No. B295935

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

CITY OF SANTA MONICA,

Appellant-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Respondents and Plaintiffs.

CITY OF SANTA MONICA'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Superior Court for the County of Los Angeles
The Hon. Yvette M. Palazuelos, Judge Presiding
Superior Court Case No. BC616804

Gov't Code, § 6103

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TABLE OF CONTENTS

TABLE OF CONTENTS
(*continued*)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Plaintiffs' case has never made much sense. They sued the City of Santa Monica on the theory that its adoption and maintenance of an at-large method of electing its seven-member Council reflects intentional discrimination against minorities and violates the California Voting Rights Act. The discrimination claim is out of the case, because this Court held it was completely unsupported and premised on a misreading of historical documents. Now, all that remains is plaintiffs' CVRA claim, which is also unsupported and premised on a misreading of historical documents—namely, decades of election returns. Those returns, along with the expert analysis required to estimate which groups voted for which candidates, are undisputed, and they paint a clear picture: Candidates preferred by Latino voters have been winning Council elections in Santa Monica for decades. What's more, no other election system would permit more Latino-preferred candidates to win, so the at-large system isn't diluting Latino votes. For either or both of those reasons, this Court should direct the trial court to enter judgment in favor of the City.

To satisfy the CVRA's element of legally significant racially polarized voting, plaintiffs needed to prove that Latinos have cohesively voted for candidates who have usually lost because of white bloc voting. But that's not what the undisputed facts show.

In the elections analyzed by both sides' experts, about three-quarters of Latino-preferred candidates over the last three decades have prevailed in Council elections.

Plaintiffs and the trial court have reached a different conclusion only by redefining what it means to be preferred by Latino voters and cherry-picking the elections that suit plaintiffs' theory of the case. According to plaintiffs, the only candidates whom Latino voters truly prefer are themselves Latino, so plaintiffs limit their analysis of elections to Latino-surnamed candidates. Plaintiffs' theory is not only contrary to the evidence, but courts have uniformly decided that their core premise—that voters vote only for members of their own ethnicity or race—itself amounts to unconstitutional race discrimination. Plaintiffs have also invented reasons to discount every victory by a Latino candidate. When this case went to trial, the seven-member Council had two Latino members. The plaintiffs denied one was Latino at all, and the other—a three-time winner in at-large Council elections—figured in plaintiffs' story only in the one Council election that he lost.

Plaintiffs' narrative that Latino candidates can't get elected in Santa Monica's at-large elections has become only weaker with time. After the 2020 election, when this case was pending before the Supreme Court, there were three Latinos on the Council, including Oscar de la Torre, the husband of one plaintiff and the

former chair of the other. And today, after the 2022 election, there are four Latinos on the Council—the majority of the Council in a city where Latinos account for less than one-seventh of the voters.

The success of Latino-preferred candidates—including those who happen to be Latino—coupled with the fact that Latino voters are few in number and dispersed across the City, makes it impossible for plaintiffs to prove vote dilution. The Supreme Court made clear that an at-large voting system doesn't dilute minority voting power unless an alternative system would produce a *net gain* in the number of minority-preferred candidates elected. Under either side's theory of the case, there is no way that scrapping the City's current system could improve Latino voting power.

If only Latino candidates matter (as plaintiffs have long insisted), then Latino voters have been punching above their weight for years, with at least two Latinos on the seven-member Council for the last decade-plus even though Latinos account for less than one-seventh of the electorate. The same is true if Latino-*preferred* candidates matter (as the City contends); Latino voters have with few exceptions been able to elect their preferred candidates, despite their small numbers, over the last three decades. Plaintiffs would have the City abandon this successful system in favor of a district-based system that would give a group

of Latino voters in one part of the City a slim chance at electing *one* preferred candidate, leaving the majority of the City's Latino voters with zero say over who holds the remaining six Council seats. Any alternative system would harm, not empower, Latino voters.

Because plaintiffs haven't proved either legally significant racially polarized voting or vote dilution, this Court should direct the trial court to enter judgment for the City.

BACKGROUND

This Court is familiar with the long history of this case, much of which is set out in this Court's opinion, so the City offers only a brief summary here.

I. After a bench trial, the trial court enters judgment for plaintiffs

Plaintiffs sued the City in 2016, claiming that its at-large system violates the CVRA by diluting Latinos' votes, and that by adopting and maintaining that system, the City had intentionally discriminated against minorities in violation of California's Equal Protection Clause. (1AA70; 4AA1141.)

During the 2018 bench trial, each side called an expert to present statistical estimates of different ethnic groups' support for various candidates. Because ballots are secret, it is impossible to determine how many members of any minority group voted for any candidate, but it is possible to estimate voting patterns by

comparing election returns against precinct-level demographic data. RT2957:3-28. Precinct-level data were available to the experts only for Council elections held between 1994 and 2016. The two experts produced essentially identical estimates of voting behavior. (Compare 28AA12328-12332 with 25AA11006-11012.) The only meaningful difference in the work of the two experts was that the City's expert addressed a wider range of elections. Whereas plaintiffs' expert analyzed only those elections featuring at least one Latino-surnamed candidate whom he deemed "serious" (see, e.g., 14AA5409, 14AA5420, 14AA5422, 21AA9527-9528, RT3179:3-3181:2), the City's expert analyzed all Council elections for which precinct-level data were available (see 28AA12328-12332).

The trial court issued a tentative decision stating only that it found in favor of plaintiffs on both causes of action. (22AA9966.) The court then ordered plaintiffs to prepare a proposed statement of decision and judgment (23AA10254), which plaintiffs did (24AA10353, 24AA10368), and the court adopted both with scarcely any changes. (24AA10667.) As for plaintiffs' CVRA claim, the court concluded voting was racially polarized in Council elections by examining only white and Latino voters' respective levels of support for Latino-surnamed candidates. (24AA10681-10682.)

The trial court also decided voting patterns in other City elections (School Board, Rent Control Board, etc.) "support the conclusion that the levels of support for Latino candidates from Latino and [white] voters, respectively, is always statistically significantly different, with [white] voters consistently voting against the Latino candidates who are overwhelmingly supported by Latino voters." (24AA10692-10693.) The court did not mention that 14 of the 16 Latino-surnamed candidates who ran in local non-Council elections between 2002 and 2016 won. (24AA10693-10694; 26AA11611, 26AA11657, 26AA11692, 26AA11733, 27AA11868, 27AA11947, 27AA11995, 28AA12253.)

The court expressed doubt that "'dilution' is a separate element of a violation of the CVRA." (24AA10706.) It then stated, in one sentence, that plaintiffs had proved vote dilution by "present[ing] 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." (24AA10706-10707.) As for plaintiffs' Equal Protection claim, the court decided the City intentionally discriminated against minority voters in adopting and maintaining its election system. (24AA10716-10727.)

The trial court entered judgment in favor of plaintiffs and ordered the City to adopt a seven-district map drawn up by plaintiffs' expert. (24AA10738.)

II. This Court reverses the judgment in full.

The City appealed. (24AA10740.) Plaintiffs and the trial court refused to acknowledge that the appeal stayed the trial court's judgment. (25AA10873, 25AA10888.) The City filed a petition for a writ of supersedeas (25AA10888A), which this Court granted. (25AA10889A.)

This Court decided that plaintiffs had not proved a violation of either the CVRA or the Equal Protection Clause. As for plaintiffs' CVRA claim, the Court reasoned that the CVRA requires proof of dilution—that "the City's at-large method impaired Latinos' ability to elect candidates of their choice." (Opn. at p. 30.) The Court concluded that plaintiffs have not proved dilution because Latino voters would not have the numbers to elect candidates of their choice in a district-based system. (*Id.* at p. 31.) The Court noted plaintiffs' theory that they had proved dilution by reference to hypothetical election systems other than districts, such as cumulative voting, but concluded that the "fleeting reference" to such systems in the trial court's decision, "which [plaintiffs] authored, is insubstantial and cannot support the judgment." (*Ibid.*)

"In light of this conclusion" on dilution, the Court did "not reach the issues of whether there was racially polarized voting or whether the trial court's interpretation of the Act would make the Act unconstitutional as applied to this case." (Opn. at p. 37.)

As for plaintiffs' Equal Protection claim, the Court concluded that plaintiffs "did not prove the City adopted or maintained its [election] system for the purpose of discriminating against minorities." (Opn. at p. 38.) There was no discrimination in 1946, when the City adopted its current system; to the contrary, the City's minority leaders "unanimously favored" at-large elections. (*Id.* at pp. 42-46.) And there was no discrimination in 1992, when the City Council discussed the possibility of switching to a different election system; "[t]here was never a hint of hostility to minorities." (*Id.* at p. 46.)

This Court directed the trial court to enter judgment for the City. (Opn. at p. 50.)

While the City's appeal was pending in this Court, plaintiffs moved for attorneys' fees and costs, claiming that those totaled some $22 million through the entry of judgment in early 2019. After this Court reversed the trial court's judgment, the parties agreed that plaintiffs would take their fees motion off calendar and would reschedule a hearing on that motion if it ever became appropriate to do so.

III. The Supreme Court grants review on plaintiffs' CVRA claim, clarifies the legal standard for proving dilution, and remands.

Plaintiffs petitioned for review of this Court's rulings on both of their claims. The Supreme Court granted plaintiffs' petition, but only "to determine what constitutes dilution of a protected class's ability to elect candidates of its choice or to influence the outcome of an election within the meaning of the CVRA." (*Pico Neighborhood Assn. v. City of Santa Monica* (2023) 15 Cal.5th 292, 310.) The Supreme Court also ordered this Court's decision depublished (*ibid.*), but it remains law of the case with respect to plaintiffs' Equal Protection claim. (*People v. Rivera* (1984) 157 Cal.App.3d 494, 495; Cal. Rules of Court, rule 8.115(b)(1).)

In its decision, the Supreme Court rejected both sides' theories of dilution, as well as what it understood to be this Court's reasoning in ruling against the plaintiffs on that element:

- The Supreme Court held that plaintiffs' theory—that "proof of racially polarized voting, in itself, establishes 'dilution'"—runs counter to both the text of the CVRA and the federal statutory and decisional law against which the CVRA was enacted. (15 Cal.5th at pp. 314-315.) "Plaintiffs' construction would allow a party to prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system." (*Id.* at p. 315.)

- The Supreme Court read this Court's decision to have "effectively embraced" the federal rule that a vote-dilution plaintiff must prove that the relevant minority group would account for the majority of voters in a hypothetical district. (15 Cal.5th at p. 316.) The Court reasoned that the Legislature "intended to make the CVRA more expansive" than its federal analog. (*Id.* at p. 317.)
- The Supreme Court also rejected the City's call for a rule different from the federal majority-minority requirement—namely, that CVRA plaintiffs must prove that "the relevant minority group would account for a near-majority of voters in a hypothetical district with a history of reliable crossover support from other voters." (15 Cal.5th at p. 318.) The Court explained that "defining a near majority presents a new set of line-drawing problems." (*Ibid.*)

Instead, the Supreme Court adopted a fact-dependent standard meant to answer the question "whether the prospect of crossover support from other voters under a lawful alternative electoral scheme would offer the protected class, whatever its size, the potential to elect its preferred candidate." (15 Cal.5th at p. 319; accord *id.* at pp. 307-308.) The Court explained that the showing necessary to prove dilution might vary substantially across cities. In some cases, a group will be too small in any sys-

tem to elect its preferred candidates, even if it is far more concentrated in a district than in the city as a whole. (*Id.* at p. 321.) Increasing a protected class's share of eligible voters from 0.1% citywide to 1.5% in a district, for example, will have no effect on that group's ability to elect its preferred candidate; it will have zero ability either way. (*Ibid.*) And in other cases, what plaintiffs must prove won't be much different from a near-majority or majority-minority requirement: "When the hypothetical alternative is district elections, a high degree of racially polarized voting may, in many cases, effectively require the protected class to constitute a substantial or very substantial minority of voters." (*Id.* at p. 319.)

Most cases will fall in between these extremes, and the Court made clear that there are no hard and fast rules when it comes to determining dilution under the CVRA. Instead, "[c]ourts should consider the totality of the facts and circumstances of the particular case, including the characteristics of the specific locality, its electoral history, and an intensely local appraisal of the design and impact of the contested electoral mechanisms as well as the design and impact of the potential alternative system." (*Pico*, 15 Cal.5th at p. 320, citations and quotation marks omitted).

There is, however, an important guardrail. A CVRA plaintiff needs to prove not only "what percentage of the vote would be required to win," but that the relevant minority group would have

greater voting power under some other election system. (15 Cal.5th at pp. 320, 322.) In other words, "[t]he dilution element also ensures the protected class is not made worse off." (*Id.* at p. 322.) Courts therefore must consider, among other things, whether "the incremental gain in the class's ability to elect its candidate of choice" in a remedial district would be "offset by a loss of the class's potential to elect its candidates elsewhere in the locality." (*Ibid.*)

The Supreme Court also clarified that this case concerns only the ability of Latinos to *elect* their preferred representatives. Although the CVRA permits claims premised on a protected class's "ability to *influence* the outcome of an election," the Court saw no need to decide what plaintiffs must prove to succeed on such a claim. (15 Cal.5th at pp. 323-324, italics added.) "Plaintiffs did not argue in the trial court or in th[e Supreme Court] an influence theory distinct from their claim that the City's at-large election system diluted their ability to elect their candidates of choice." (*Id.* at p. 324.)

The Supreme Court "expressed no view on the ultimate question of whether the City's at-large voting system is consistent with the CVRA" and remanded the case to this Court to decide "whether, under the correct legal standard, plaintiffs have established that at-large elections dilute their ability to elect their pre-

ferred candidates," as well as "whether plaintiffs have demonstrated the existence of racially polarized voting" and "any of the other unresolved issues in the City's appeal." (15 Cal.5th at pp. 324-325.)

At the request of the parties, this Court then issued an order calling for supplemental briefing. In that order, the Court noted that the Supreme Court did not "reinstate the trial court's judgment" and instead only "identified the proper way to analyze" the CVRA's dilution requirement. (Order at p. 1.) This Court also "invite[d] the parties to include in their briefing whether it would be appropriate to remand the case to the trial court" to perform the fact-intensive analysis necessary to decide whether the City's current election system dilutes Latino voting strength. (*Id.* at p. 2.)

ARGUMENT

I. There is no legally significant racially polarized voting in Santa Monica Council elections.

Like its federal counterpart, the CVRA requires plaintiffs "to show racially polarized voting—i.e., that the protected class members vote as a politically cohesive unit, while the majority votes 'sufficiently as a bloc usually to defeat' the protected class's preferred candidate." (*Pico*, 15 Cal.5th at p. 306.) The parties have extensively briefed, both in this Court and the Supreme Court, the question whether plaintiffs proved this element of their

CVRA claim at trial. (E.g., AOB at pp. 25-48; RB at pp. 45-62; ARB at pp. 15-39.) But neither court decided the issue, focusing instead on the question whether plaintiffs proved that the City's at-large system has diluted Latino voting power. (*Pico*, 15 Cal.5th at pp. 324-325.) For that reason, and because this brief is a supplemental brief rather than a replacement brief, the City will not here restate its entire argument on racially polarized voting.

What the City will instead do is make four points about that issue: (A) the Court should decide it now because the Supreme Court made clear that racially polarized voting isn't just an independent element of the CVRA, but also a prerequisite for finding vote dilution, (B) the racially polarized voting question is purely legal, (C) the only way to rule in plaintiffs' favor is to accept their invitation to make unconstitutional assumptions about voter behavior and to cherry-pick election data, and (D) the results of the Council elections held since the trial court's decision are also inconsistent with plaintiffs' theory of the case.

A. The Court should address the racially-polarized-voting question first because it also informs the dilution analysis.

The Supreme Court granted review to address how CVRA plaintiffs should prove that an at-large method of election has diluted the relevant minority group's votes. The Court did not address the independent element of racially polarized voting, but

it nevertheless made clear that the racial-polarization question bears on the dilution analysis. This Court therefore should address racially polarized voting first.

In determining whether there is legally significant racially polarized voting, the Supreme Court explained, courts should examine whether bloc voting has usually defeated the relevant minority group's preferred candidates. (*Pico*, 15 Cal.5th at p. 306.) And in determining whether that group's voting power has been diluted by at-large voting, courts must "ensure[] the protected class is not made worse off." (*Id.* at p. 322.) That is, CVRA plaintiffs must "demonstrate a net gain in the protected class's potential to elect candidates under an alternative system," or they will not have "shown the at-large method of election 'impairs' the ability of the protected class to elect its preferred candidates." (*Ibid.*)

It is impossible to show either a "net gain" or an "'impair[ment]'" of anything without first establishing a baseline. (*Pico*, 15 Cal.5th at p. 322.) Voting-rights litigation, by its nature, calls for a comparison between the status quo and some alternative. (*Reno v. Bossier Parish Sch. Bd.* (1997) 520 U.S. 471, 478.) Plaintiffs contend that Latino voters in Santa Monica would do better under some other system. To evaluate that claim, it's essential to understand how well they are doing now.

It makes sense, then, for this Court to begin by assessing

the status quo. If the Court agrees with the City that Latinos have generally been able to elect their preferred candidates in the current system, that would be a sufficient basis for the Court to end this case with judgment in favor of the City, without reaching the dilution question. And if the Court wishes to decide the dilution question, it will still have to evaluate Latino voting power under the current system.

B. The racially-polarized-voting question is purely legal, and the trial court adopted the wrong legal standard.

The parties have agreed from the outset of the case that the question whether voting is racially polarized can be answered only with expert evidence. There is no direct evidence of how voters of different races and ethnicities voted; experts must infer voting patterns from precinct-level demographic data. (RT 2957:18-28.) This exercise is inexact and can produce wild ranges in estimates, especially when, as in this case, minority groups are small and dispersed throughout a city. (See, e.g., RT 5841:6-5842:7; see also 25AA11006-11012 [confidence intervals for minority support of candidates are far wider than intervals for white support].)

There are nevertheless standard methods of statistical inference that are used in cases like this one, and the parties' experts used them here. What's more, their estimates of group vot-

ing behavior—the extent to which each group supported each candidate—were essentially identical. (Compare 28AA12328-12332 [City's expert's analysis] with 25AA11006-11012 [plaintiffs' expert's analysis]; see also RB at p. 24 [estimates of City's expert "differed only slightly from those of" plaintiffs' expert].) So the dispute between the parties is not over what the numbers *are*, but what they *mean*. In other words, the parties disagree about what legal standard to apply to undisputed facts. To resolve that disagreement, this Court reviews the trial court's decision de novo. (E.g., *Poole v. Orange Cnty. Fire Auth.* (2015) 61 Cal.4th 1378, 1384.)

In determining whether Latino-preferred candidates have usually lost because of white bloc voting, the first step is figuring out who those candidates are in the first place. Plaintiffs' expert, Dr. Morgan Kousser, confined his analysis of elections to "candidates who are Latino-surnamed." (RT4239:2-4241:20; accord, e.g., RT4058:3-8; RT4978:10-20.) This means Dr. Kousser didn't start with data telling him how Latinos may have voted—he instead started with the subset of candidates whom plaintiffs assumed would perform best with Latino voters because of their surnames.

The trial court accepted this analysis, even though it was premised on stereotypes about Latinos' voting behavior rather than actual facts. (24AA10682.) That approach is at odds with an unbroken line of federal cases holding that courts cannot assume

how people will vote based on their skin color or ethnicity; doing so would be "invidious discrimination of the kind that the Voting Rights Act was enacted to eradicate, effectively disenfranchising every minority citizen who casts his or her vote for a non-minority candidate." (*Lewis v. Alamance County* (4th Cir. 1996) 99 F.3d 600, 607; see also *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 551 (per curiam); AOB at pp. 27-29, ARB at pp. 17-20 [collecting similar cases].)

The trial court's presumption that Latino voters always prefer Latino-surnamed candidates is also contrary to the record. In analyzing the 1996 election, for example, the trial court focused exclusively on a Latino-surnamed candidate named Donna Alvarez (24AA10685)—Latino voters' seventh choice (25AA11007)—even though three candidates who didn't have Latino surnames are estimated to have won nearly unanimous support from Latino voters (25AA11007). And in other elections, Latino-surnamed candidates received hardly any votes from Latino voters (e.g., 25AA11010 [Linda Piera-Avila], 25AA11011 [Robert Gomez, Steve Duron], 28AA12332 [Zoe Muntaner]), further undermining the theory that names signaling ethnicity are all that matters. Because those unsuccessful candidates destroy plaintiffs' narrative that Latino voters prefer only Latino candidates, Plaintiffs disregard them as not "meaningful" or "serious." (RB at pp. 15, 23, 46;

see also ARB at pp. 34, 27 [addressing plaintiffs' effort to label certain Latino candidates as not "serious"].)

That focus on the wrong candidates reflects a general trend in the trial court's decision of ignoring or downplaying facts inconsistent with plaintiffs' theory of the case. For example:

- The trial court relied on the defeat of Tony Vazquez in 1994 (24AA10687, 24AA10725), even though he won the three other times he ran for a Council seat, in 1990, 2012, and 2016 (RT3035:27-3036:1; RT3039:11-13; 25AA11011; 25AA11012). The trial court gave no weight to the 1990 victory; minimized the 2012 victory as the result of an "unusual election" and a "special circumstance[]"; and concluded that Vazquez wasn't a Latino-preferred candidate in 2016 (even though he is estimated to have won about 80% of Latino votes) because plaintiff Maria Loya's husband, Oscar de la Torre, may have received slightly more Latino support in that election. (24AA10686-10688.)
- The trial court made no mention of the white candidates who received roughly the same level of Latino voters' support—and, in several cases, statistically significantly more support—than Latino-surnamed candidates. For instance, the trial court counted the 2008 election in plaintiffs' favor because a Latino-surnamed candidate lost, but that candi-

date is estimated to have received only about 30% of the Latino vote; two non-Latino-surnamed candidates received substantially greater Latino support and prevailed. (25AA11010.)

- The trial court accepted plaintiffs' invitation to set aside the victories of Councilmember Gleam Davis, whose father was Mexican (RT9077:17-20, RT9079:19-9080:26, RT9124:9-9134:4), because, according to a telephone survey conducted by plaintiffs' expert, "the Santa Monica electorate does not recognize her as Latina." (24AA10684-10685, fn. 7.)

In short, plaintiffs convinced the trial court to accept the theory that non-Latino-surnamed candidates never count, no matter how much support they may have received from Latino voters, and Latino-surnamed candidates count only when they lose.

C. Under the correct legal standard, the evidence shows Latino-preferred candidates aren't usually defeated by white bloc voting.

Rather than starting from the impermissible assumption that Latino always prefer Latino-surnamed candidates, the trial court should have started with the data and allowed for the possibility that any voters might prefer any candidates. In multi-seat elections like those in Santa Monica, voters might prefer multiple candidates, so courts first narrow the field to those candidates who would have won if the only voters came from the

relevant minority group. (AOB at p. 37.) Courts then determine whether the group preferred some candidates more strongly than others. They discount winning candidates who were clearly not as strongly minority-preferred as losing candidates. (*Id.* at pp. 37-38.) But courts do not discount winning candidates who received roughly the same minority support as losing candidates. (*Id.* at p. 38.) Finally, candidates shouldn't be considered be minority-preferred if they won little support from minority voters. (*Id.* at pp. 38-39.)

With the Latino-preferred candidates properly identified, a court can assess whether those candidates have usually lost Council elections as a result of white bloc voting, as the CVRA requires for a finding of legally significant racially polarized voting. (*Pico*, 15 Cal.5th at pp. 306, 311.)

Here, the undisputed data show that Latino-preferred candidates have usually *won* Council elections, as well as other local elections in Santa Monica. In the Council elections analyzed by the parties' experts, 16 of the 22 Latino-preferred candidates won. (See AOB at pp. 41-46; ARB at pp. 23-39; 25AA11006-11012, 28AA12328-12332.) And in other local elections (for the School, College, and Rent Boards), 23 of 27 Latino-preferred candidates won. (AOB at pp. 44-46; ARB at p. 38.) That Latino-preferred candidates usually win is a sufficient basis for a judgment against a CVRA plaintiff. (E.g., *Askew v. City of Rome* (11th Cir. 1997)

127 F.3d 1355, 1381, 1385 (per curiam).)

D. Recent elections have further undermined plaintiffs' theory of the case.

Plaintiffs have from the beginning of this case focused solely on the performance of Latino candidates. In the brief they filed in this Court in late 2019, plaintiffs repeatedly claimed that even though "Latino voters overwhelmingly support Latino candidates," those candidates almost always lose. (RB at p. 14; accord, e.g., *id.* at pp. 15, 26-27, 34, 46, 51.) That wasn't true then, and it isn't true now.

At trial, plaintiffs couldn't make their claim about a consistent Latino preference for unsuccessful Latino candidates without heavily cherry-picking the data. They discounted the elections in which Latino voters didn't vote for Latino candidates—by labeling those candidates as not "serious." Plaintiffs also discounted the elections in which Latino candidates won—by attributing those victories to "special circumstances" and by denying a candidate's Latino heritage. Plaintiffs' theory has always been that Latino voters need more Latino representatives on the Council, but, as this Court observed, "[d]uring trial, . . . the percentage of self-identified Latinos on the City Council was about 29 percent, which is about twice the percentage of voting-age Latinos in Santa Monica." (Opn. at p. 16.)

The disconnect between plaintiffs' theory and reality has

grown only starker in the years since the trial. In November 2020, voters elected two additional Latino Councilmembers: Oscar de la Torre and Christine Parra. (Motion for Judicial Notice (MJN) at p. 7; *id.* Ex. A.) Councilmember de la Torre is married to one of the plaintiffs and is the former chairman of the other. (RT6163:12-6164:2.) He joined the Council after winning five straight at-large School Board elections. (28AA12328-12331.) Councilmembers de la Torre and Parra also both live in the Pico neighborhood (MJN at pp. 8-9; *id.* Ex. D), which plaintiffs claim is underrepresented and has a higher share of Latino voters than any other neighborhood (e.g., RB at p. 14). As this Court noted, one Councilmember was living in that neighborhood at the time of trial as well. (Opn. at p. 16; RT7811:6-13.)

In November 2022, the Council added another Latino Councilmember, Lana Negrete. (MJN at pp. 7-8; *id.* Ex. B.) The current seven-member Council therefore has four Latino members: Mayor Davis, Mayor Pro Tem Negrete, Councilmember Parra, and Councilmember de la Torre.

Councilmember de la Torre filed an amicus brief in the Supreme Court, "in his individual capacity and not as a council member," in large part to try to explain away his and Councilmember Parra's success in the 2020 election. (MJN, Ex. C, at p. 4.) He described that election as "very much an outlier" and the product of "a global pandemic and unprecedented anti-

incumbent sentiment." (*Id.* at p. 15.) In other words, Councilmember de la Torre took a page from plaintiffs' playbook by seeking to discount or ignore every Latino victory in at-large Council elections—including his own.

In short, even if plaintiffs were right that this Court should focus on the success of Latino candidates, they would still be unable to prove their case. There could scarcely be a bigger gap between the picture plaintiffs have painted of Santa Monica—a racist town where no Latino could ever get elected because of a system designed to exclude them—and the reality of a progressive city where Latino-preferred candidates, several of whom also happen to be Latino, have been winning at-large elections for decades.

II. Plaintiffs have not proved that the City's at-large system has diluted Latino voting power.

The Supreme Court held that the CVRA requires plaintiffs to prove that the challenged at-large system has diluted the voting power of the protected class—i.e., that members of the protected class would be able to elect more of their preferred candidates under some other election system. Here, that showing is impossible. Latinos have long elected their preferred Council candidates in Santa Monica under the current at-large system, and they would have substantially *less* power under a different system. That's true even under plaintiffs' theory of the case, which focuses only

on the success of Latino candidates. At the time of trial, there were two Latinos on the Council, and there now are four. The speculative possibility of some alternative system that would allow *one* Latino-preferred or Latino candidate to win elections is no reason to abandon an at-large system that has regularly produced multiple winning Latino-preferred (and Latino) candidates.

This Court can and should decide the vote-dilution question in the City's favor on the basis that no other voting system would permit Latinos to elect more preferred candidates than the current system. But if the Court declines to reach that conclusion, it should remand to the trial court for a heavily factual totality-of-the-circumstances inquiry that the trial court—which concluded dilution isn't even an element of the CVRA—never performed.

A. No other election system would deliver a net gain in Latino voters' ability to elect their preferred candidates.

The CVRA forbids at-large systems that "impair[] 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 . . . of the rights of voters who are members of a protected class." (Elec. Code, § 14027.) The Supreme Court explained that although the statute thus permits both ability-to-elect claims and ability-to-influence claims, "Plaintiffs did not argue in the trial court or in this court an influence theory distinct from their claim

that the City's at-large election system diluted their ability to elect their candidates of choice." (*Pico*, 15 Cal.5th at p. 324.) In other words, plaintiffs forfeited any argument premised on mere "influence"—on anything less than the ability to change the result at the ballot box. The question for this Court, then, is whether plaintiffs proved at trial that an alternative election system would improve Latino voters' ability to elect their preferred candidates. The answer is no.

The Supreme Court made clear that the CVRA doesn't require cities to abandon at-large voting systems when the protected class would be "made worse off" under a different system. (*Pico*, 15 Cal.5th at p. 322.) Plaintiffs must prove not just that an alternative system would create "a real electoral opportunity" for minority-preferred candidates, but that there would be "[an] incremental gain in the class's ability to elect its candidates of choice." (*Ibid.*) If a potential gain in one corner of a city would be "offset by a loss of the class's potential to elect its candidates of choice elsewhere" in the city—that is, if there's no "net gain in the protected class's potential to elect candidates under an alternative system"—then there's no liability under the CVRA. (*Ibid.*) That Hippocratic principle—that the CVRA never requires medicine that would harm the very people it was designed to help—compels resolution of this case in the City's favor under either side's theory.

Plaintiffs' theory is that Latino voters want to elect Latino candidates. (E.g., RB at pp. 14-15, 46.) That theory led the trial court to focus, incorrectly, only on Latino candidates, even when Latino voters preferred non-Latino candidates. But even on the theory that only Latino candidates matter, the trial court still got its math wrong.

As this Court noted, at the time of trial (and going back to 2012), two of the City's seven-member Council were Latino, "which is about twice the percentage of voting-age Latinos in Santa Monica." (Opn. at p. 16.) Now, *four* members of the Council are Latino. (MJN at p. 7.) Plaintiffs want to divide the City into seven districts because they think a subset of the City's Latino voters *might* be able to elect *one* Latino candidate in *one* district: the Pico District. That hope may not be realistic, given that Latino voters would account for only 30% of the electorate there (24AA10734)—and given that Latino voters often vote for non-Latino candidates over Latino ones (e.g., 25AA11007, 25AA11010). But even if it were certain that voters in the Pico District would elect a Latino candidate, that would put only *one* Latino on the Council—a far cry from the four who currently sit on the dais. In fact, two of the Latinos currently on the Council, Councilmembers de la Torre and Parra, would have to run against each other (MJN at p. 7), guaranteeing that the number of Latinos from the Pico

District on the Council would at least be cut in half (and potentially drop to zero, because both might lose in a district election).

Under plaintiffs' theory of the case and the Supreme Court's decision, there would be no opportunity for Latino voters in any of the six other districts—collectively about two-thirds of the City's Latinos (RT5352:25–5355:2)—to elect Latino candidates. The concentration of Latino voters in the other districts would range from 7.6% to 13.9% (RA47)—figures smaller than or about equal to Latino voters' 13.6% share of the citywide electorate (RT2470:8-10). Plaintiffs themselves argued in the Supreme Court that groups accounting for less than 25% of voters in a district would be presumptively unable to elect Latino candidates. (See *Pico*, 15 Cal.5th at p. 322, fn. 12.) The Supreme Court also acknowledged that protected classes can be small enough to lack the ability to elect their preferred candidates under *any* election system. (*Id.* at p. 321.) It would make no sense to abandon a system where Latinos are regularly electing multiple Latinos for one in which Latinos would be eligible to vote for only one candidate and, even by plaintiffs' own lights, only the Latinos who lived in the Pico District would have any chance of electing a Latino candidate. That wouldn't be a "net gain" (*id.* at p. 322) in Latino voters' ability to elect Latino candidates, plaintiffs' yardstick for dilution.

What's more, the Supreme Court explained that CVRA plaintiffs, in demonstrating that the minority group would have

the ability to elect candidates of its choice under an alternative system, should "assum[e] the *same* degree of racial polarization" under the alternative system as under the at-large system. (15 Cal.5th at p. 318.) And as plaintiffs tell it, voting in Santa Monica is as polarized as in the "in the late '60s in the Deep South." (RB at p. 25.) Of course, that's dead wrong. (See Part I.C, *ante*.) But if it were true, then plaintiffs' theory of "stark" polarization would mean that Latino-preferred candidates probably couldn't win in the Pico District with a mere 30% of the votes, and they *certainly* couldn't win with about 10% in the other six districts. And it would be no answer for plaintiffs to claim that other minority groups would vote in a "coalition" with Latinos; the undisputed facts show that Asian and African-American voters consistently do not vote for the same candidates as Latinos. (See 25AA11006-110012.)

In short, under plaintiffs' Latino candidate-centric theory of the case, where voters prefer candidates of their own ethnicity, switching to a different election scheme would be a disaster, as it would be sure to yield far fewer winning Latino candidates than under the current system. Latino voters in the Pico District *might* be able to elect one Latino candidate, but that uncertain success would come at the cost of losing as many as three other Latino members of the Council. And as the Supreme Court made clear,

when an alternative system would offer some gain in representation that would be "offset by a loss of the class's potential to elect its candidates of choice elsewhere in the locality," there is no vote dilution. (*Pico*, 15 Cal.5th at p. 322.)

Switching to a different election scheme would also harm Latino voters under the City's theory of the case, which focuses on voters' actual preferences rather than on Latino candidates. Under the City's at-large system, Latino voters have consistently been able to elect candidates of their choice. (See pp. 25-27, *ante*.) Districts, by contrast, would pack one-third of the City's Latino voters into a single district, where they probably would be outvoted in winner-take-all elections. Districts would also strand the other two-thirds of Latino voters in overwhelmingly white districts, where they would definitely be outvoted. The mere possibility of electing *one* preferred candidate in a single district in every election doesn't measure up to the decades-long history of electing *multiple* preferred candidates citywide.

This result would also implicate "serious constitutional concerns under the Equal Protection Clause." (*Bartlett v. Strickland* (2009) 556 U.S. 1, 21 (plurality opn.).) The Constitution forbids predominantly race-based remedies unless they are narrowly tailored to serve compelling government interests. (*Cooper v. Harris* (2017) 581 U.S. 285, 291-292.) Ordering the City to scrap its current election system for race-based reasons—even though the

change would fail to produce a demonstrable increase in Latinos' potential to elect candidates of their choice—would be unconstitutional. (See *ibid.*; *Bethune-Hill v. Virginia State Board of Elections* (2017) 580 U.S. 178, 190, 194.) The Supreme Court dismissed these concerns on the ground that the CVRA does not require a municipality "to draw district lines . . . based 'principally on race.'" (*Pico*, 15 Cal.5th at p. 323.) But the problem with plaintiffs' requested remedy is not the *shape* of the new district lines—it's that a new electoral system is being imposed for race-based reasons, namely, as a remedy for supposed dilution of minority voting strength. Although "race [would be] the predominant factor" for imposing district-based elections or any other alternate voting system, that remedy would not "withstand strict scrutiny" because it would decrease—rather than bolster—Latinos' ability to elect candidates of their choice. (*Cooper*, 581 U.S. at pp. 291-292.)

When an at-large scheme has sapped the strength of a protected class, the CVRA offers the medicine of an alternative election scheme. But in some cases, including this one, that medicine would harm the very group it was meant to help. Under any theory of the case, switching away from the City's at-large system would not produce a "net gain" in Latino voting power. (*Pico*, 15 Cal.5th at p. 322.) The City's at-large election system therefore hasn't diluted Latino votes, and the Court should enter judgment

in favor of the City.

B. If the Court declines to enter judgment in favor of the City, it should remand to the trial court.

The vote-dilution question can be decided in the City's favor because plaintiffs haven't demonstrated that any other system would produce a net gain in representation for Latino voters. But if the Court declines to reach that conclusion, that would leave a "fact-specific inquiry" into "the totality of the facts and circumstances of the particular case." (*Pico*, 15 Cal.5th at p. 320.) The trial court would be better suited to undertake that searching analysis in the first instance.

Remand would be appropriate because the trial court didn't conduct any meaningful analysis of whether plaintiffs had demonstrated vote dilution. In fact, the court expressed doubt that "'dilution' is a separate element of a violation of the CVRA" at all (24AA10706)—a conclusion the Supreme Court expressly rejected. (15 Cal.5th at p. 315 ["we agree with the Court of Appeal that dilution is a separate element under the CVRA"].) As a result, the trial court's discussion of vote dilution was limited to a single sentence: It said only that if the statute does require dilution, plaintiffs proved it by "present[ing] 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."

(24AA10706-10707.) That conclusory sentence—lacking any reasoning or citations—does not provide a basis on which to enter judgment for plaintiffs. The trial court did not explain how or why those alternative election systems would allow Latinos to elect more candidates of their choice than under the City's current election system. And the trial court's conclusion was premised on a deeply flawed understanding of the status quo.

The trial court also did not have the benefit of the Supreme Court's decision, which provides a new framework for evaluating the question of vote dilution. Under the Court's decision, "[t]he key inquiry" when assessing whether a protected class's ability to elect its preferred candidates has been diluted "is what percentage of the vote would be required to win." (15 Cal.5th at p. 320.) When "predicting how many candidates are likely to run and what percentage may be necessary to win," courts may "consider the experiences of other similar jurisdictions that use district elections or other alternatives to traditional at-large elections." (*Id.* at p. 321) The "fact-specific inquiry" looks to "the totality of the facts and circumstances of the particular case . . ., including the characteristics of the specific locality, its electoral history, and 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms as well as the design and impact of the potential alternative system." (*Id.* at p. 320, citations omitted.)

Given the trial court's mistaken view that the CVRA doesn't require any evidence of vote dilution, its flawed conclusions about Latino voters' success in the current system, and the fact that the Supreme Court has since announced a new standard, the trial court didn't undertake the required analysis before concluding that an alternative election system would somehow "enhance Latino voting power over the current at-large system." (24AA10707.) Under those circumstances—where "the parties and the [trial] court focused on the wrong legal standards" and a Supreme Court decision corrects that mistake, the proper course is to remand for the trial court to conduct further proceedings consistent with the Court's decision. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 167.) Remand would provide the parties with "a full and fair opportunity to develop their positions before the [trial] court in accordance with" the standard announced in the Supreme Court's decision. (*Atkinson v. Garland* (7th Cir. 2023) 70 F.4th 1018, 1023.)

Accordingly, if this Court declines to resolve the case based on the absence of racially polarized voting, and if the Court determines it cannot resolve the case based on the principle that no ostensible remedy can do any *harm* to the protected class the CVRA was designed to protect, then it should remand to the trial court. There, the parties could present evidence relevant to the standard announced by the Supreme Court, and the trial court

could decide in the first instance whether plaintiffs have shown vote dilution.

CONCLUSION

This has always been a case in search of a theory. Plaintiffs brought an intentional-discrimination claim, but then told a story that was missing any actual discrimination. All that remains of their case is their CVRA claim, but they did not prove either legally significant racially polarized voting (that Latino-preferred candidates usually lose due to majority bloc voting) or vote dilution (that some other method of election would allow Latinos to elect more candidates of their choice). In fact, all the evidence shows that switching to a different method would substantially reduce Latino voting power. The Court should bring this long-running case to an end by directing the trial court to enter judgment in favor of the City.

DATED: December 6, 2023 Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Under rule 8.204(c)(1) of the California Rules of Court, and in keeping with this Court's October 6 order, I certify that this supplemental opening brief contains 7,676 words.

DATED: December 6, 2023

Kahn A. Scolnick

PROOF OF SERVICE

I, Susanne Hoang, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years, and I am not a party to this action. My business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105. On December 6, 2023, I served:

CITY OF SANTA MONICA'S
SUPPLEMENTAL OPENING BRIEF

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

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☑ **BY ELECTRONIC SERVICE:** A true and correct copy of the brief was electronically served through TrueFiling on the persons listed on the attached service list.

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

Executed on December 6, 2023.

Susanne Hoang

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