No. S263972

In the

Supreme Court

of the

State of California

Pico Neighborhood Association, *et al.,*
Plaintiffs and Petitioners,
v.
City of Santa Monica,
Defendant and Respondent,

PLAINTIFFS AND RESPONDENTS PICO NEIGHBORHOOD ASSOCIATION AND MARIA LOYA'S OPPOSITION TO AMICI CURIAE LEAGUE OF WOMEN VOTERS OF SANTA MONICA ET AL.'S MOTION FOR JUDICIAL NOTICE

After a Decision of the Court of Appeal
Second Appellate District, Division Eight
Case No. BC295935 (DEPUBLISHED)

Appeal from the Superior Court of Los Angeles
Case No. BC616804
Honorable Yvette M. Palazuelos

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Page

I. INTRODUCTION

Amici's untimely motion for judicial notice seeks to improperly admit post-judgment evidence to attack the trial court's judgment, affording Petitioners no meaningful opportunity to respond to that evidence, and affording the trial court no opportunity to weigh that evidence in its factual findings. Had Amici complied with California Rules of Court, rule 8.809 (they did not), they would have had to acknowledge the evidence of November 2022 election results, for which they seek judicial notice, "was [never] presented to the trial court" (Cal. Rules of Court, rule 8.809(a)(2)(B)) and "relates to proceedings occurring after the order or judgment that is the subject of the appeal" (Cal. Rules of Court, rule 8.809(a)(2)(D)). Yet, Amici do not, and cannot, establish the "exceptional circumstances" this Court has held are required for any appellate court to consider such post-judgment matters. (*In re Zeth S.* (2003) 31 Cal. 4th 396, 405-406.)

Treating this appeal as a trial *de novo*, as Amici invites this Court to do, complete with new post-judgment evidence never presented to the appropriate fact-finder – the trial court, would be both disrespectful of the trial court's role and greatly prejudicial to Plaintiffs and Respondents Pico Neighborhood Association and Maria Loya ("Plaintiffs"). Plaintiffs have had no opportunity to respond to the post-judgment evidence by, for example, presenting expert testimony to show that the candidate(s)

preferred by Latino voters were not elected, or if they were, presenting witness testimony and documents to show that the November 2022 election results were influenced by "special circumstances" that justify disregarding that election. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 57 & fn. 26.) This appeal was fully briefed as of August 2021, so Plaintiffs could not even address the November 2022 elections in their briefs on the merits. And, even if Plaintiffs had that opportunity now, appellate courts like this Court, are ill-suited to make factual findings about the circumstances of an election and determine the weight, if any, to be assigned to a post-judgment election. Fact finding is the role of the trial court, not to be usurped by the appellate courts.

Amici's apparent attempt to also have this Court further take judicial notice of 2022 candidates' and councilmembers' ethnicities is flawed for additional reasons. Ethnicity is not properly subject to judicial notice—at least not on this record. Moreover, the trial court has already made findings at odds with Amici's assertions about the relevant ethnic identification of one of the councilmembers discussed in the Request for Judicial Notice.

Amici's attempt at an end-run around the trial court, nearly four years after the trial court's judgment, should be rejected. Their motion for judicial notice should be denied.

II. ARGUMENT

A. Materials Related to the 2022 Elections Are Improper Post-Judgment Evidence, and Should Not Be Considered by This Court.

1. Absent Exceptional Circumstances, Post-Judgment Evidence May Not Be Considered on Appeal.

The role of an appellate court is to "review[] the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*Zeth, supra,* 31 Cal.4th at 405, quoting *In re James V.* (1979) 90 Cal. App. 3d 300, 304.) That rule reflects the "essential distinction between the trial and the appellate court … that it is the province of the trial court to decide questions of fact and the appellate court to decide questions of law." (*Ibid.,* quoting *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263.) "The rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal." (*Ibid.*; see also *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 [denying request for judicial notice of post-judgment deposition testimony]; *People's Home Sav. Bank v. Sadler* (1905) 1 Cal. App. 189, 193-194 ["It is therefore manifest that error on the part of the [trial] court cannot be predicated by reason of any matter occurring subsequent to its rendition of the judgment, and it is equally evident that it would be irrelevant for the appellate court to entertain any

evidence of such subsequent matters."].)

This Court's decision in *Zeth* illustrates both the rationale and firmness of the rule against consideration of post-judgment events. In *Zeth*, this Court considered whether an exception to this "generally applicable rule[] of appellate procedure" should be made for appeals of orders terminating parental rights—a proposition that it conclusively rejected, reversing a series of decisions by the Fourth District Court of Appeal which had invited and relied on post-judgment evidence. (See *id*. at 407-08, 413-414.) This Court reasoned that "however well intentioned" an appellate court's consideration of events and evidence developed during the pendency of the appeal may have been, it "effectively substitutes the reviewing court's own post hoc determination of whether termination of parental rights remains in the minor's best interests" for the judgment of the trial court. (*Id*. at 409-410.) It is hard to imagine a case in which the equities more favor consideration of post-judgment evidence than one involving the termination of parental rights, yet this Court still held firm in prohibiting the consideration of any post-judgment evidence. (*Id*. at 405-414.)

The rule has also been upheld in voting rights cases, in circumstances almost identical to those presented here. In the leading California Voting Rights Act ("CVRA") case of *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781, the appellate court was reviewing the

trial court's September 30, 2013 issuance of a preliminary injunction prohibiting the certification of the 2013 election. (*Id.* at 791.) The November 2013 "election was held, the votes were tabulated, but the results were not certified." (*Id.* at 792.) Both sides averred to the results of that election, in which the first African-American was elected to the Palmdale City Council, but the court refused to consider that election (or the parties' briefing concerning the results of that election) because it occurred after the preliminary injunction was issued, and post-injunction events were not "properly before" the court. (*Id.* at 793, citing *Zeth*, *supra*, at 405-414 and *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 442.)

The entry of new evidence on appeal is particularly inappropriate where it is introduced to justify reversing a trial court's judgment. (*DeYoung v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 863, fn.3, citing *First. Nat. Bank of Findlay v. Terry* (1930) 103 Cal.App. 501, 509.) Though post-judgment evidence has occasionally been taken by appellate courts for the purpose of further supporting affirmance of a judgment, post-judgment evidence may not be used to argue for reversal. (*Id.* at 863; *Bassett v. Johnson* (1949) 94 Cal.App.2d 807, 812 ["normally, additional evidence will be taken by an appellate court only for the purpose of affirmance and not for the purpose of reversal."].) It is also inappropriate to consider new evidence where it would require the appellate

court to resolve factual conflicts. (*Butt v. State of California* (1992) 4 Cal.4th 668, 697 n.23.)

The lone case cited by Amici in their request for judicial notice – *Yumori Kaku v. City of Santa Clara* (2020) 59 Cal. App. 5th 385 – does not dictate a different result. In *Yumori Kaku*, the request for judicial notice was unopposed (see *id.* at 399, fn. 5 and 408, fn. 7), and the election results were introduced in support of affirmance of the trial court's judgment, not reversal. (See *DeYoung, supra* 159 Cal.App.3d at 863, fn.3.) Ultimately, the *Yumori-Kaku* court did not refer to or cite the post-judgment election results in its analysis of the trial court's actions; it granted an unopposed request without significant analysis because it made no difference to its determination of the appeal. (See Cal. Rules of Court, rule 8.54(c) ["A failure to oppose a motion may be deemed a consent to the granting of the motion."].)

Only in "exceptional circumstances" should an appellate court consider post-judgment events, or make factual findings of its own. (*Zeth, supra,* 31 Cal.4th at 405-406; see also *California School Bds. Assn. v. State of California* (2011) 192 Cal. App. 4th 770, 803 ["It is a fundamental principle of appellate law that our review of the trial court's decision must be based on the evidence before the court at the time it rendered its decision. School Districts have not cited any exceptional circumstances that would justify a deviation from this rule in this appeal."] (internal

citations omitted).) The most typical circumstance justifying consideration of post-judgment events is where those events may render the appeal moot. (See *People's Home Sav. Bank*, *supra,* 1 Cal.App. at 193-194 [collecting cases]; see also *Edelstein v. City & County of San Francisco* (2002) 29 Cal. 4th 164, 171 [considering post-judgment election materials for proposition amending San Francisco's charter to determine whether the question before the court had become moot].) But, even where post-judgment events are considered to evaluate mootness, they are then disregarded when considering the merits of the appeal. (See *Center. for Biological Diversity v. Department of Conservation* (2018) 26 Cal.App.5th 161, 170-171 ["We conclude that resolving the mootness question constitutes exceptional circumstances warranting our taking the additional documentary evidence for this limited purpose. Appellant also relies on this additional evidence in arguing the judgment should be reversed. We find no extraordinary circumstances warranting our consideration of the evidence for such purposes, and we thus do not consider it in determining the merits of the appeal."].)

2. There Are No Exceptional Circumstances Here That Would Make Judicial Notice of a Post-Judgment Election Appropriate.

Amici fail to point to any exceptional circumstance that would warrant admission of post-judgment evidence in this appeal. Neither Amici, nor the parties to this appeal, claim this appeal, or this case more

generally, is moot. Nor could Amici argue this case is moot; the City of Santa Monica stubbornly persists in utilizing the at-large election system that the trial court found to be racially discriminatory.

Rather, Amici contend the 2022 election results are relevant to the merits – according to Amici, that they somehow demonstrate "a longstanding pattern of Latino voting power." (Motion, p. 2). Amici would have this Court disregard the trial court's factual finding – that "as a result [of racially polarized voting], 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." (24AA10680-10681 [Statement of Decision, pp. 12-13].) – because at one snapshot in time, and after the trial court's judgment, one other candidate Amici identify as Latina was elected to the city council. That consideration of post-judgment events to attack the factual findings of the trial court, is exactly what this Court and countless other courts have repeatedly cautioned is inappropriate.

Nor is there anything exceptional about the fact that another election has occurred while this case was pending on appeal. Indeed, permitting new evidence of electoral results to be raised every two years during the pendency of often-prolonged appellate proceedings in voting rights cases would make finality elusive for litigants, the public and the courts.

Amici seek to do with post-judgment events exactly what this Court and many other courts have held is inappropriate – use post-judgment evidence to attack the factual findings of the trial court. (See Section II.A.1, *supra*.) Therefore, the results of the November 2022 election and any discussion of the November 2022 election results should be rejected as "not properly before [the Court]." (*Jauregui, supra*, 226 Cal. App. 4th at 793.)

3. Appellate Courts Are Ill-Suited to Determine the Probative Value of Election Results Never Subjected to Examination at Trial.

Though there are no exceptional circumstances that would justify consideration of the 2022 election, there are numerous additional reasons specific to this case why it should not be considered by this Court.

The question of vote dilution requires "'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 79 (quoting *Rogers v. Lodge* (1982) 458 U.S. 613, 622; *see also Yumori Kaku, supra,* 59 Cal. App. 5th at 410.) Each election must be viewed in context to determine, for example, whether the election involved "special circumstances" that warrant disregarding minority success in that election (*Gingles*, supra, 478 U.S. at p. 57 & fn. 26), as the trial court found with the 2012 election in this case. (24AA10686-10687 [Statement of Decision, pp. 18-19.) At trial, Plaintiffs elicited testimony from four city council candidates (Tony Vazquez, Maria

Loya, Steve Duron and Oscar de la Torre) and an expert historian (Dr. J. Morgan Kousser) to provide context for each of the elections analyzed by the trial court. At a minimum, election results, or the victory of a particular candidate, means nothing without evidence of group voting behavior. (See *Gingles, supra,* 478 U.S. at 68 ["it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important."] (emphasis in original).) Without anything but the raw election results, to say that Ms. Negrete, as an appointed incumbent coming in third in a race for three seats involving no other incumbents, somehow evidences Latino voting power, is no different than saying Herschel Walker's recent showing in his U.S. Senate race demonstrates African American voting power in Georgia despite the fact that he lacked support from African American voters.[1]

That intense inquiry is especially important for elections held while voting rights litigation is pending. (See *Collins v. Norfolk* (4th Cir. 1987) 816 F.2d 932, 938 [discounting the election of a minority candidate after the lawsuit was filed, where the mayor endorsed the candidate]; *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 556-58 [courts should

[1] See CNN poll showing Herschel Walker supported by just 3% of African American voters, available at: https://s3.documentcloud.org/documents/23324148/cnn-poll-georgia-december-2022.pdf.

"cautiously view minority electoral success achieved after a vote dilution lawsuit is filed" and consider whether the election may be surrounded by "unusual circumstances" including support for the minority candidate by the local political establishment]; *U.S. v. Village of Port Chester* (S.D.N.Y. 2010) 704 F. Supp. 2d 411, 442 [finding that a post-lawsuit election, in which the lawsuit was a central campaign issue, was a "special circumstance" that created an outlier in the defendant's election history].) While a trial court can admit and assess qualitative and statistical evidence, including witness testimony, submitted by both sides of a case to weigh and contextualize the results of an election, an appellate court cannot.

Amici's motion does not present this Court with any evidence about the November 2022 election – aside from the numeric results and Amici's unsupported assertion of the ethnicity of a city council candidate and a school board candidate. To properly evaluate the implications of the 2022 election, a court would have to consider all of the contextual evidence bearing on the weight, if any, to be afforded to that election. For example, the fact finder should weigh evidence relating to the City Council's selection of Ms. Negrete for appointment to a vacant seat, the timing of that appointment while this lawsuit was pending, evidence regarding which interest groups or elected officials brought about that appointment, and evidence related to the effect of her incumbency as well as that of supporting interest groups or elected officials on her subsequent election.

(See, e.g., *Collins, supra,* 816 F.3d at 938 [directing the court to "probe further to determine whether the [minority] candidate's success … while this action was pending, resulted from unusual circumstances."].) To consider the 2022 election without affording Plaintiffs an opportunity to elicit and present such contextual evidence, as Amici seek to have this Court do through their judicial notice motion, would be greatly prejudicial to Plaintiffs. (Evid. Code §§ 352; 454(a)(2) [appellate courts may decline to take notice of otherwise judicially noticeable facts if their probative value is substantially outweighed by the probability that their admission will create a substantial danger of undue prejudice to the adverse party].)

Because the Parties disagree about the implications of the November 2022 election, the admission of such evidence would require this Court to resolve a "factual conflict," and therefore it should not be considered by this Court. (*See Butt, supra*, 4 Cal.4th at 697, fn.23.)

B. THE ETHNICITIES OF CANDIDATES IS NOT SUBJECT TO JUDICIAL NOTICE.

Through their motion, Amici apparently seek judicial notice of not just the 2022 election results, but also the ethnicities of two candidates and one city council member. (See Motion, p. 3 & fn. 2.) Even if the post-judgment election results were properly subject to judicial notice (they're not), the purported ethnicities still would not be.

This Court summarized the relevant principle in *Mangini v. R.J.*

Reynolds Tobacco (1994) 7 Cal.4th 1057:

> While courts may notice official acts and public records, "we do not take judicial notice of the truth of all matters stated therein." [Citations.] "[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom."

(*Id.* at 1063-1064, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276; see also *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal.App.4th 514, 519.)

In requesting judicial notice of the 2022 election results, Amici also seeks to have this Court assume the ethnicities of two candidates – one for city council and one for the Santa Monica Malibu Unified School District board, even though there is no evidence at all of those candidates' ethnicities. Moreover, while Amici asks this Court to assume that Gleam Davis is Latina (see Motion, p. 3 fn. 2), the trial court provided important context and explanation for Ms. Davis' ethnicity, which undermines Amici's assertion and renders it at best a disputable factual contention unsuitable for judicial notice:

> 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.

(24AA10684-10685 [Statement of Decision, pp. 16-17, fn. 7].)

Neither of the candidates, for which Amici would have this Court assume their ethnicity, testified at trial; no witness identified either of them as Latina; and, unlike with other historical candidates, there was no survey evidence to measure the Santa Monica electorate's recognition of what their ethnicities might be. (RA50-52.) The candidates' ethnicities are far from being "not reasonably subject to dispute." (Evid. Code §452(h).)

III. CONCLUSION

For all the reasons above, Amici's motion for judicial notice should be denied.

Dated: January 5, 2023

Respectfully submitted,

SHENKMAN & HUGHES

/s/ Kevin Shenkman

Attorneys for Plaintiffs and Respondents Pico Neighborhood Association and Maria Loya

PROOF OF SERVICE

I am a citizen of the United States, am over the age of 18 years, and not a party to the within entitled action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, CA 94612. I declare that on the date hereof I served the following document:

PLAINTIFFS AND RESPONDENTS PICO NEIGHBORHOOD ASSOCIATION AND MARIA LOYA'S OPPOSITION TO AMICI CURIAE LEAGUE OF WOMEN VOTERS OF SANTA MONICA ET AL.'S MOTION FOR JUDICIAL NOTICE

On the parties listed below, by the following means of service:

☒ **Via Electronic Filing/Submission: Via electronic submission through the TrueFiling web page at www.truefiling.com.**

☒ **BY U.S. MAIL: By placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Oakland, California addressed as set forth below.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 14th day of September 2020, at Oakland, California.

Scott G. Grimes

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