, 2018 through September 13, 2018. Plaintiffs submitted their closing argument on September 25, 2018. Defendant submitted its closing augment on October 15, 2018. On October 25, 2018 Plaintiffs submitted their rebuttal argument. The Court issued its Tentative Decision on November 8, 2018. On November 15, 2018 Defendant requested a statement of decision. The parties submitted further briefing regarding proposed remedies, and on December 7, 2018 a hearing was held on the issue of remedies. On December 12, 2018 the Court issued its Amended Tentative Decision.

Plaintiffs' First Amended Complaint alleges two causes of action: 1) Violation of the California Voting Rights Act of 2001 ("CVRA"); and 2) Violation of the Equal Protection Clause of the California Constitution ("Equal Protection Clause"). In response, Defendant denied that it has violated either the CVRA or the Equal Protection Clause, and asserted various affirmative defenses.

The Court finds in favor of Plaintiffs on both causes of action. Accordingly, the Court orders that Defendant may no longer elect its city council, or any members thereof, through the at-large election structure responsible for the injuries; rather all future elections for any seat(s) on Defendant's city council shall be district-based elections (as defined in the CVRA) as specified herein.

II. THE CALIFORNIA VOTING RIGHTS ACT

The CVRA disfavors the use of so-called "at-large" voting—an election method that permits voters of an entire jurisdiction to elect candidates to the seats of its governing board and which permits a plurality of voters to capture all of the available seats. (See generally *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660 (*Sanchez*).) The U.S. Supreme Court "has long recognized that multi-member districts and at-large voting schemes may operate to minimize or cancel out the voting strength" of minorities. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 46 (*Gingles*) at p. 47; see also *id.* at p. 48, n. 14 [at-large elections may also cause elected officials to "ignore [minority] interests without fear of political consequences"], citing *Rogers v. Lodge* (1982) 458 U.S. 613, 623; *White v. Regester* (1973) 412 U.S. 755, 769.) In at-large elections, "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." (*Gingles*, at p. 47).

Section 2 of the federal Voting Rights Act ("FVRA"), 52 U.S.C. § 10101, et seq., which

Congress enacted in 1965 and amended in 1982, targets, among other things, discriminatory at-large election schemes. (*Gingles*, *supra*, 478 U.S. at p. 37; see also Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History* (1983) 40 Wash. & Lee L. Rev. 1347, 1402.) By enacting the CVRA, the California "Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act of 1965." (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 808 (*Jauregui*).)

The CVRA "was enacted to implement the equal protection and voting guarantees of article I, section 7, subdivision (a) and article II, section 2" of the California Constitution. (*Jauregui* at 793, citing § 14031)[1]. "Section 14027 [of the CVRA] sets forth the circumstances where an at-large electoral system may not be imposed …: 'An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.'" (*Id.*, citing *Sanchez* at p. 669). Section 14028 of the CVRA provides more clarity on how a violation of the CVRA is established: "A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision." "Section 14026, subdivision (e) defines racially polarized voting thusly: 'Racially polarized voting means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act ([52 U.S.C. Sec. 10301 et seq.]), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." (*Jauregui* at 793). "Proof of racially polarized voting patterns are established by examining voting results of elections where at least one candidate is a member of a protected class; elections involving ballot measures; or other 'electoral choices that affect the rights and privileges' of protected class members." (*Id.*, citing § 14028 subd. (b)). Racially polarized voting can be shown through quantitative statistical evidence, using the methods approved in

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

federal Voting Rights Act cases. (*Jauregui* at 794, quoting § 14026, subd. (e). ["The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act ([52 U.S.C. Sec. 10301 et seq.]) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting."]). Additionally, "[t]here are a variety of [other] factors a court may consider in determining whether an at-large electoral system impairs a protected class's ability to elect candidates or otherwise dilute their voting power," including "the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action" (§ 14028, subd. (b)) and the qualitative factors listed in Section 14028 subd. (e) which "are probative, but not necessary factors to establish a violation of [the CVRA]".[2] (*Jauregui* at 794).

Equally important to an understanding of the CVRA as what the CVRA directs the Court to consider is acknowledging what need *not* be shown to establish a violation of the CVRA. While the CVRA is similar to the FVRA in several respects, it is also different in several key respects, as the Legislature sought to remedy what it considered "restrictive interpretations given to the federal act." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, at p. 2.) Unlike the FVRA, to establish a violation of the CVRA, plaintiffs need not show that a "majority-minority" district can be drawn. (§ 14028, subd. (c); *Sanchez, supra,* 145 Cal.App.4th at p. 669). Likewise, the factors enumerated in section 14028 subd. (e), which are modeled on, but also differ from, the FVRA's "Senate factors," are "not necessary [] to establish a violation" (§ 14028, subd. (e)). "[P]roof of an intent to discriminate is [also] not an element of a violation of [the CVRA]."

[2] Section 14028 subd. (e) provides: "Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section."

(*Jauregui* at 794, citing § 14028, subd. (d)).

The appellate courts that have addressed the CVRA have noted that showing racially polarized voting establishes the at-large election system dilutes minority votes and therefore violates the CVRA. (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1229 ["To prove a CVRA violation, the plaintiffs must show that the voting was racially polarized. However, they do not need to either show that members of a protected class live in a geographically compact area or demonstrate a discriminatory intent on the part of voters or officials."]; *Jauregui* at p. 798 ["The trial court's unquestioned findings [concerning racially polarized voting] demonstrate that defendant's at-large system dilutes the votes of Latino and African American voters."]; see also Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, at p. 2 [The CVRA "addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity."]) The key element under the CVRA—"racially polarized voting"—consists of two interrelated elements: (1) "the minority group . . . is politically cohesive[;]" and (2) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances—usually to defeat the minority's preferred candidate." (*Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1413, quoting *Gingles*, *supra*, 478 U.S. at pp. 50–51.) It is the combination of plurality-winner at-large elections and racially polarized voting that yields the harm the CVRA is intended to combat. (*Jauregui*, *supra*, 226 Cal.App.4th at p. 789 [describing how vote dilution is proven in FVRA cases and how vote dilution is differently proven in CVRA cases].) To an even greater extent than the FVRA, the CVRA expressly directs the courts, in analyzing "elections for members of the governing body of the [defendant]" to focus on those "elections in which at least one candidate is a member of a protected class." (§ 14028, subds. (a), (b).)

Once liability is established under the CVRA, the Court has a broad range of remedies from which to choose in order to provide greater electoral opportunity, including both district and non-district solutions. (See § 14029; *Sanchez*, *supra*, 145 Cal.App.4th at p. 670; *Jauregui*, *supra*, 226 Cal.App.4th at p. 808 ["The Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act. It is incongruous to intend this expansion of vote dilution liability but then constrict the available remedies in the electoral context to less than those in the Voting

Rights Act. The Legislature did not intend such an odd result."].) In light of the broad range of remedies available to the Court, a plaintiff need not demonstrate the desirability of any particular remedy to establish a violation of the CVRA. (See § 14028, subd. (a); Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 ["Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown."].)

III. DEFENDANT'S AT-LARGE ELECTION SYSTEM VIOLATES THE CVRA

A. Defendant Employs An "At Large" Method of Electing Its City Council, and Plaintiffs Have Standing to Challenge That At-Large Method Pursuant to the CVRA.

The CVRA defines "[a]t-large method of election" as including any method"in which the voters of the entire jurisdiction elect the members to the governing body." (§ 14026 subd. (a)). All of the voters residing in Santa Monica elect every member of its city council, and the candidates with a plurality of the votes win the available seats. Though the parties did not stipulate to this element, Defendant has never disputed that it employs an at-large method of electing its city council.

Likewise, though the parties did not stipulate to Plaintiffs' standing to challenge Defendant's at-large method of election under the CVRA, the requisite facts establishing their standing were presented at trial without any rebuttal by Defendant. The CVRA explicitly grants standing to "any voter who is a member of a protected class and who resides in a political subdivision where a violation of [the CVRA] is alleged." (§ 14032). Plaintiff Maria Loya resides in Santa Monica, is registered to vote, and is Latina – the "protected class" principally at issue in this case. Plaintiff Pico Neighborhood Association is an organization with members who, like Maria Loya, reside in Santa Monica, are registered to vote, and are Latino/a. Some of those members testified at trial – e.g. Oscar de la Torre and Berenice Onofre. Plaintiff Pico Neighborhood Association's organizational mission is germane to the subject of this case – namely, advocating for the interests of residents of the Pico Neighborhood (where Latinos are concentrated in Santa Monica), including to the city government. "[E]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." (*Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal. App. 4th 666, 672). "An

association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief request requires the participation of the individual members in the lawsuit." (*Id.* at 673, quoting *Hunt v. Washington State Apple Advertising Com'n* (1977) 432 U.S. 333, 343). Therefore, Plaintiff Pico Neighborhood Association also has standing.

B. The Relevant Elections Are Consistently Plagued By Racially Polarized Voting.

1. *The Definition of Racially Polarized Voting and How It Is Determined*

The CVRA defines "racially polarized voting" as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. § 1973 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." (§ 14026, subd. (e).) The federal jurisprudence regarding "racially polarized voting" over the past thirty-two years finds its roots in Justice Brennan's decision in *Gingles*, and in particular, the second and third "*Gingles* factors." Justice Brennan explained that racially polarized voting is tested by two criteria: (1) that the minority group is politically cohesive; and (2) the majority group votes sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidates. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 51) A minority group is politically cohesive where it supports its preferred choices to a significantly greater degree than the majority group supports those same choices; in elections for office (as opposed to ballot measures), the CVRA focuses on elections in which at least one candidate is a member of the protected class of interest (§ 14028(b)), because those elections usually offer the most probative test of whether voting patterns are racially polarized. (See *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F. 2d 1407, 1416 ["The district court expressly found that predominantly Hispanic sections of Watsonville have, in actual elections, demonstrated near unanimous support for Hispanic candidates. This establishes the requisite political cohesion of the minority group."].) The extent of majority "bloc voting" sufficient to show racially polarized voting is that which allows the white majority to "usually defeat the minority group's preferred candidate." (*Ibid.*) As Justice Brennan explained, it is through establishment of this element that impairment is

shown—i.e. that the "at-large method of election [is] imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." (§ 14027; *Gingles*, at p. 51 ["In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives."].)

The U.S. Supreme Court in *Gingles* also set forth appropriate methods of identifying racially polarized voting; since individual ballots are not identified by race, race must be imputed through ecological demographic and political data. The long-approved method of ecological regression ("ER") yields statistical power to determine if there is racially polarized voting if there are not a sufficient number of racially homogenous precincts (90% or more of the precinct is of one particular ethnicity). (See *Benavidez v. City of Irving* (N.D. Tex. 2009) 638 F.Supp.2d 709, 723 ["HPA [(homogenous precinct analysis)] and ER [(ecological regression)] were both approved in *Gingles* and have been utilized by numerous courts in Voting Rights Act cases."].) The CVRA expressly adopts method methods like ER that have been used in federal Voting Rights Act cases to demonstrate racially polarized voting. (§ 14026, subd. (e) ["The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting."].)

2. *The Experts' Analyses*

At trial, Plaintiffs and Defendant each offered the statistical analyses of their respective experts – Dr. J. Morgan Kousser and Dr. Jeffrey Lewis, respectively. Though the details and methods of their respective analyses differed in minor ways, the analyses by Plaintiffs' and Defendant's experts reveal the same thing— Santa Monica elections that are legally relevant under the CVRA are racially polarized.[3] Analyzing elections over the past twenty-four years, a consistent pattern of racially-

[3] Dr. Kousser opined that his analysis demonstrates racially polarized voting. Though he had done so in other cases, Dr. Lewis reached no conclusions about racially polarized voting in this case, and declined to opine about whether his analysis demonstrated racially polarized voting. Another of Plaintiffs' experts, Justin Levitt, evaluated the results of Dr. Lewis' statistical analyses, and concluded, like Dr. Kousser, that all of the relevant elections evaluated by Dr. Lewis exhibit racially polarized

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.

Dr. J. Morgan Kousser, a Caltech professor who has testified in many voting rights cases spanning more than 40 years, analyzed the elections specified by the CVRA: "elections for members of the governing body of the political subdivision . . . in which at least one candidate is a member of a protected class." (§ 14028 subds. (a), (b)). The CVRA's focus on elections involving minority candidates is consistent with the view of a majority of federal circuit courts that racially-contested elections are most probative of an electorate's tendencies with respect to racially polarized voting.[4]

In those elections, Dr. Kousser focused on the level of support for minority candidates from minority voters and majority voters respectively, just as the Court in *Gingles*, and many lower courts

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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."

[4] See *U.S. v. Blaine Cty.* (9th Cir. 2004) 363 F.3d 897, 911 [rejecting defendant's argument that trial court must give weight to elections involving no minority candidates]; *Ruiz v. Santa Maria* (9th Cir. 1998) 160 F.3d 543, 553 ["minority v. non-minority election is more probative of racially polarized voting than a non-minority v. non-minority election" because "[t]he Act means more than securing minority voters' opportunity to elect whites."]; *Westwego Citizens for Better Gov't v. City of Westwego* (5th Cir.1991) 946 F.2d 1109, 1119, n. 15 ["[T]he evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates."]; *LULAC v. Clements* (5th Cir. en banc 1993) 999 F.2d 831, 864 ["This court has consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates . . . ."]; *Citizens for a Better Gretna v. City of Gretna* (5th Cir.1987) 834 F.2d 496, 502 ["That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference [for a black candidate]."]; *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.* (3d Cir. 1993) 4 F.3d 1103, 1128–1129 ["The defendants also argue that the plaintiffs may not selectively choose which elections to analyze, but rather must analyze all the elections, including those involving only white candidates. It is only on the basis of such a comprehensive analysis, the defendants submit, that the court is able to evaluate whether or not there is a pattern of white bloc voting that usually defeats the minority voters' candidate of choice. We disagree."].)

since then, have done. (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."]; *Id.* at 81 [Appendix A – providing Dr. Grofman's ecological regression estimates for support for black candidates from, respectively, white and black voters]; see also, e.g., *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1335-37 (C.D. Cal. 1990), aff'd, 918 F.2d 763 (9th Cir. 1990) [summarizing the bases on which the court found racially polarized voting: "The results of the ecological regression analyses demonstrated that for all elections analyzed, Hispanic voters generally preferred Hispanic candidates over non-Hispanic candidates. … Of the elections analyzed by plaintiffs' experts non-Hispanic voters provided majority support for the Hispanic candidates in only three elections, all partisan general election contests in which party affiliation often influences the behavior of voters"]; *Benavidez v. Irving Indep. Sch. Dist*. 2014 WL 4055366, *11-12 (N.D. Tex. 2014) [finding racially polarized voting based on Dr. Engstrom's analysis which the court described as follows: "Dr. Engstrom then conducted a statistical analysis … to estimate the percentage of Hispanic and non-Hispanic voters who voted for the Hispanic candidate in each election. … Based on this analysis, Dr. Engstrom opined that voting in Irving ISD trustee elections is racially polarized."])[5]

[5] In its closing brief, Defendant argued that the Supreme Court in *Gingles* held that the race of a candidate is "irrelevant," but what Defendant fails to recognize is that the portion of *Gingles* it relies upon did not command a majority of the Court, and Defendant's reading of *Gingles* has been rejected by federal circuit courts in favor of a more practical race-sensitive analysis. (See *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 550-53 [collecting other cases rejecting Defendant's view and noting that "non-minority elections do not provide minority voters with the choice of a minority candidate and thus do not fully demonstrate the degree of racially polarized voting in the community."]). To the extent there is any doubt about whether the race of a candidate impacts the analysis in FVRA cases, there can be no doubt under the CVRA; the statutory language mandates a focus on elections involving minority candidates. (§14028(b) ["The occurrence of racially polarized voting shall be determined from examining results of elections in which *at least one candidate is a member of a protected class* … One circumstance that may be considered … is the extent to which *candidates who are members of a protected class* and who are preferred by voters of the protected class … have been elected to the governing body of the political subdivision that is the subject of an action …"]). In this analysis, it is not that minority support for minority candidates is presumed; to the

Dr. Kousser provided the details of his analysis, and concluded those elections demonstrate legally significant racially polarized voting.[6] Specifically, Dr. Kousser evaluated the 7 elections for Santa Monica City Council between 1994 and 2016 that involved at least one Spanish-surnamed candidate[7] and provided both the point estimates of group support for each candidate as well as the corresponding statistical errors (in parentheses in the charts below):

Weighted Ecological Regression[8]

Year	Latino Candidate(s)	% Latino Support	% Non-Hispanic White Support	Polarized	Won?
1994	**Vazquez**	145.5 (28.0)	34.9 (1.9)	Yes	No
1996	**Alvarez**	22.2 (12.9)	15.8 (1.1)	No	No
2002	**Aranda**	82.6 (12.6)	16.5 (1.3)	Yes	No
2004	**Loya**	106.0 (12.3)	21.2 (2.0)	Yes	No
2008	**Piera-Avila**	33.3 (5.2)	5.7 (0.8)	Yes	No
2012	**Vazquez**	92.7 (9.0)	19.1 (2.0)	Yes	Yes
	Gomez	30.4 (3.3)	2.9 (0.7)	Yes	No
	Duron	5.0 (2.6)	4.4 (0.6)	No	No
2016	**de la Torre**	88.0 (6.0)	12.9 (1.5)	Yes	No
	Vazquez	78.3 (9.0)	36.6 (2.3)	Yes	Yes

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contrary, it must be demonstrated. But both the CVRA and federal caselaw recognize that the most probative test for minority voter support and cohesion usually involves an election with the option of a minority candidate.

[6] At trial, Dr. Kousser presented his analyses using unweighted ER, weighted ER and ecological inference ("EI"). Dr. Kousser explained that, of these three statistical methods, weighted ER is preferable in this case. Dr. Kousser's conclusions were the same for each of these three methods, so, for the sake of brevity, only his weighted ER analysis is duplicated here.

[7] One of Defendant's city council members, Gleam Davis, testified that she considers herself Latina because her biological father was of Hispanic descent (she was adopted at an early age by non-Hispanic white parents). Though that may be true, the Santa Monica electorate does not recognize her as Latina, as demonstrated by the telephone survey of registered voters conducted by Jonathan Brown; even her fellow council members did not realize she considered herself to be Latina until after the present case was filed. Consistent with the purpose of considering the race of a candidate in assessing racially polarized voting, it is the electorate's perception that matters, not the unknown self-identification of a candidate. (See footnote 5, *supra*)

[8] Because each voter could cast votes for up to three or four candidates in a particular election, Prof. Kousser estimated the portion of voters, from each ethnic group, who cast at least one vote for each candidate.

Non-Hispanic whites voted statistically significantly differently from Latinos in 6 of the 7 elections. The ecological regression analyses of these elections also reveals that when serious Latino candidates run for the Santa Monica City Council, Latino voters cohesively support those Latino candidates – in all but one of those six elections, a Latino candidate received the most Latino votes, often by a large margin. And in all but one of those six elections, the Latino candidate most favored by Latino voters lost, making the racially polarized voting legally significant. (*Gingles* at p. 56 ["in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting."]). Even in that one instance (2012 – Tony Vazquez) the Latino candidate barely won, coming in fourth in a four-seat race in that unusual election, in which none of the incumbents who had won four years earlier sought re-election. (*Id*.; see also *Gingles*, *supra*, 478 U.S. at p. 57, fn. 26 ["Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest. This list of special circumstances is illustrative, not exclusive."].)

In 1994, Latino voters heavily favored the lone Latino candidate—Tony Vazquez-- but he lost. In 2002, the lone Latina candidate and resident of the Pico Neighborhood—Josefina Aranda—was heavily favored by Latino voters, but she lost. In 2004, the lone Latina candidate and resident of the Pico Neighborhood—Maria Loya—was heavily favored by Latino voters, but she lost. In 2008, the lone Latina candidate and resident of the Pico Neighborhood—Linda Piera-Avila—received significant support from Latino voters, even though she was not a particularly serious candidate.[9] In 2012, two incumbents—Richard Bloom and Bobby Shriver—decided not to run for re-election, and the two other incumbents who had prevailed in 2008 – Ken Genser and Herb Katz – died during their 2008-12 terms.

[9] At trial, Dr. Kousser explained that even though Ms. Piera-Avila did not receive support from a majority of Latinos, the contrast between the levels of support she received from Latinos and non-Hispanic whites, respectively, nonetheless demonstrate racially polarized voting, just as the *Gingles* court found very similar levels of support for Mr. Norman in the 1978 and 1980 North Carolina House races to likewise be consistent with a finding of racially polarized voting. (*Gingles* at 81, Appx. A).

The leading Latino candidate—Tony Vazquez—was heavily favored by Latino voters but did not receive nearly as much support from non-Hispanic white voters. He was able to eke out a victory, coming in fourth place in this four-seat race. Finally, in 2016, a race for four city council positions, Oscar de la Torre—a Latino resident of the Pico Neighborhood—was heavily favored by Latinos, but lost. In 2016, Mr. de la Torre received more support from Latinos than did Mr. Vazquez.[10] 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.

Defendant's expert, Dr. Lewis, did not disagree. In fact, he confirmed all of the indicia of racially polarized voting in all of the Santa Monica City Council elections he analyzed involving at least one Latino candidate, as well as in other elections. Specifically, Dr. Lewis confirmed that his ER and EI results demonstrate: (1) that the Latino candidates for city council generally received the most votes from Latino voters; (2) that those Latino candidates received far less support from non-Hispanic whites; and (3) the difference in levels of support between Latino and non-Hispanic white voters were

[10] Defendant argues that the Court should disregard Mr. de la Torre's 2016 candidacy because, according to Defendant, Mr. de la Torre intentionally lost that election. But Defendant presented no evidence that Mr. de la Torre did not try to win that election, and Mr. de la Torre unequivocally denied that he deliberately attempted to lose that election. And, the ER analysis by Dr. Lewis further undermines Defendant's assertion – Mr. de la Torre received essentially the same level of support from Latino voters in the 2016 council election as he did in his 2014 election for school board, an odd result if Mr. de la Torre had tried to win one election and lose the other.

statistically significant applying even a 95% confidence level (with the lone exception of Steve Duron):

Year	Latino Candidate(s)	% Latino Support	% Non-Hispanic White Support
2002	**Aranda**	69 (10)	16 (1)
2004	**Loya**	106 (14)	21 (2)
2008	**Piera-Avila**	32 (4)	6 (1)
2012	**Vazquez** **Gomez** **Duron**	90 (6) 29 (2) 5 (2)	20 (1) 3 (1) 4 (0)
2016	**de la Torre** **Vazquez**	87 (4) 65 (7)	14 (1) 34 (2)

Dr. Lewis also analyzed elections for other local offices (e.g. school board and college board) and ballot measures such as Propositions 187 (1994), 209 (1996) and 227 (1998). The instant case concerns legal challenges to the election structure for the Santa Monica City Council; where there exist legally relevant election results concerning the Santa Monica City Council, those elections will necessarily be most probative. Consistent with FVRA cases that have addressed the relevance and weight of "exogenous" elections, this Court gives exogenous elections less weight than the endogenous elections discussed above. (See, e.g. *Bone Shirt v. Hazeltine* (8th Cir. 2006) 461 F.3d 1011[acknowledging that exogenous elections are of much less probative value than endogenous elections, some federal courts have relied upon exogenous elections involving minority candidates to *further support* evidence of racially polarized voting in endogenous elections]; *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.* (3d Cir. 1993) 4 F.3d 1103, 1128–1129 [same]; *Rodriguez v. Harris Cnty, Texas* (2013) 964 F.Supp.2d 686 [same]; *Citizens for a Better Gretna v. City of Gretna, La.* (5th Cir. 1987) 834 F.2d 496, 502–503 ["Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections, the district court properly considered them as additional evidence of bloc voting— particularly in light of the sparsity of available data."]; *Clay v. Board of Educ. of City of St. Louis* (8th Cir. 1996) 90 F.3d 1357 [exogenous elections "should be used only to supplement the analysis of" endogenous elections]; *Westwego Citizens for Better Gov't v. City of Westwego* (5th Cir.1991) 946 F.2d 1109 [analysis of exogenous elections appropriate because no

minority candidates had ever run for the governing board of the defendant])[11] Regardless of the weight given to exogenous elections, they may not be used to undermine a finding of racially polarized voting in endogenous elections. (See *Cottier v. City of Martin* (8th Cir.2006) 445 F.3d 1113, 1121–1122 [reversing district court's reliance on exogenous elections to undermine racially polarized voting in endogenous elections]; *Rural West Tenn. African American Affairs Council v. Sundquist* (W.D. Tenn. 1998) 29 F.Supp.2d 448, 457 ["Certainly, the voting patterns in exogenous elections cannot defeat evidence, statistical or otherwise, about endogenous elections."], quoting *Cofield v. City of LaGrange* (N.D.Ga.1997) 969 F.Supp. 749, 773.) To hold otherwise would only serve to perpetuate the sort of glass ceiling that the CVRA and FVRA are intended to eliminate. Nonetheless, exogenous elections in Santa Monica further support the conclusion that the levels of support for Latino candidates from Latino and non-Hispanic white voters, respectively, is always statistically significantly different, with non-Hispanic white voters consistently voting against the Latino candidates who are overwhelmingly supported by Latino voters.

Election	**Latino Candidate(s)**	**% Latino Support**	**% Non-Hispanic White Support**
2002 – school board	**de la Torre**	107 (13)	34 (2)
2004 – school board	**Jara**	113 (13)	37 (2)
	Leon-Vazquez	98 (9)	44 (2)
	Escarce	74 (8)	44 (1)
2004 – college board	**Quinones-Perez**	55 (5)	21 (1)
2006 – school board	**de la Torre**	95 (12)	40 (1)
2008 – school board	**Leon-Vazquez**	101 (8)	40 (1)
	Escarce	68 (6)	36 (1)
2008 – college board	**Quinones-Perez**	58 (6)	35 (1)
2010 – school board	**de la Torre**	94 (8)	33 (1)
2012 – school board	**Leon-Vazquez**	92 (7)	32 (1)

[11] The focus on endogenous elections is particularly appropriate in this case because, as several witnesses confirmed, the political reality of Defendant's city council elections is very different than that of elections for other governing boards with more circumscribed powers, such as school board and rent board. Dr. Lewis' ER and EI analyses show that non-Hispanic white voters in Santa Monica will support Latino candidates for offices other than city council. For example, according to Dr. Lewis, Mr. de la Torre received votes from 88% of Latino voters and 33% of non-Hispanic white voters in his school board race in 2014, and when he ran for city council just two years later he received essentially the same level of support from Latino voters (87%) but much less support from non-Hispanic whites (14%) than he had received in the school board race.

	Escarce	62 (6)	29 (1)
2014 – school board	**de la Torre**	88 (7)	33 (1)
2014 – college board	**Loya**	84 (3)	27 (1)
2014 – rent board	**Duron**	46 (8)	23 (1)
2016 – college board	**Quinones-Perez**	85 (5)	36 (1)

While he provided his estimates based on ER and EI, Dr. Lewis also questioned the propriety of using those methods. Dr. Lewis showed that the "neighborhood model" yields different estimates, but the neighborhood model does not fit real-world patterns of voting behavior for particular candidates and the use of the neighborhood model to undermine ER has been rejected by other courts. (See, e.g., *Garza* at p. 1334). Dr. Lewis claimed that the lack of data from predominantly Hispanic precincts in Santa Monica renders the ER and EI estimates unreliable, but that argument too has been rejected by the courts. (See, e.g., *Fabela v. Farmers Branch* (N.D. Tex. Aug. 2, 2012) 2012 WL 3135545, *10-11, n. 25, n. 33 [relying on EI despite the absence of "precincts with a high concentration of Hispanic voters"]; *Benavidez v. City of Irving* (N.D. Tex. 2009) 638 F.Supp.2d 709, 724-25 [approving use of ER and EI where the precincts analyzed all had "less than 35%" Spanish-surnamed registered voters]; *Perez v. Pasadena Indep. Sch. Dist.* (S.D. Tex. 1997) 958 F.Supp. 1196, 1205, 1220-21, 1229, *aff'd* (5th Cir. 1999) 165 F.3d 368 [relying on ER to show racially polarized voting where the polling place with the highest Latino population was 35% Latino]).[12] To disregard ER and EI estimates because of a lack of predominantly minority precincts would also be contrary to the intent of the Legislature in expressly disavowing a requirement that the minority group is concentrated. (§ 14028 subd. (c) ["[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting."]). Dr. Lewis argued that using Spanish-surname matching to estimate the Latino proportion of voting precincts causes a "skew," but he also acknowledged that Spanish surname matching is the best method for estimating the

[12] Moreover, the comparably low percentage of Latinos among the actual voters in Santa Monica precincts is due in part to the reduced rates of voter registration and turnout among eligible Latino voters. Where limitations in the data derive from reduced political participation by members of the protected class, it would be inappropriate to discard the ER results on that basis, because to do so "would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." (*Perez*, 958 F.Supp. at 1221 quoting *Clark v. Calhoun Cty.* (5th Cir. 1996) 88 F.3d 1393, 1398)

Latino proportion of each precinct, and the conclusion of racially polarized voting in this case would not change even if the estimates were adjusted to account for any skew. Finally, Dr. Lewis showed that ER and EI do not produce accurate estimates of Democratic party *registration* among Latinos in Santa Monica, but that does not undermine the validity or propriety of ER and EI to estimate *voting* behavior in this case. (See *Luna v. County of Kern* (E.D. Cal. 2018) 291 F.Supp.3d 1088, 1123-25 [rejecting the same argument]). Most importantly, the CVRA directs this Court to credit the statistical methods accepted by federal courts in FVRA cases, including ER and EI, and Dr. Lewis did not suggest or employ any method that could more accurately estimate group voting behavior in Santa Monica. (§ 14026 subd. (e) ["The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting."].)

In its closing brief, Defendant argues that there is no racially polarized voting because at least half of what Defendant calls "Latino-preferred" candidacies have been successful in Santa Monica. But that mechanical approach suggested by Defendant – 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. (*Ruiz*, 160 F.3d at 554 [rejecting the district court's "mechanical approach" that viewed the victory of a white candidate who was the second-choice of Latinos in a multi-seat race as undermining a finding of racially polarized voting where Latinos' first choice was a Latino candidate who lost: "The defeat of Hispanic-preferred Hispanic candidates, however, is more probative of racially polarized voting and is entitled to more evidentiary weight. The district court should also consider the order of preference non-Hispanics and Hispanics assigned Hispanic-preferred Hispanic candidates as well as the order of overall finish of these candidates."]; see also *id.* at 553 ["But the Act's guarantee of equal opportunity is not met when . . . [c]andidates favored by [minorities] can win, but only if the candidates are white." (citations and internal quotations omitted)]; *Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, 1318, aff'd, 488 U.S. 988 (1988) [it is not enough

to avoid liability under the FVRA that "candidates favored by blacks can win, but only if the candidates are white."]; also see *Clarke v. City of Cincinatti* (6th Cir. 1994) 40 F.3d 807, 812 [voting rights laws' "guarantee of equal opportunity is not met when [] candidates favored by [minority voters] can win, but only if the candidates are white."]). A more holistic approach that accounts for the political realities of the jurisdiction is required, particularly in light of purpose of the CVRA. (*Jauregui* at at p. 807 ["Thus, the Legislature intended to expand the protections against vote dilution provided by the federal Voting Rights Act of 1965."]; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, at p. 2 [the Legislature sought to remedy what it considered "restrictive interpretations given to the federal act."]; Cf. *Gingles* at 62-63 ["appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended § 2, and would prevent courts from performing the 'functional' analysis of the political process, and the 'searching practical evaluation of the past and present reality'"]). To disregard or discount both the order of preference of minority voters and the demonstrated salience of the races of the candidates, as Defendant suggests, would actually exculpate discriminatory at-large election systems where there is a paucity of serious minority candidates willing to run in the at-large system – itself a symptom of the discriminatory election system. (See *Westwego Citizens for Better Government v. City of Westwego* (5th Cir. 1989) 872 F. 2d 1201, 1208-1209, n. 9 ["it is precisely this concern that underpins the refusal of this court and of the Supreme Court to preclude vote dilution claims where few or no black candidates have sought offices in the challenged electoral system. To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove."].)

No doubt, a minority group can prefer a non-minority candidate and, in a multi-seat plurality at-large election, can prefer more than one candidate, perhaps to varying degrees, but that does not mean that this Court should blind itself to the races of the candidates, the order of preference of minority voters, and the political realities of Defendant's elections. When serious Latino candidates have run for Santa Monica's city council, they have been overwhelmingly supported by Latino voters, receiving more votes from Latino voters than any other candidates. And absent unusual circumstances, because the remainder of the electorate votes against the candidates receiving overwhelming support

from Latino voters, those candidates generally still lose. That demonstrates legally relevant racially polarized voting under the CVRA. (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."]

C. The Qualitative Factors Further Support a Finding of Racially Polarized Voting and a Violation of the CVRA.

Section 14028(e) allows plaintiffs to supplement their statistical evidence with other evidence that is "probative, but not necessary [] to establish a violation" of the CVRA, specifically:

> "[a] history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns."

(see also Assembly Committee Analysis of SB 976 (Apr. 2, 2002)). These "probative, but not necessary" factors further support a finding of racially polarized voting in Santa Monica and a violation of the CVRA.

1. History of discrimination.

In *Garza, supra,* 756 F.Supp. at pp. 1339-1340, the court detailed how "[t]he Hispanic community in Los Angeles County has borne the effects of a history of discrimination." The court described the many sources of discrimination endured by Latinos in Los Angeles County: "restrictive real estate covenants [that] have created limited housing opportunities for the Mexican-origin population"; the "repatriation" program in which "many legal resident aliens and American citizens of Mexican descent were forced or coerced out of the country"; segregation in public schools; exclusion of Latinos from "the use of public facilities" such as public swimming facilities; and "English language literacy [being] a prerequisite for voting" until 1970. (*Id.* at 1340-41). Since Santa Monica is within Los Angeles County, Plaintiffs do not need to re-prove this history of discrimination in this case. (See *Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, 1317 ["We do not believe that this history of

discrimination, which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act."].) Nonetheless, at trial Plaintiffs presented evidence that this same sort of discrimination was perpetuated specifically against Latinos *in Santa Monica* – e.g. restrictive real estate covenants, and approximately 70% of Santa Monica voters voting in favor of Proposition 14 in 1964 to repeal the Rumford Fair Housing Act and therefore again allow racial discrimination in housing; segregation in the use of public swimming facilities; repatriation and voting restrictions applicable to all of California, including Santa Monica.

2. *The use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections.*

Defendant stresses that its elections are free of many devices that dilute (or have diluted) minority votes in other jurisdictions, such as numbered posts and majority vote requirements. Nevertheless, the staggering of Defendant's city council elections enhances the dilutive effect of its at-large election system. (See *City of Lockhart v. United States* (1983) 460 U.S. 125, 135 ["The use of staggered terms also may have a discriminatory effect under some circumstances, since it . . . might reduce the opportunity for single-shot voting or tend to highlight individual races."]; *City of Rome v. United States* (1980) 446 U.S. 156, 183 [same].)

3. *The extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.*

"Courts have [generally] recognized that political participation by minorities tends to be depressed where minority groups suffer effects of prior discrimination such as inferior education, poor employment opportunities and low incomes." (*Garza, supra* 756 F.Supp. at p. 1347, citing *Gingles*, *supra*, 478 U.S. at p. 69). Where a minority group has less education and wealth than the majority group, that disparity "necessarily inhibits full participation in the political process" by the minority. (*Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, 1317.)

As revealed by the most recent Census, Whites enjoy significantly higher income levels than their Hispanic and African American neighbors in Santa Monica—a difference far greater than the national disparity. This is particularly problematic for Latinos in Santa Monica's at-large elections

because of how expensive those elections have become – more than one million dollars was spent in pursuit of the city council seats available in 2012, for example. There is also a severe achievement gap between White students and their African American and Hispanic peers in Santa Monica's schools that may further contribute to lingering turnout disparities.

4. The use of overt or subtle racial appeals in political campaigns.

In 1994, after opponents of Tony Vazquez advertised that he had voted to allow "Illegal Aliens to Vote" and characterized him as the leader of a Latino gang, causing Mr. Vazquez to lose that election, he let his feelings be known to the Los Angeles Times: "Vazquez blamed his loss on 'the racism that still exists in our city. ... The racism that came out in this campaign was just unbelievable.'" More recent racial appeals, though less overt, have been used to defeat other Latino candidates for Santa Monica's city council. For example, when Maria Loya ran in 2004, she was frequently asked whether she could represent all Santa Monica residents or just "her people" – a question that non-Hispanic white candidates were not asked. These sorts of racial appeals are particularly caustic to minority success, because they not only make it more difficult for minority candidates to win, but they also discourage minority candidates from even running.

5. Lack of responsiveness to the Latino Community.

Although not listed in section 14028(e), the unresponsiveness of Defendant to the needs of the Latino community is a factor probative of impaired voting rights. (See *Gingles*, 478 U.S. at 37, 45; see also §14028(e) [indicating that list of factors is not exhaustive – "Other factors *such as* the history of discrimination …"] (emphasis added)). That unresponsiveness is a natural, perhaps inevitable, consequence of the at-large election system that tends to cause elected officials to "ignore [minority] interests without fear of political consequences." (*Gingles* 478 U.S. at 48, n. 14).

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. At least 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.

Defendant's various commissions (planning commission, arts commission, parks and recreation commission, etc.), the members of which are appointed by Defendant's city council, are nearly devoid of Latino members, in sharp contrast to the significant proportion (16%) of Santa Monica residents who are Latino. That near absence of Latinos on those commissions is important not only in city planning but also for political advancement: in the past 25 years there have been 2 appointments to the Santa Monica City Council, and both of the appointees had served on the planning commission.

D. The At-Large Election System Dilutes the Latino Vote in Santa Monica City Council Elections.

Defendant argues that, in addition to racially polarized voting, "dilution" is a separate element of a violation of the CVRA. Even if "dilution" were an element of a CVRA claim, separate and apart from a showing of racially polarized voting, the evidence still demonstrates dilution by the standard proposed by Defendant in its closing brief – "that some alternative method of election would enhance Latino voting power." At trial, Plaintiffs presented several available remedies (district-based elections, cumulative voting, limited voting and ranked choice voting), each of which would enhance Latino voting power over the current at-large system.

While it is impossible to predict with certainty the results of future elections, this Court considered 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. Based on that evidence, this Court finds that the district map developed by Mr. Ely, and adopted by this Court as an appropriate remedy, will likely be effective, improving Latinos' ability to elect their preferred candidate or influence the outcome of such an election.

IV. THE CVRA IS NOT UNCONSTITIONAL

Defendant argues that the CVRA is unconstitutional, pursuant to a line of cases beginning with *Shaw v. Reno* (1993), 509 U.S. 630. As the court in *Sanchez* held, the CVRA is not unconstitutional; *Shaw* is simply not applicable. (*Sanchez*, *supra*, 145 Cal.App.4th at pp. 680–682.)

A. The CVRA Is Not Subject to Strict Scrutiny.

Defendant's argument that the CVRA is unconstitutional begins with the already-rejected notion that the CVRA is subject to strict scrutiny because it employs a racial classification. (Motion, pp. 10-11). The court in *Sanchez* rejected that very argument. (*Sanchez, supra*, 145 Cal.App.4th at pp. 680–682.) Rather, although "the CVRA involves race and voting, ... it does not allocate benefits or burdens on the basis of race"; it is race-neutral in that it neither singles out members of any one race nor advantages or disadvantages members of any one race. (*Sanchez*, at p. 680) Accordingly, the CVRA is not subject to strict scrutiny; it is subject to the more permissive rational basis test, which the *Sanchez* court held it easily passes. (*Ibid.*)

Defendant seems to suggest that even though the CVRA was not subject to strict scrutiny in Modesto, it must be subject to strict scrutiny in Santa Monica under *Shaw*, because any remedy in Santa Monica will inevitably be based predominantly on race. But, as discussed below, the remedy selected by this Court was not based predominantly on race – the district map was drawn based on the non-racial criteria enumerated in Elections Code section 21620. Moreover, *Shaw* and its progeny do not require strict scrutiny every time that race is pertinent in electoral proceedings. Instead, the *Shaw* line of cases, which focus on the expressive harm to voters conveyed by particular district lines, require strict scrutiny when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district[.]" (*Alabama Legislative Black Caucus v. Alabama* (2015) 135 S. Ct. 1257, 1267, quoting *Miller v. Johnson* (1995) 515 U.S. 900, 916.) This standard does not govern liability under the CVRA, and does not govern the imposition of a remedy in the abstract (e.g., whether district lines should be drawn or an alternative voting system imposed), but rather it governs the imposition of particular lines in particular places affecting particular voters. The CVRA is silent on *how* district lines must be drawn, or even if districts are necessarily the appropriate remedy. *Sanchez*, at p. 687 ["Upon a finding of liability, [the CVRA] calls only for appropriate remedies, not for any particular, let alone any improper, use of race."].) This Court is not aware of any applicable case, finding a *Shaw* violation based on the adoption of district elections, as opposed to where lines are drawn (and as explained below, the appropriate remedial

lines in this case were not drawn predominantly based on race). That is precisely why the *Sanchez* court rejected the City of Modesto's similar reliance on *Shaw* in that case. (*Sanchez*, *supra*, 145 Cal.App.4th at pp. 682–683.)

B. The CVRA Easily Satisfies the Rational Basis Test.

The State of California has a legitimate—indeed compelling—interest in preventing race discrimination in voting and in particular curing demonstrated vote dilution. This interest is consistent with and reflects the purposes of the California Constitution as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. (See § 14027 [identifying the abridgment of voting rights as the end to be prohibited]; § 14031 [indicating that the CVRA was "enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution"]; see also Cal. Const., Art. I, § 7 [guaranteeing, among other rights, the right to equal protection of the laws]; *id*. Art. II, § 2 [guaranteeing the right to vote]; *Sanchez* at p. 680 [identifying "[c]uring vote dilution" as a purpose of the CVRA].) The CVRA, which provides a private right of action to seek remedies for vote dilution, is rationally related to the State's interest in curing vote dilution, protecting the right to vote, protecting the right to equal protection of the laws, and protecting the integrity of the electoral process. (*Jauregui* at pp. 799-801; *Sanchez*, at p. 680). As discussed above, Defendant's election system has resulted in vote dilution – the very injury that the CVRA is intended to prevent and remedy – and, though not required by the CVRA, the evidence explored below even indicates that the dilution remedied in this case was the product of intentional discrimination. And, as discussed below, there are several remedial options to effectively remedy that vote dilution in this case. Accordingly, the CVRA is constitutional and easily satisfies the rational basis test, on its face and in its specific application to Defendant.

C. The CVRA Would Also Satisfy Strict Scrutiny.

Even if strict scrutiny were found to apply to the CVRA, the CVRA is narrowly tailored to achieve a compelling state interest and therefore also satisfies that test. First, California has compelling state interests in protecting all of its citizens' rights to vote and to participate equally in the political process, protecting the integrity of the electoral process, and in ensuring that its

laws and those of its subdivisions do not result in vote dilution in violation of its robust commitment to equal protection of the laws. See Cal. Const., Art. I, § 7, Art. II, § 2; Elec. Code §§ 14027, 14031; *Sanchez*, at p. 680; *Jauregui*, at pp. 799-801).

Second, the CVRA is narrowly tailored to achieve its compelling interests in preventing the abridgment of the right to vote. The CVRA requires a person to demonstrate the existence of racially polarized voting to prove a violation. (§ 14028 subd. (a)). Where racially polarized voting does not exist, the CVRA will not require a remedy. As with the FVRA, both the findings of liability and the establishment of a remedy under the CVRA do not rely on assumptions about race, but rather on factual patterns specific to particular communities in particular geographic regions, based on electoral evidence. (Compare *Shaw v. Reno* (1993) 509 U.S. 630, 647-648 [unconstitutional racial gerrymandering is based on the *assumption* that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls" with *id*. at 653 [distinguishing the Voting Rights Act, in which "racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case" based on evidence of group voting behavior].) And though federal cases have not considered the CVRA specifically in this regard, the Supreme Court has repeatedly implied that remedies narrowly drawn to combat racially polarized voting and discriminatory vote dilution will survive strict scrutiny.[13] As a result, the CVRA sweeps no wider than necessary to equitably secure for Californians their rights to vote and to participate in the political process. (*Jauregui*, at

[13] See, e.g., *League of United Latin Am. Citizens v. Perry* (2006) 548 U.S. 399, 475 & n.12 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part); *id*. at p. 518–519 (Scalia, J., joined by Thomas, J., Alito, J., and Roberts, C.J., concurring in the judgment in part and dissenting in part); *Bush v. Vera* (1996) 517 U.S. 952, 990, 994 (O'Connor, J., concurring); *Shaw v. Reno* (1993) 509 U.S. 630, 653-54. Indeed, just last year, in *Bethune-Hill v. Va. State Bd. of Elections* (2017) 137 S. Ct. 788, the Supreme Court upheld a Virginia state Senate district against challenge on the theory that it was predominantly driven by race, but in a manner designed to meet strict scrutiny through compliance with the Voting Rights Act. (*Id*. at 802.) Neither party contested that compliance with the Voting Rights Act would satisfy strict scrutiny, but the Court does not usually permit the litigants to concede the justification for its most exacting level of scrutiny.

p. 802) And if the CVRA generally satisfies strict scrutiny, it a fortiori satisfies strict scrutiny in application here, where as described below, the dilution remedied was proven to be the product of intentional discrimination.

V. THE EQUAL PROTECTION CLAUSE OF THE CALIFORNIA CONSTITUTION

Article I, section 7 of the California Constitution mirrors the Equal Protection Clause of the U.S. Constitution (Fourteenth Amendment).[14] Where governmental actions or omissions are motivated by a racially discriminatory purpose they violate the Equal Protection Clause, and when voting rights are implicated, "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all . . . .' (*N. Carolina NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239 [surveying Supreme Court cases]; see also generally *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, cert. denied (1991) 111 S.Ct. 681). Neither the passage of time, nor the modification of the original enactment, can save a provision enacted with discriminatory intent. (*Id.*; *Hunter v. Underwood* (1985) 471 U.S. 222 [invalidating a provision of the 1901 Alabama Constitution because it was motivated by a desire to disenfranchise African Americans, even though its "more blatantly discriminatory" portions had since been removed].)

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. … [including] the historical background of the decision." *Village of Arlington Heights v. Metro. Housing Dev. Corp*. (1977) 429 U.S. 252, 266-68. Sometimes, racially discriminatory intent can be demonstrated by the clear statements of one or more decisionmakers. But, recognizing that these "smoking gun" admissions of racially discriminatory intent are exceedingly rare, in *Arlington Heights*, the U.S. Supreme Court described a number of *potential*, *non-exhaustive*, sources of evidence that might shed light on the question of discriminatory intent in the absence of a smoking gun admission:

[14] Other than provisions relating exclusively to school integration, Article I section 7 provides "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

> The impact of the official action -- whether it bears more heavily on one race than another, may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence. The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. … Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances, the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.

(*Id*. at 266-268 (citations omitted). "[P]laintiffs are not required to show that [discriminatory] intent was the sole purpose of the [challenged government decision]," or even the "primary purpose," just that it was "*a* purpose." (*Brown v. Board of Com'rs of Chattanooga, Tenn.* (E.D. Tenn. 1989) 722 F. Supp. 380, 389, citing *Arlington Heights* at 265 and *Bolden v. City of Mobile* (S.D. Ala. 1982) 543 F. Supp. 1050, 1072).

VI. DEFENDANT'S AT-LARGE ELECTION SYSTEM VIOLATES THE EQUAL PROTECTION CLAUSE OF THE CALIFORNIA CONSTITUTION.

Defendant's at-large election system was adopted and/or maintained with a discriminatory intent on at least two occasions – in 1946 and in 1992, either of which necessitates this Court invalidating the at-large election system. (See *Hunter v. Underwood* (1985) 471 U.S. 222 [invalidating

a provision of the 1901 Alabama Constitution because it was motivated by a desire to disenfranchise African Americans, even though its "more blatantly discriminatory" portions had since been removed]; *Brown, supra* 722 F. Supp. at p. 389 [striking at-large election system based on discriminatory intent in 1911 even absent discriminatory intent in maintaining that system in decisions of 1957, the late 1960s and early 1970s]). In the early 1990s, the Charter Review Commission, impaneled by Defendant's city council, concluded that "a shift from the at-large plurality system currently in use" was necessary "to distribute empowerment more broadly in Santa Monica, particularly to ethnic groups …" Even back in 1946, it was understood that at-large elections 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." Yet, in each instance Defendant chose at-large elections.

A. 1946

Defendant's current at-large election system has a long history that has its roots in 1946.[15] As Dr. Kousser's testimony at trial, and his report to the Santa Monica Charter Review Committee in 1992, explained, proponents and opponents of the at-large system alike, bluntly recognized that the at-large system would impair minority representation. And, another ballot measure involving a pure racial issue was on the ballot at the same time in 1946 – Proposition 11, which sought to ban racial discrimination in employment. Dr. Kousser's statistical analysis shows 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.

When the *Arlington Heights* factors are each considered, those non-exhaustive factors militate in favor of finding discriminatory intent in the 1946 adoption of the current at large election system.

[15] In 1946, Defendant adopted its current council-manager form of government, and chose an at-large elected city council and school board. The at-large election feature remains in Defendant's city charter. (Santa Monica Charter § 600 ["The City Council shall consist of seven members elected from the City at large …"], § 900)

The discriminatory impact of the at-large election system was felt immediately after its adoption in 1946. Though several ran, no candidates of color were elected to the Santa Monica City Council in the 1940s, 50s or 60s. (See *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 disparate impact, even without a showing that black voters voted for each of the particular black candidates going back to 1874].) Moreover, the impact on the minority-concentrated Pico Neighborhood over the past 72 years, discussed in Section III(C)(5) above, also demonstrates the discriminatory impact of the at-large election system in this case. (*Gingles* 478 U.S. at 48, n. 14 [describing how at-large election systems tend to cause elected officials to "ignore [minority] interests without fear of political consequences."].)

The historical background of the decision in 1946 also militates in favor of a finding of discriminatory intent. At-large elections are well known to disadvantage minorities, and that was well understood in Santa Monica in 1946. The non-white population in Santa Monica was growing at a faster rate than the white population – enough that the chief newspaper in Santa Monica, the Evening Outlook, was alarmed by the rate of increase in the non-white population. The fifteen Freeholders, who proposed only at-large elections to the Santa Monica electorate in 1946, were all white, and all but one lived on the wealthier whiter side of Wilshire Boulevard. At-large elections were, therefore, in their self-interest, and at least three of the Freeholders successfully ran for seats on the city council in the years that followed. The Santa Monica commissioners had adopted a resolution calling for all Japanese Americans to be deported to Japan rather than being allowed to return to their homes after being interned, Los Angeles County had been marred by the zoot suit riots, and racial tensions were prevalent enough in Santa Monica that a Committee on Interracial Progress was necessary. At the same time as the 1946 Santa Monica charter amendment was approved, a significant majority of Santa Monica voters voted against Proposition 11, which would have outlawed racial discrimination in employment, and Dr. Kousser's EI analysis shows a very strong correlation between voting for the charter amendment and against Proposition 11.

The sequence of events leading up to the adoption of the at-large system in 1946 likewise supports a finding of discriminatory intent. As Dr. Kousser detailed, in 1946, the Freeholders waffled between giving voters a choice of having some district elections or just at-large elections, and

ultimately chose to only present an at-large election option despite the recognition that district elections would be better for minority representation.

The substantive and procedural departures from the norm also support a finding of discriminatory intent. In 1946, the Freeholders' reversed course on offering to the voters a hybrid system (some district, and some at-large, elected council seats) in the wake of discussion of minority representation, and, after a series of votes the local newspaper called "unexpected," offered the voters only the option of at-large elections.

The legislative and administrative history in 1946 is difficult to discern. There appears to have been no report of the Freeholders' discussions, but the statements by proponents and opponents of the charter amendment demonstrate that all understood that at-large elections would diminish minorities' influence on elections.

B. 1992

After winning a FVRA case ending at-large elections in Watsonville in 1989, Joaquin Avila (later principally involved in drafting the CVRA) and other attorneys began to file and threaten to file lawsuits challenging at-large elections throughout California on the grounds that they discriminated against Latinos. The Santa Monica Citizens United to Reform Elections (CURE) specifically noted the Watsonville case in urging the Santa Monica City Council to place the issue of substituting district for at-large elections on the ballot, allowing Santa Monica voters to decide the question. With the issue of at-large elections diluting minority vote receiving increased attention in Santa Monica and throughout California, Defendant appointed a 15-member Charter Review Commission to study the matter and make recommendations to the City Council. As part of their investigation, the Charter Review Commission sought the analysis of Dr. Kousser, who had just completed his work in *Garza* regarding discriminatory intent in the way Los Angeles County's supervisorial districts had been drawn. Dr. Kousser was asked whether Santa Monica's at-large election system was adopted or maintained for a discriminatory purpose, and Dr. Kousser concluded that it was, for all of the reasons discussed above. Based on their extensive study and investigations, the near-unanimous Charter Review Commission recommended that Defendant's at-large election system be eliminated. The principal reason for that

recommendation was that the at-large system prevents minorities and the minority-concentrated Pico Neighborhood from having a seat at the table.

That recommendation went to the City Council in July 1992, and was the subject of a public city council meeting. Excerpts from the video of that hours-long meeting were played at trial, and provide direct evidence of the intent of the then-members of Defendant's City Council. One speaker after another – members of the Charter Review Commission, the public, an attorney from the Mexican American Legal Defense and Education Fund, and even a former councilmember – urged Defendant's City Council to change its at-large election system. Many of the speakers specifically stressed that the at-large system discriminated against Latino voters and/or that courts might rule that they did in an appropriate case. Though the City Council understood well that the at-large system prevented racial minorities from achieving representation – that point was made by the Charter Review Commission's report and several speakers and was never challenged – the members refused by a 4-3 vote to allow the voters to change the system that had elected them. Councilmember Dennis Zane explained his professed reasoning – in a district system, Santa Monica would no longer be able to place a disproportionate share of affordable housing into the minority-concentrated Pico Neighborhood, where, according to the unrefuted remarks at the July 1992 council meeting, the majority of the city's affordable housing was already located, because the Pico Neighborhood district's representative would oppose it. Mr. Zane's comments were candid and revealing. He specifically phrased the issue as one of Latino representation versus affordable housing: "So you gain the representation but you lose the housing."[16] While this professed rationale could be characterized as not demonstrating that Mr. Zane or his colleagues "harbored any ethnic or racial animus toward the . . . Hispanic community," it nonetheless reflects intentional discrimination—Mr. Zane understood that his action would harm

[16] Mr. Zane's insistence on a tradeoff between Latino representation and policy goals that he believed would be more likely to be accomplished by an at-large council echoed comments of the *Santa Monica Evening Outlook*, the chief sponsor of and spokesman for the charter change to an at-large city council in 1946. "[G]roups such as organized labor and the colored people," the newspaper announced, should realize that "The interest of minorities is always best protected by a system which favors the election of liberal-minded persons who are not compelled to play peanut politics. Such liberal-minded persons, of high caliber, will run for office and be elected if elections are held at large."

Latinos' voting power, and he took that action to maintain the power of his political group to continue dumping affordable housing in the Latino-concentrated neighborhood despite their opposition. (See *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 778 (J. Kozinski, concurring) [finding that incumbents preserving their power by drawing district lines that avoided a higher proportion of Latinos in one district was intentionally discriminatory despite the lack of any racial animus], cert. denied (1991) 111 S.Ct. 681)

In addition to Mr. Zane's "smoking gun" contemporaneous explanation of his own decisive vote, the Court also considers the circumstantial evidence of intent revealed by the *Arlington Heights* factors. While those non-exhaustive factors do not each reveal discrimination to the same extent, on balance, they also militate in favor of finding discriminatory intent in this case.

The discriminatory impact of the at-large election system was felt immediately after its maintenance in 1992. The first and only Latino elected to the Santa Monica City Council lost his re-election bid in 1994 in an election marred by racial appeals – a notable anomaly in Santa Monica where election records establish that incumbents lose very rarely. (See *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 disparate impact, even without a showing that black voters voted for each of the particular black candidates going back to 1874].) Moreover, the impact on the minority-concentrated Pico Neighborhood over the past 72 years, discussed in Section III(C)(5) above, also demonstrates the discriminatory impact of the at-large election system in this case, and has continued well past 1992. (*Gingles* 478 U.S. at 48, n. 14 [describing how at-large election systems tend to cause elected officials to "ignore [minority] interests without fear of political consequences."].)

The historical background of the decision in 1992 also militate in favor of finding a discriminatory intent. At-large elections are well known to disadvantage minorities, and that was well understood in Santa Monica in 1992. In 1992 the non-white population was sufficiently compact (in the Pico Neighborhood) that Dr. Leo Estrada concluded that a council district could be drawn with a combined majority of Latino and African American residents. While the Santa Monica City Council of the late 1980s and early 1990s was sometimes supportive of policies and programs that benefited racial minorities, as pointed out by Defendant's expert, Dr. Lichtman, the members also supported a curfew

that Santa Monica's lone Latino council member described as "institutional racism," as pointed out by Dr. Kousser, and they understood that district elections would undermine the slate politics that had facilitated the election of many of them.

The sequence of events leading up to the maintenance of the at-large system in 1992, likewise supports a finding of discriminatory intent. In 1992, the Charter Review Commission, and the CURE group before that, intertwined the issue of district elections with racial justice, and the connection was clear from the video of the July 1992 city council meeting, immediately prior to Defendant's city council voting to prevent Santa Monica voters from adopting district elections.

The substantive and procedural departures from the norm also support a finding of discriminatory intent. In 1992, the Charter Review Commission recommended scrapping the at-large election system, principally because of its deleterious effect on minority representation. While Defendant's City Council adopted nearly all of the Charter Review Commission's recommendations, it refused to adopt any change to the at-large elections or even submit the issue to the voters.

Finally, as discussed above, the legislative and administrative history in 1992, specifically the Charter Review Commission report and the video of the July 1992 city council meeting, demonstrates a deliberate decision to maintain the existing at-large election structure because of, and not merely despite, the at-large system's impact on Santa Monica's minority population.

VII. REMEDIES

Having found that Defendant's election system violates the CVRA and the Equal Protection Clause, the Court must implement a remedy to cure those violations. The CVRA specifies that the implementation of appropriate remedies is mandatory:

> "Upon a finding of a violation of Section 14027 and Section 14028, the court ***shall*** implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation."

(Elec. Code § 14029 (emphasis added)). The federal courts in FVRA cases have similarly and unequivocally held that once a violation is found, a remedy must be adopted. (See, e.g. *Williams v. Texarkana, Ark.* (8th Cir. 1994) 32 F.3d 1265, 1268 [Once a violation of the FVRA is found, "[i]f [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]; see also *Reynolds v. Sims* (1964) 377 U.S. 533, 585 ["[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."].) Likewise, in regards to an Equal Protection violation implicating voting rights, "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all . . . .' Thus, the proper remedy for a legal provision enacted with discriminatory intent is invalidation." (*N. Carolina NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239 [surveying Supreme Court cases].)

A. The Court Has Broad Authority to Remedy Defendant's Violation of the California Voting Rights Act and the Equal Protection Clause.

Once liability is established under the CVRA, the Court has a broad range of remedies from which to choose. (§ 14029 ["Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation."]; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 670). The range of remedies from which this Court may choose is at least as broad as those remedies that have been adopted in FVRA cases. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 807 ["Thus, the Legislature intended to expand the protections against vote dilution provided by the federal Voting Rights Act of 1965. It would be inconsistent with the evident legislative intent to expand protections against vote dilution to narrowly limit the scope of . . . relief as defendant asserts. Logically, the appropriate remedies language in section 14029 extends to . . . orders of the type approved under the federal Voting Rights Act of 1965."].) Thus, the range of remedies available to this Court includes not only the imposition of district-based elections (§ 14029), but also, for example, less common at-large remedies imposed in FVRA cases such as cumulative voting, limited voting and unstaggering elections. (*U.S. v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411 [ordering cumulative voting and unstaggering elections]; *U.S. v. City of Euclid* (N.D. Ohio 2008) 580 F.Supp.2d 584 [ordering limited voting]). This Court may also order a special election. (See *Neal v. Harris* (4th

Cir. 1987) 837 F.2d 632, 634 [affirming trial court's order requiring a special election, during the terms of the members elected under the at-large system, rather than awaiting the date of the next regularly scheduled election, when their terms would have expired.]; *Ketchum v. City Council of Chicago* (N.D Ill. 1985) 630 F.Supp. 551, 564-566 [ordering special elections to replace aldermen elected under a system that violated the FVRA]; *Bell v. Southwell* (5th. Cir. 1967) 376 F.2d 659, 665 [voiding an unlawful election, prohibiting the winner of that unlawful election from taking office, and ordering that a special election be held promptly]; *Coalition for Education in District One v. Board of Elections* (S.D.N.Y. 1974) 370 F.Supp. 42, 58, aff'd (2nd Cir. 1974) 495 F.2d 1090; *Tucker v. Burford* (N.D. Miss. 1985) 603 F.Supp. 276, 279; *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany* (2d Cir. 2004) 357 F.3d 260, 262-263 [applauding the district court for ordering a special election].) Indeed, courts have even used their remedial authority to remove all members of a city council where necessary. (See *Bell v. Southwell* (5th Cir. 1967) 367 F.2d 659, 665; *Williams v. City of Texarkana* (W.D. Ark. 1993) 861 F.Supp. 771, aff'd (8th Cir. 1994) 32 F.3d 1265; *Hellebust v. Brownback* (10th Cir. 1994) 42 F.3d 1331).

The broad remedial authority granted to this Court by Section 14029 of the CVRA extends to remedies that are inconsistent with a city charter (*Jauregui, supra,* 226 Cal. App. 4th at pp. 794-804) and even remedies that would otherwise be inconsistent with state laws enacted prior to the CVRA. (*Id.* at pp. 804-808 [affirming the trial court's injunction, pursuant to section 14029 of the CVRA, prohibiting the City of Palmdale from certifying its at-large election results despite that injunction being inconsistent with Code of Civil Procedure section 526(b)(4) and Civil Code section 3423(d)]). Likewise, because the California Constitution is supreme over state statutes, any remedy for Defendant's violation of the Equal Protection Clause is unimpeded by administrative state statutes. (*Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 [invalidating a state statute because it impinged upon rights guaranteed by the California Constitution]). Voting rights are the most fundamental in our democratic system; when those rights have been violated, this Court has the obligation to ensure that the remedy is up to the task.

B. The Remedy Should Be Prompt and Complete, and Remedy Past Harm as Well as Prevent Future Violations.

Any remedial plan should fully remedy the violation. (See, e.g., *Dillard v. Crenshaw Cnty., Ala.* (11th Cir. 1987) 831 F.2d 246, 250 ["The court should exercise its traditional equitable powers to fashion the relief so that it *completely* remedies the prior dilution of minority voting strength and *fully* provides equal opportunity for minority citizens to participate and to elect candidates of their choice. … This Court cannot authorize an element of an election proposal that will not with certitude completely remedy the [] violation."] (italics added); see also *Harvell v. Blytheville Sch. Dist. No. 5* (8th Cir. 1997) 126 F.3d 1038, 1040 [affirming trial court's rejection of defendant's plan because it would not "completely remedy the violation"]; *LULAC Council No. 4836 v. Midland Indep. Sch. Dist.* (W.D. Tex. 1986) 648 F.Supp. 596, 609; *United States v. Osceola Cnty., Fla.* (M.D. Fla. 2006) 474 F.Supp.2d 1254, 1256.) The United States Supreme Court has explained that the court's duty is to both remedy past harm and prevent future violations of minority voting rights:

> [T]he court has not merely the power, but the duty, to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

(*Louisiana v. United States* (1965) 380 U.S. 145, 154; see also *Buchanan v. City of Jackson, Tenn.*, (W.D. Tenn. 1988) 683 F. Supp. 1537, 1541 [same, rejecting defendant's hybrid at-large remedial plan].)

The remedy for a violation of the Equal Protection Clause should likewise be prompt and complete. Courts have consistently held that intentional racial discrimination is so caustic to our system of government that once intentional discrimination is shown, "the 'racial discrimination must be eliminated root and branch'" by "a remedy that will fully correct past wrongs." (*N. Carolina NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239, quoting *Green v. Cty. Sch. Bd.* (1968) 391 U.S. 430, 437–439, *Smith v. Town of Clarkton* (4th Cir. 1982) 682 F.2d 1055, 1068.)

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. (See *Williams v. City of Dallas* (N.D. Tex. 1990) 734 F.Supp. 1317 ["*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."], emphasis in original)

VIII. THE APPROPRIATE REMEDY IN THIS CASE IS THE PROMPT IMPLEMENTATION OF THE SEVEN-DISTRICT PLAN PRESENTED AT TRIAL.

Though other remedies, such as cumulative voting, limited voting and ranked choice voting, are possible options in a CVRA action and would improve Latino voting power in Santa Monica, the parties agreed that, given the local context in this case – including socioeconomic and electoral patterns, the voting experience of the local population, and the election administration practicalities present here – a district-based remedy is preferable. The choice of a district-based remedy is also consistent with the overwhelming majority of CVRA and FVRA cases.

At trial, only one district plan was presented to the Court – Trial Exhibit 261. That plan was developed by David Ely, following the criteria mandated by Section 21620 of the Elections Code, applicable to charter cities. The populations of the proposed districts are all within 10% of one another; areas with similar demographics (e.g. socio-economic status) are grouped together where possible and the historic neighborhoods of Santa Monica are intact to the extent possible; natural boundaries such as main roads and existing precinct boundaries are used to divide the districts where possible; and neither race nor the residences of incumbents was a predominant factor in drawing any of the districts.

Trial testimony revealed that jurisdictions that have switched from at-large elections to district elections as a result of CVRA cases have experienced a pronounced increase in minority electoral power, including Latino representation. Even in districts where the minority group is one-third or less of a district's electorate, minority candidates previously unsuccessful in at-large elections have won district elections. (See, e.g., Florence Adams, Latinos and Local Representation: Changing Realities, Emerging Theories (2000), at pp. 49–61.) The particular demographics and electoral experiences of Santa Monica suggest that the seven-district plan would similarly result in the increased ability of the minority population to elect candidates of their choice or influence the outcomes of elections. First,

Mr. Ely's analysis of various elections shows that the Latino candidates preferred by Latino voters perform much better in the Pico Neighborhood district of Mr. Ely's plan than they do in other parts of the city – while they lose citywide, they often receive the most votes in the Pico Neighborhood district. Second, the Latino proportion of eligible voters is much greater in the Pico Neighborhood district than the city as a whole. In contrast to 13.64% of the citizen-voting-age-population in the city as a whole, Latinos comprise 30% of the citizen-voting-age-population in the Pico Neighborhood district. That portion of the population and citizen-voting-age-population falls squarely within the range the U.S. Supreme Court deems to be an influence district. (*Georgia v. Aschcroft* (2003) 539 U.S. 461, 470–471, 482 [evaluating the impact of "influence districts," defined as districts with a minority electorate "of between 25% and 50%,"]) Third, testimony established that Latinos in the Pico Neighborhood are politically organized in a manner that would more likely translate to equitable electoral strength. Fourth, testimony also established that districts tend to reduce the campaign effects of wealth disparities between the majority and minority communities, which are pronounced in Santa Monica.

Though given the opportunity to do so, Defendant did not propose a remedy. The six-week trial of this case was not bifurcated between liability and remedies. Though Plaintiffs presented potential remedies at trial, Defendant did not propose any remedy at all in the event that the Court found in favor of Plaintiffs. On November 8, 2018 this Court gave Defendant another opportunity, ordering the parties to file briefs and attend a hearing on December 7, 2018 "regarding the appropriate/preferred remedy for violation of the [CVRA]." [17] Still, Defendant did not propose a remedy, other than to say that it prefers the implementation of district-based elections over the less-common at-large remedies

[17] The schedule set by this Court on November 8, 2018 is in line with what other courts have afforded defendants to propose a remedy following a determination that voting rights have been violated. (See, e.g., *Williams v. City of Texarkana* (W.D. Ark. 1992) 861 F.Supp. 756, 767 [requiring the defendant to submit its proposed remedy 16 days after finding Texarkana's at-large elections violated the FVRA], aff'd (8th Cir. 1994) 32 F.3d 1265; *Larios v. Cox* (N.D. Ga. 2004) 300 F.Supp.2d 1320, 1356–1357 [requiring the Georgia legislature to propose a satisfactory apportionment plan and seek Section 5 preclearance from the U.S. Attorney General within 19 days]; *Jauregui v. City of Palmdale*, No. BC483039, 2013 WL 7018376 (Aug. 27, 2013) [scheduling remedies *hearing* for 24 days after the court *mailed* its decision finding a violation of the CVRA]).

discussed at trial. Where a defendant fails to propose a remedy to a voting rights violation on the schedule directed by the court, the court must provide a remedy without the defendant's input. (See *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]).[18]

In order to eliminate the taint of the illegal at-large election system in this case, in a prompt and orderly manner, a special election for all seven council seats is appropriate. Other courts have similarly held that a special election is appropriate, where an election system is found to violate the FVRA. (See *Neal v. Harris* (4th Cir. 1987) 837 F.2d 632, 632-634 ["[o]nce it was determined that plaintiffs were entitled to relief under section 2, … the timing of that relief was a matter within the discretion of the court."]; *Ketchum v. City Council of Chicago* (N.D Ill. 1985) 630 F.Supp. 551, 564-566; *Bell v. Southwell* (5th. Cir. 1967) 376 F.2d 659, 665 [voiding an unlawful election, prohibiting the winner of that unlawful election from taking office, and ordering that a special election be held promptly]; *Coalition for Education in District One v. Board of Elections* (S.D.N.Y. 1974) 370 F.Supp. 42, 58, aff'd (2nd Cir. 1974) 495 F.2d 1090; *Tucker v. Burford* (N.D. Miss. 1985) 603 F.Supp. 276, 279; *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany* (2d Cir. 2004) 357 F.3d 260, 262-63 [applauding the district court for ordering a special election]; *Montes v. City of Yakima* (E.D. Wash. 2015) 2015 WL 11120964, at p. 11, [explaining that a special election is often necessary to completely

[18] Defendant argues that section 10010 of the Elections Code constrains this Court's ability to adopt a district plan without holding a series of public hearings. On the contrary, section 10010 speaks to what a political subdivision must do (e.g. a series of public hearings) in order to adopt district elections or propose a legislative plan remedy in a CVRA case, not what a court must do in completing its responsibility under section 14029 of the Elections Code to implement appropriate remedies tailored to remedy the violation. Defendant could have completed the process specified in section 10010 at any time in the course of this case, which has been pending for nearly 3 years. Even if Defendant had started the process of drawing districts only upon receiving this Court's November 8 Order (on November 13), it could have held the initial public meetings required by section 10010(a)(1) by November 19, and the additional public meetings the week of November 26, completing the process in advance of its November 30 remedies brief. To this Court's knowledge, even at the time of the present statement of decision, Defendant has failed to begin any remedial process of its own.

eliminate the stain of illegal elections]. As the Second District Court of Appeal held in *Jauregui*, "the appropriate remedies language in section 14029 extends to [remedial] orders of the type approved under the federal Voting Rights Act of 1965" (*Jauregui*, *supra,* at p. 807), so the logic of the courts for ordering special elections in all of these cases is equally applicable in this case.

From the beginning of the nomination period to election day, takes a little less than four months. (https://www.smvote.org/uploadedFiles/SMVote/2016(1)/Election%20Calendar_website.pdf.). Based on the path this Court has laid out, a final judgment in this case should be entered by no later than March 1, 2019. Therefore, a special election – a district-based election pursuant to the seven-district map (Tr. Ex. 261) – for all seven city council positions should be held on July 2, 2019. The votes can be tabulated within 30 days of the election, and the winners can be seated on the Santa Monica City Council at its first meeting in August 2019, so nobody who has not been elected through a lawful election consistent with this decision may serve on the Santa Monica City Council past August 15, 2019. Only in that way can the stain of the unlawful discriminatory at-large election system be promptly erased.

IX. CONCLUSION.

All Santa Monica residents deserve an equitable voice in their city government. Defendant's at-large election system denies some of its residents that right in a discriminatory fashion, and violates both the CVRA and the Equal Protection Clause. Accordingly, this Court orders that, from the date of judgment, Defendant is prohibited from imposing its at-large election system, and must implement district-based elections for its city council in accordance with the seven-district map presented at trial (Tr. Ex. 261).

Dated: By: _____

Hon. Yvette M. Palazuelos
Los Angeles Superior Court Judge

PROOF OF SERVICE
1013A(3) CCP Revised 5/l/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 January 3, 2019, I served the foregoing document described as **[PROPOSED] STATEMENT OF DECISION** as follows:

****** 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.

[ ] **BY PERSONAL SERVICE as follows:**

[ ] I delivered such envelope by hand to the addressees at 111 North Hill Street, Los Angeles, CA 90012. _____

[ ]_ I caused the foregoing document described hereinabove to be personally delivered by hand by placing it in a sealed envelope or package addressed to the persons at the addresses listed on the attached service list and provided it to a professional messenger service whose name and business address is Team Legal, Inc., 40015 Sierra Highway, Suite B220, Palmdale, CA 93550.

[ ]__ I caused the foregoing document described hereinabove to be personally delivered by hand by placing it in a sealed envelope or package addressed to the persons at the addresses listed on the attached service list and provided it to a professional messenger service whose name and business address is First Legal Support Services,1511 West Beverly Blvd., Los Angeles, CA 90026.

[ ] **BY FACSIMILE as follows:** I served such document(s) by fax at See Service List to the fax number provided by each of the parties in this litigation at Lancaster, California. I received a confirmation sheet indicating said fax was transmitted completely.

[ ] **BY GOLDEN STATE OVERNIGHT DELIVERY/OVERNIGHT MAIL as follows:** I placed such envelope in a Golden State Overnight Delivery Mailer addressed to the above party or parties at the above address(es), with delivery fees fully pre-paid for next-business-day delivery, and delivered it to a Federal Express pick-up driver before 4:00 p.m. on the stated date.

[ ] **BY ELECTRONIC SERVICE as follows:** Based on a court order, or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addressed listed on the attached Service List.

Executed on January 3, 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.

Marci Cussimonio

SERVICE LIST

Pico Neighborhood Association v. City of Santa Monica, California, et al.

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