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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **FOR THE COUNTY OF LOS ANGELES**

18 PICO NEIGHBORHOOD ASSOCIATION;
19 MARIA LOYA; and ADVOCATES FOR
MALIBU PUBLIC SCHOOLS,

20 Plaintiffs,

21 v.

22 CITY OF SANTA MONICA; and DOES 1-100, in-
23 clusive,

24 Defendants.

CASE NO. BC616804

**DEFENDANT CITY OF SANTA MONICA'S
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY ADJUDICA-
TION; SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES**

*[Separate Statement of Undisputed Material
Facts; Declaration of Peter Morrison; Declara-
tion of Daniel Adler and Request for Judicial
Notice filed concurrently]*

Complaint Filed: April 12, 2016
Hearing Date: June 14, 2018, 8:45 am
Reservation ID: 170614226861
Trial Date: July 30, 2018

Assigned to Judge Yvette Palazuelos, Dep't 28

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 14, 2018, at 8:45 a.m. or as soon thereafter as the
3 matter may be heard in Department 28 of the Superior Court of the State of California for the County
4 of Los Angeles, located at 111 N. Hill St., Los Angeles, California 90012, defendant City of Santa
5 Monica will, and hereby does, move pursuant to California Code of Civil Procedure Section 437c, for
6 an order granting summary judgment or, in the alternative, summary adjudication in its favor.

7 The City makes this motion because there are no triable issues of material fact on either of
8 plaintiffs' causes of action.

9 To prevail on their California Voting Rights Act claim, plaintiffs must prove, among other
10 things, that vote dilution caused by the City's at-large electoral system. Plaintiffs must therefore
11 demonstrate that some permissible electoral scheme *other than* the City's current system would en-
12 hance Latino voting power. But expert demographic analysis confirms that plaintiffs cannot do so,
13 because no constitutionally or statutorily permissible remedy could enhance Latino voting strength.
14 Absent proof of vote dilution, there is no constitutional basis on which to supply any remedy at all,
15 much less a race-conscious one. Governments are authorized to separate persons into voting districts
16 predominantly on the basis of race only when they have a compelling interest in doing so, and only
17 where their actions are specifically and narrowly tailored to further their legitimate purposes. Courts
18 have assumed without deciding that curing vote dilution is a compelling state interest. Because Lati-
19 nos' votes are not being diluted by Santa Monica's at-large electoral system, plaintiffs' claim presents
20 no compelling interest. Further, the imposition of a remedy predominantly influenced by race would
21 amount to impermissible racial gerrymandering reflecting the sort of invidious racial classifications
22 that the Supreme Court has consistently held to violate the Equal Protection Clause. To the extent that
23 the CVRA authorizes the imposition of a remedy predominantly influenced by race even absent a
24 showing of a compelling state interest or the narrow tailoring of remedies to right wrongs, it is uncon-
25 stitutional as applied to the facts of this case.

26 To prevail on their Equal Protection claim, plaintiffs must prove that in adopting the City's
27 current electoral system in 1946, the relevant decisionmakers intentionally discriminated against mem-
28 bers of a protected class. Such an Equal Protection claim can, in the abstract, be proven in one of three

1 ways—by showing that the challenged law is discriminatory on its face; that the law, although facially
2 neutral, has been applied in a racially discriminatory way; or that the law, although facially neutral and
3 applied evenhandedly, has had a disparate impact on members of a protected class that, as demonstrated
4 by other evidence, was intended by the relevant decisionmakers. In this case, only the third method of
5 proof is even potentially viable, as plaintiffs have never alleged that the relevant enactment is facially
6 discriminatory or has been applied in a racially discriminatory way. Plaintiffs lack admissible evidence
7 demonstrating any disparate impact or, for that matter, any causal link between an alleged disparate
8 impact and Santa Monica’s at-large electoral system. There is no admissible evidence that election
9 outcomes would have been any different for members of a protected class under any other electoral
10 system. And even if plaintiffs could demonstrate some disparate impact, they have no admissible evi-
11 dence showing that impact was intended by the relevant decisionmakers in 1946, or at any other rele-
12 vant time.

13 This motion is based upon this notice of motion and motion, the attached memorandum of
14 points and authorities, the Declaration of Peter Morrison, the Declaration of Daniel Adler, the Request
15 for Judicial Notice and the separate statement of undisputed material facts filed concurrently, along
16 with all other matters of which the Court may take judicial notice, the oral argument of counsel, plead-
17 ings already on file with the Court, and all other evidence that may be presented at the hearing on this
18 matter.

19
20
21 DATED: March 29, 2018

Respectfully submitted,

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION & SUMMARY OF ARGUMENT

3 Plaintiffs seek to have the Court overturn the electoral system chosen by Santa Monica voters
4 and draw districts along racial lines to replace the City's at-large elections. Such a dramatic remedy is
5 required, plaintiffs allege, because the current system dilutes Latino voting power, which they claim is
6 centered in the Pico neighborhood. The undisputed facts conclusively demonstrate otherwise. Objec-
7 tive demographic data, backed by expert analysis, confirms that districted elections would not enhance
8 Latino voting strength. The City's at-large elections therefore have not caused any dilution of Latino
9 voting strength. Because plaintiffs cannot dispute these basic facts, their case hinges on their claim
10 that the California Voting Rights Act (CVRA) permits replacement of the City's at-large elections
11 without a shred of evidence that they have caused any vote dilution. This is wrong. The CVRA is not
12 properly interpreted, and cannot constitutionally be applied, to impose liability or a remedy without
13 proof of vote dilution. Plaintiffs cannot prove all the elements of their claim, and the Court should
14 grant summary judgment.

15 With respect to liability, Elections Code sections 14027 and 14028 require plaintiffs to establish
16 that the at-large electoral system has impaired Latinos' ability to elect or influence elections by causing
17 a dilution of their voting strength. Plaintiffs cannot prove this. Latinos account for roughly 13% of
18 the City's citizen voting-age population. Not a single voting precinct is majority-Latino, and the City's
19 Latino population is spread throughout the City. These small numbers and broad dispersion make it
20 impossible to construct an equipopulous majority-Latino district. As a result, districted elections would
21 not enhance Latino voters' ability to elect candidates of their choice. In fact, the undisputed record
22 shows that districted elections would actually *dilute* Latino voting strength by submerging the vast
23 majority of Latino voters in overwhelmingly white districts, while failing to create a Latino-majority
24 district. Thus, even if it were true as plaintiffs claim that voting in the City is racially polarized (which
25 the City vigorously disputes), districted elections would necessarily deprive Latino voters of their cur-
26 rent ability to concentrate their citywide influence on particular candidates or issues.

27 The CVRA is modeled largely on section 2 of the Federal Voting Rights Act (FVRA). The
28 impossibility of creating a majority-minority district is fatal to claims brought under the FVRA.

1 Although Section 2 itself does not say as much, the Supreme Court has held repeatedly that a majority-
2 minority district is the *only* constitutional remedy for federal vote-dilution claims. If such a district
3 cannot be formed, a plaintiff not only cannot prove entitlement to a remedy, but also cannot prove
4 liability. In other words, liability is determined by examining whether a minority group would have
5 more voting power under a different electoral system. If the answer is no, there is no vote dilution, no
6 liability, and no entitlement to a remedy.

7 The CVRA was intended to be more expansive than its federal counterpart. Plaintiffs have
8 referred to certain provisions of the CVRA to argue that the impossibility of drawing a majority-mi-
9 nority district is not fatal to a CVRA claim. (See Elec. Code, § 14028(c) [to prove liability, plaintiff
10 need not show that minority group is “geographically compact or concentrated”].)¹ But the CVRA’s
11 departure from federal case law goes only so far. First, the plain text of the CVRA itself requires proof
12 that an at-large electoral system has caused an injury in the form of minority vote dilution. (§ 14027.)
13 Legislative intent cannot override statutory text. Second, the constitutional limitations underpinning
14 the federal decisions—chiefly, a concern that judicially ordered redistricting not violate the Fourteenth
15 Amendment’s prohibition on invidious racial classifications—apply equally to the CVRA.

16 Plaintiffs have sought throughout this case to dodge the statute’s plain language and these fun-
17 damental constitutional limitations, arguing that proof of racially polarized voting alone—which they
18 define as a bare difference in voting patterns across racial lines—is enough to establish a violation of
19 the CVRA. Not so. If that were true, CVRA liability—with the attendant award of attorneys’ fees and
20 overturning of legislatively chosen electoral systems—could be premised merely on a showing that a
21 small minority group, consisting of hundreds, or even dozens, of voters in a city of more than 100,000,
22 regularly voted as a bloc for candidates different from the preferred candidates of the racial majority.
23 Courts, of course, must construe the CVRA to avoid such “absurd and unfair consequences” (*Stanton*
24 *v. Panish* (1980) 28 Cal.3d 107, 115), by requiring proof that the at-large method of election has diluted
25 a minority group’s voting strength—which Plaintiffs cannot show here.

26 Without such proof, finding liability and imposing a remedy under the CVRA would also be
27 unconstitutional, and the Court should construe the CVRA to avoid these constitutional infirmities.

28 _____
¹ All subsequent statutory references are to the Elections Code, unless otherwise noted.

1 (See *People v. Chandler* (2014) 60 Cal.4th 508, 524.) The U.S. Supreme Court has consistently assumed without deciding that remedying vote dilution is a compelling state interest that can authorize a
2 narrowly tailored racial classification of voters—for example, by separating voters into districts based
3 predominately on race. But an order declaring a violation of the CVRA and mandating changes in
4 voting procedures without proof of vote dilution would not advance any compelling state interest, much
5 less be narrowly tailored to do so. Such an order would instead amount to a racial classification drawn
6 without good cause—which would “pose the risk of lasting harm to our society,” as such classifications
7 “reinforce the belief, held by too many for too much of our history, that individuals should be judged
8 by the color of their skin.” (*Shaw v. Reno* (1993) 509 U.S. 630, 657). As a result, they are “antithetical
9 to the Fourteenth Amendment” and permitted only in the narrowest of circumstances—where a gov-
10 ernment is pursuing a compelling interest by means specifically and narrowly tailored to accomplish
11 its purpose. (*Shaw v. Hunt* (1996) 517 U.S. 899, 907, 915).

12
13 In Santa Monica, the undisputed facts show that even if there were racially polarized voting, it
14 could not have caused any vote dilution because no majority-minority district is possible. To avoid
15 constitutional infirmity, the CVRA should be interpreted to require vote dilution and preclude a finding
16 of liability on these facts. If it is not, and if section 14028 is interpreted to permit liability based on a
17 showing of racially polarized voting alone, its application to mandate a change to Santa Monica’s at-
18 large elections would be unconstitutional.

19 An alternative basis for summary judgment on the CVRA claim is the constitutional unavaila-
20 bility of the districting remedy plaintiffs seek. The CVRA expressly allows consideration of geo-
21 graphic compactness and concentration “in determining an appropriate remedy.” (§ 14028(c).) Be-
22 cause any court order implementing plaintiffs’ requested change to districted elections would separate
23 voters predominantly on the basis of on race, it would need to be narrowly tailored to accomplish a
24 compelling state interest. Indisputable demographic facts preclude this standard from being met. In-
25 deed, any district that is even 40% Latino would be so highly irregular in shape, so bizarre on its face,
26 that it would plainly be impermissibly racially gerrymandered.

27 Summary judgment on plaintiffs’ other claim—an alleged violation of the Equal Protection
28 Clause—is required for similar reasons. Like a CVRA claim, an Equal Protection claim demands proof

1 of causation: a strong connection between the challenged action and a purportedly disparate impact on
2 a protected class. Plaintiffs cannot draw a connection between the City's at-large electoral system and
3 any impact on Latino voting power, because the indisputable demographic facts show that no alterna-
4 tive system could produce more favorable results. Plaintiffs also have no evidence that the relevant
5 decisionmakers behind the 1946 Charter amendment that adopted the current electoral system, whoever
6 they may have been, affirmatively intended to discriminate against ethnic minorities. Indeed, their
7 decision made it mathematically *easier* for a cohesive minority group to elect candidates of its choice.

8 Because plaintiffs lack the evidence necessary to support their causes of action, and because
9 plaintiffs' theory of the case is squarely contradicted by the undisputed demographic and historical
10 record, this Court should enter summary judgment or adjudication in favor of the City.

11 II. STATEMENT OF FACTS

12 A. The parties

13 **Defendant City of Santa Monica** is a charter city. (FAC ¶ 48.) Incorporated in 1886, the City
14 has operated under four systems of elections and governance. (Ex. H.) The first, under which five
15 trustees were elected on an at-large basis, lasted until 1905. (*Ibid.*) For the vast majority of that time,
16 the President of the Board of Trustees, often described in contemporaneous newspaper accounts as the
17 Mayor of Santa Monica, was Judge Juan José Carrillo. (Adler Decl. ¶ 10.) The trustee form of gov-
18 ernment was succeeded by the City's first charter. In effect from 1906 through 1915, this charter
19 marked the beginning of the City Council; it called for governance by seven councilmembers, each
20 elected from a geographically distinct ward. (Ex. H.) In 1915, the City transitioned to a commission
21 form of government. Under this system, which lasted until 1946, voters elected three commissioners—
22 one for public safety, a second for finance, and a third for public works—on an at-large basis. (Sep.
23 St. ¶ 1.) The three-commissioner system was widely perceived to be flawed, as it distributed authority
24 and responsibility across the commissioners, none of whom was accountable to the others. In 1946,
25 the City adopted its present form of government, under which seven councilmembers are elected every
26 other year (four in one election, three in the next) on an at-large basis for four-year terms. (Exs. G, H.)
27 Each year, councilmembers select a new mayor from their own ranks. (FAC ¶ 16.) The vast majority
28 of California cities similarly employ an at-large mayor-council system of election and governance.

1 Santa Monica is characterized by a high level of civic engagement. Many residents run for
2 elective office, and voter turnout is high. Given the large number of candidates, particularly in Council
3 races, voting is extremely fragmented. Many candidates attract a substantial percentage of the vote;
4 the last seven Council races attracted an average of 13 candidates; more than half of those candidates
5 won at least 5% of the vote. (Adler ¶ 3(b).) Under the at-large system, therefore, victory can come
6 even with relatively low levels of support. Since 2000, just over 13% of the vote has been required to
7 win a Council seat, and candidates have been successful with as little as 10% of the vote. (*Ibid.*)

8 Latino candidates have been successful under the City's at-large voting system. Although La-
9 tinos account for just over one-eighth of the City's population (St. ¶ 4), they hold roughly one-fifth of
10 the City's elective offices. Two sitting councilmembers, Tony Vazquez and Glean Davis, are Latino.
11 Vazquez was first elected in 1990 and is currently serving his third term; he also recently served a term
12 as Mayor. (Adler ¶ 2(b).) Davis, who joined the Council in 2009, has won three elections; she currently
13 serves as the Mayor Pro Tempore. (*Id.* Ex. A.) Latinos have also recently won at-large elections to
14 the Santa Monica College Board of Trustees (Dr. Margaret Quinones-Perez), Santa Monica-Malibu
15 Unified School District Board of Education (Maria Leon-Vazquez, Dr. Jose Escarce, and Oscar de la
16 Torre, who is plaintiff PNA's representative), and Rent Control Board (Steve Duron). (*Id.* ¶ 2(a).)

17 **Plaintiff Maria Loya** is a Santa Monica resident who has twice run for local office, both times
18 unsuccessfully. (FAC ¶ 8; Ex. B.) She ran for City Council in 2004, coming in seventh; she was one
19 of twelve unsuccessful candidates that year. (Ex. B.) She also ran for a seat on the Santa Monica
20 Community College Board of Trustees in 2014. (*Ibid.*) In that election, she placed sixth (last). (*Ibid.*)

21 **Plaintiff Pico Neighborhood Association** is an organization focused on neighborhood issues
22 like crime and traffic. (Adler ¶ 11.) The Pico Neighborhood has no formal definition, but it is roughly
23 the area within the City east of Lincoln Boulevard, south of Interstate 10, and north of Pico Boulevard.

24 **B. The Operative Complaint**

25 Plaintiffs filed the operative first amended complaint (FAC) in February 2017. The FAC asserts
26 two causes of action, one under the CVRA and the other under the Equal Protection Clause of the
27 California Constitution. Plaintiffs allege that "Santa Monica's at-large method of election violates the
28 CVRA." (FAC ¶ 3.) Plaintiffs specifically allege that Ms. Loya and other unidentified "Latino

1 residents of the Pico Neighborhood” have run in “several recent elections for the Santa Monica City
2 Council,” also unidentified, and “though they have often drawn significant support from both voters in
3 the Pico Neighborhood and by Latino voters generally,” they have all been “defeated by the bloc voting
4 of the non-Latino electorate against them.” (*Id.* ¶ 2; see also ¶¶ 20–25 [reviewing four “exemplary”
5 elections].) The FAC contains many allegations concerning the Pico Neighborhood, the boundaries of
6 which the FAC does not define. (See, e.g., *id.* ¶¶ 2, 19, 22–24, 27.) Plaintiffs allege that 39% of the
7 neighborhood’s residents are Latino. (*Id.* ¶ 27.)

8 Plaintiffs seek to compel the City to adopt an “alternative method of election,” and the only
9 remedy the FAC requests is “district-based elections.” (*Id.* ¶ 34; see also ¶¶ 3, 23–24, 28.)

10 The City demurred to the FAC, but the Court concluded that, as a matter of pleading, “Plaintiffs
11 have properly alleged an injury and the fact that Latinos in Santa Monica may not be concentrated in a
12 certain neighborhood or divisible ‘district’ does not mean the claim fails.” (Ex. C.)

13 **C. A Majority-Latino District Cannot Be Created Anywhere in the City.**

14 Latinos are widely dispersed across the City, accounting for at least one in ten eligible voters
15 in almost 60% of voting precincts. (Morrison Decl. ¶ 14.) In none of those 56 precincts do Latinos
16 account for the majority of citizen voting-age residents. (*Ibid.*) Because Latinos are so few in number
17 and so widely dispersed across the City’s precincts, it is not possible to draw a contiguous, equipopu-
18 lous, majority-Latino district anywhere in the City. (*Id.* ¶ 21–22.) The largest Latino citizen voting-
19 age population in any hypothetical contiguous district is 31.6%. (*Id.* ¶ 23.) That district would contain
20 only a third of Santa Monica’s Latino citizen voting-age residents, leaving the vast majority of the
21 Latino voting population scattered across the other six districts. (*Id.* ¶ 26.)

22 It is impossible to draw not just a contiguous majority-Latino district, but even a non-contiguous
23 district. The largest the Latino citizen voting-age population that could be included in even an irregu-
24 larly shaped noncontiguous district is 37.1%. (*Id.* ¶ 21.)

25 **D. A “Coalition District” Also Cannot Be Created Anywhere in the City.**

26 The City’s African-American population, like its Latino population, is small and widely
27 dispersed across the City. (*Id.* ¶ 29.) It is thus also impossible to draw a contiguous, equipopulous
28 “coalition” district in which a majority of potential voters would be Africa-American or Latino. (*Id.*

1 ¶ 33.) The largest the population of such voters could be in any hypothetical contiguous district is
2 41%. (*Ibid.*) That district would include only 28% of Latino voters and only 43% of African-American
3 voters, such that the vast majority would be scattered across the remaining six districts. (*Id.* ¶ 34.)

4 **III. LEGAL STANDARD**

5 To prevail on summary judgment, a defendant must show that the “cause of action has no merit”
6 by demonstrating “that one or more of the elements of the cause of action . . . cannot be established, or
7 that there is a complete defense to that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2).) A
8 defendant may “point to the absence of evidence to support the plaintiff’s case” (*Leslie G. v. Perry &*
9 *Assocs.* (1996) 43 Cal.App.4th 472, 482, italics omitted), or present affirmative evidence negating an
10 essential element of the plaintiff’s claim. (See *Guz v. Bechtel Nat’l, Inc.* (2000) 24 Cal.4th 317, 334–
11 335.) A defendant need not conclusively negate an element of the plaintiff’s cause of action, but must
12 only “show that the plaintiff does not possess needed evidence . . . [and] that the plaintiff cannot rea-
13 sonably obtain needed evidence.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854).

14 “[T]he burden [then] shifts to the plaintiff . . . to show that a triable issue of one or more material
15 facts exists as to that cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subd. (p)(2).) To
16 avoid summary judgment, the plaintiff must “set forth the specific facts showing that a triable issue of
17 material fact exists.” (*Ibid.*) “[T]he plaintiff must produce substantial responsive evidence sufficient
18 to establish a triable issue of material fact on the merits of the defendant’s showing.” (*Sangster v.*
19 *Paetkau* (1998) 68 Cal.App.4th 151, 162–163.) “[R]esponsive evidence that gives rise to no more than
20 mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of
21 material fact.” (*Id.* at p. 163.) The complaint represents the “outer measure of materiality” for a sum-
22 mary-judgment motion, which may not be denied on issues not raised therein. (*FPI Dev., Inc. v.*
23 *Nakashima* (1991) 231 Cal.App.3d 367, 381.) If the plaintiff cannot carry the burden of producing
24 substantial admissible evidence to establish a triable issue of material fact, the defendant is entitled to
25 judgment as a matter of law. (See *Saelzler v. Advanced Grp. 400* (2001) 25 Cal.4th 763, 780–781.)

26 A party may also move for summary adjudication “as to one or more causes of action” or “one
27 or more claims for damages.” (Code Civ. Proc., § 437c, subd. (f)(1).)

1 IV. ARGUMENT

2 A. There Is No Triable Issue of Material Fact on Plaintiffs' CVRA Claim.

3 1. The CVRA requires plaintiffs to prove that an at-large electoral system has
4 caused vote dilution.

5 In construing the CVRA, as with any statute, the court's inquiry "begins with the statute's text,
6 assigning the relevant terms their ordinary meaning." (*People v. Hubbard* (2016) 63 Cal.4th 378, 387.)
7 An at-large electoral system violates the CVRA where it has "*impair[ed]* the ability of a protected class
8 to elect candidates of its choice . . . *as a result of* the dilution . . . of the rights of voters who are members
9 of a protected class"—in other words, where the at-large system has directly caused minority vote
10 dilution. (§ 14027, italics added; see also § 14029 [authorizing the imposition of a remedy only if
11 section 14027 is found to have been violated]; *Sanchez v. City of Modesto*, 145 Cal.App.4th at p. 686
12 [CVRA "liability . . . is imposed because of dilution of the plaintiffs' votes"]; see also Ex. E [plaintiffs'
13 demand letter, contending that "voting within Santa Monica is racially polarized, resulting in minority
14 vote dilution, and therefore . . . [a] violat[ion] of the California Voting Rights Act".])

15 "Unless minority voters possess the *potential* to elect representatives in the absence of the chal-
16 lenged structure or practice, they cannot claim to have been injured by that structure or practice."
17 (*Thornburg v. Gingles* (1978) 478 U.S. 30, 50, fn. 17.) Vote dilution is not assessed in a vacuum; it
18 must be *measured* through a comparison. A minority group's voting strength must be compared against
19 a benchmark of full or undiluted strength to determine whether it has been watered down by some
20 voting practice or standard. (*Id.* at p. 88 (conc. opn. of O'Connor, J.)) Under the FVRA, courts identify
21 vote dilution in only one way: by determining whether it is possible to create a contiguous, equipopu-
22 lous, majority-minority district. (*Bartlett v. Strickland* (2009) 556 U.S. 1, 18–26 (plurality opn.))

23 While the CVRA does not necessarily require compactness (§ 14028(c)), this does not eliminate
24 the statute's requirement of a finding of vote dilution and causation. (§ 14027.) Nor, constitutionally
25 speaking, could it, and the CVRA must be construed to avoid constitutional infirmities. (See Part
26 IV.A.3, *infra*.) Moreover, if the CVRA were construed to permit a finding of liability (and the impo-
27 sition of a remedy) without a showing that at-large elections caused vote dilution—that is, based on
28 Plaintiffs' theory of racially polarized voting alone—it would lead to absurd and unfair consequences.

1 For instance, under this view, even a member of a protected class of one who voted for a different
2 candidate than the racial majority could win a CVRA case, collect attorney’s fees, and force a change
3 in electoral systems, notwithstanding the obvious absence of any vote dilution. The Court should reject
4 this irrational construction of the CVRA by applying section 14027’s plain language to require proof
5 that the at-large method of election has caused vote dilution. (*Stanton, supra*, 28 Cal.3d at p. 115.)

6 **2. The City’s electoral system indisputably has not diluted Latino votes.**

7 Vote dilution purportedly caused by an electoral system cannot be shown without reference to
8 an alternative system that would produce superior results. The only such postulated alternative that
9 plaintiffs have pleaded is a districted electoral system, with one of the seven new districts to be located
10 in the Pico Neighborhood. But indisputable facts, in the form of census and voting data broken out by
11 every relevant geographic and political unit and analyzed by an expert, conclusively demonstrate the
12 impossibility of constructing a Latino-majority district anywhere in the City.

13 Latinos are too few in number and too widely dispersed to comprise a contiguous, equipopu-
14 lous, majority-Latino district. (See Morrison Decl. ¶¶ 16–25.) Latinos account for only 13.2% of the
15 citizen voting-age population, and there is a substantial number of Latino voters—at least 10% of all
16 voters—in almost 60% of all precincts. (*Id.* ¶ 14.) Thus, the ceiling on the size of the Latino citizen
17 voting-age population in any contiguous, equipopulous district is 31.6%—a far cry from a majority.
18 (*Id.* ¶ 23.) If white bloc voting were occurring, as plaintiffs allege (FAC ¶¶ 21–24) (and the City dis-
19 puts), Latinos in such a district would not be able to overcome it to elect candidates of their choice.

20 Dividing the City into districts would, if anything, have the perverse effect of *weakening* Latino
21 voting strength. Two of every three voters live outside any hypothetical district located in the Pico
22 Neighborhood. (Morrison Decl. ¶ 26.) Drawing a district to capture a plurality of Latino voters—who
23 within that hypothetical district would remain a minority of voters who could not elect candidates of
24 their choice—would assign other Latino voters to districts containing an even higher percentage of
25 whites. Were racially polarized voting occurring, such a districted system would therefore “impair[]
26 the ability of a protected class to elect candidates of its choice.” (§ 14027.)²

27
28 ² In *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1414, the Ninth Circuit held that where two majority-Latino districts could be created, the district court erred in reasoning that the dis-

1 **3. To the extent it permits liability premised on a showing of racially polarized voting**
2 **alone, the CVRA is unconstitutional as applied to the facts of this case.**

3 Plaintiffs previously have argued that the CVRA requires them to prove next to nothing—that
4 it authorizes liability where there is racially polarized voting, plain and simple. As applied to Santa
5 Monica, that argument is fundamentally incompatible with the United States Constitution.

6 The CVRA is a largely untested statute that has produced only three published decisions. (See
7 *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781; *Rey v. Madera Unified Sch. Dist.* (2012)
8 203 Cal.App.4th 1223; *Sanchez, supra*, 145 Cal.App.4th 660.) None of those decisions addresses the
9 argument this motion presents—namely, that the statute is unconstitutional as applied to the facts of
10 *this case* if it authorizes the finding of liability and the imposition of a remedy notwithstanding the
11 impossibility of demonstrating vote dilution caused by the City’s at-large electoral system. *Sanchez*
12 recognized the Legislature’s intent to provide a broader cause of action for “vote dilution” than was
13 available under the FVRA, but explicitly left unresolved, among other things, both the elements re-
14 quired to establish a CVRA violation and the “meaty constitutional issues” posed by an as-applied
15 challenge to CVRA remedies in a particular case. (*Sanchez, supra*, 145 Cal. App. 4th at pp. 665, 690.)³

16 Because the constitutional limitations into which plaintiffs’ claim runs headlong have been ad-
17 dressed principally in FVRA rather than CVRA cases, and because the CVRA expressly incorporates
18 federal case law (§ 14026(d), (e)), federal cases are the appropriate guide to resolving the City’s con-
19 stitutional argument. Those cases explain that where race is the predominant factor motivating an
20 action altering a voting system, that action violates the Fourteenth Amendment unless it satisfies strict

21 _____
22 tricting plan must be rejected because “approximately 60% of the Hispanics eligible to vote in Wat-
23 sonville would reside in five districts outside the two” majority Latino districts.” The court concluded
24 that relegating even a substantial number of minority voters to overwhelmingly white districts is per-
missible where it is possible to draw “minority-controlled districts.” (*Ibid.*) Here, by contrast, it is
impossible to draw even one such district, and so it is appropriate to consider the potential vote-diluting
effects of districting on Latinos outside the concentrated district.

25 ³ *Sanchez* rejected only the claim before it—namely, Modesto’s contention that the CVRA is facially
26 unconstitutional because its “use of race constitutes reverse racial discrimination and is a form of un-
27 constitutional affirmative action benefiting only certain racial groups.” (*Sanchez, supra*, 145
28 Cal.App.4th at p. 665.) The City does not contend that the CVRA is unconstitutional in every applica-
tion, and instead contends that, on the facts of this case, to the extent it allows liability or the imposition
of a remedy premised solely on a showing of racially polarized voting, it is unconstitutional as applied.
As noted, *Sanchez* itself contemplated the validity of an as-applied challenge of this kind. (*Ibid.*)

1 scrutiny. (E.g., *Shaw, supra*, 517 U.S. at pp. 904–908.) The cases also impose certain preconditions
2 on the recognition of liability in vote-dilution cases to avoid constitutional doubt. (E.g., *Bartlett, supra*,
3 556 U.S. at p. 21.) A finding of liability and the resulting imposition of a necessarily race-predominant
4 remedy in this case would exceed those constitutional limitations.

5 **a. Separating voters based predominantly on race triggers strict scrutiny.**

6 The CVRA is modeled on Section 2 of the FVRA, which prohibits voting standards or practices
7 that result in vote dilution “on account of race or color.” (52 U.S.C. § 10301.) Identifying and reme-
8 dying vote dilution thus requires the classification of citizens on the basis of their race, the very thing
9 the Supreme Court has interpreted the Equal Protection Clause to forbid. Although some small degree
10 of race-consciousness does not offend the Constitution (see *Sanchez, supra*, 145 Cal.App.4th at p. 681),
11 substantial reliance on race does, except under sharply limited circumstances—namely, where a gov-
12 ernment has a compelling interest to take action *and* its action is narrowly tailored to resolve the prob-
13 lem. (See *Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463–1464; *Shaw v. Hunt* (1996) 517 U.S. 899,
14 907–908; *McLaughlin v. Florida* (1964) 379 U.S. 185, 192.) In particular, governments may not draw
15 voting districts predominantly on the basis of race; racial gerrymandering is “constitutionally suspect
16 . . . whether or not the reason for the racial classification is benign or the purpose remedial.” (*Shaw,*
17 *supra*, 517 U.S. at pp. 904–905; see also *Cooper, supra*, 137 S.Ct. at p. 1463; *Bethune-Hill v. Va. State*
18 *Bd. of Electors* (2017) 137 S. Ct. 788, 797–799.) Such gerrymandering, whatever its intent, violates
19 the principle “[a]t the heart of the Constitution’s guarantee of equal protection”—“that the Government
20 must treat its citizens as individuals, not as simply components of a racial . . . class. When the State
21 assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters
22 of a particular race, because of their race, think alike, share the same political interests, and will prefer
23 the same candidates at the polls.” (*Miller v. Johnson* (1995) 515 U.S. 900, 911–912.)

24 There is an inherent tension, then, between the anti-discrimination purpose of the Fourteenth
25 Amendment and the racial classifications that are part and parcel of finding liability and imposing a
26 remedy under statutes designed to cure vote dilution. The Supreme Court has observed that walking
27 this tightrope “is a most delicate task.” (*Id.* at p. 905.) Governments may not hold elections that violate
28 voting rights laws, but they also may not separate voters on the basis of race to avoid liability under

1 those statutes unless their actions survive strict scrutiny—that is, unless any remedy is narrowly tailored
2 to advance a compelling state interest. (*Bush v. Vera* (1996) 517 U.S. 952, 976–979.)

3 In this case, as is explained below, the constitutional limitations on excessively race-based gov-
4 ernmental action prohibit either a finding of liability or the imposition of a remedy.

5 **b. The *Gingles* preconditions ensure that an election system has caused vote**
6 **dilution and that a government thus has a compelling interest in race-based**
7 **corrective action.**

8 Courts have developed a mechanism for ensuring that vote dilution is identified, and race-based
9 remedies imposed, only in appropriate cases: the three *Gingles* preconditions, under which no vote-
10 dilution claim is actionable unless (1) the minority group at issue is numerous and compact enough to
11 form a majority in a district; (2) the minority group votes in a cohesive bloc; and (3) the majority also
12 votes cohesively, such that it “usually” defeats the minority group’s preferred candidates. (478 U.S. at
13 pp. 50–51.) The Court “has made clear that unless each of the three *Gingles* prerequisites is established,
14 there neither has been a wrong nor can be a remedy.” (*Cooper, supra*, 137 S.Ct. at p. 1472; *see also*
15 *Bartlett, supra*, 556 U.S. at p. 15; *Grove v. Emison* (1993) 507 U.S. 25, 40–41.)

16 The three *Gingles* preconditions serve as guardrails that keep Section 2 within constitutional
17 limits. The preconditions ensure that the statute is the basis of liability if and only if a minority group’s
18 voting strength has been *diluted*—in other words, only where an injury truly has been suffered—and
19 only where that dilution is *caused* by the challenged electoral system.

20 The Supreme Court has assumed without deciding that governments have a compelling interest
21 in remedying actual vote dilution. (*Cooper, supra*, 137 S.Ct. at p. 1464.) Anything less—not vote
22 dilution, but instead a failure to maximize a minority group’s voting power—is not a cognizable injury
23 and so not a constitutional basis for racial classifications. (See *Bartlett, supra*, 556 U.S. at pp. 14–15;
24 *Johnson v. De Grandy* (1994) 512 U.S. 997, 1015–1016.) Attempting to maximize voting power, rather
25 than aiming to ameliorate vote dilution, would improperly elevate race above all other considerations.
26 (See *Shaw v. Reno* (1993) 509 U.S. 630, 657 [“Racial gerrymandering, even for remedial purposes,
27 may balkanize us into competing racial factions”].)

28 To separate potentially constitutional claims to remedy vote dilution from excessively race-
based and plainly unconstitutional demands for maximum representation or even over-representation,

1 the Supreme Court has required evidence in the form of a comparison between a minority group's
2 current, allegedly diluted voting strength and its voting strength under a hypothetical alternative sys-
3 tem. (See *Gingles*, *supra*, 478 U.S. at p. 50, fn. 17; see also *id.* at p. 88 (conc. opn. of O'Connor, J.).)

4 The first and second *Gingles* preconditions provide that benchmark. They limit liability to
5 those cases in which the members of a cohesive minority group, if concentrated within a single hypo-
6 thetical district, could elect candidates of their choice. (See *Grove*, *supra*, 507 U.S. at p. 41.) They
7 ensure that the minority group's inability to elect is a function of vote dilution caused by the challenged
8 electoral system, not the group's small numbers or dispersion in a substantially integrated district. (See
9 *Gingles*, *supra*, 478 U.S. at p. 50 & fn. 17). The preconditions thus avoid the constitutional peril of
10 "unnecessarily infus[ing] race into virtually every redistricting." (*Bartlett*, *supra*, 556 U.S. at p. 21.)

11 **c. Imposing liability on Santa Monica based on racially polarized voting**
12 **alone would be an unconstitutional application of the CVRA.**

13 The undisputed record shows it is impossible to construct a contiguous, majority-Latino district
14 in the City. (See Morrison Decl. ¶ 25.) Plaintiffs therefore certainly could not pursue a Section 2 claim
15 against the City. (*Bartlett*, *supra*, 556 U.S. at p. 26.) The question is whether it makes any difference
16 that they brought their claim under the CVRA instead. As a constitutional matter, it does not.

17 Federal courts have imposed restrictions on vote-dilution claims to avoid conflicts with the
18 Fourteenth Amendment. Those same restrictions necessarily apply to the CVRA. (U.S. Const., art.
19 VI, cl. 2 [Supremacy Clause].) Invidious racial classifications and excessively race-conscious remedies
20 for purported problems of vote dilution are no less unconstitutional when pursued to avoid liability
21 under the CVRA than they are when pursued to avoid liability under the federal Voting Rights Act.
22 Whatever its drafters' intent, the CVRA cannot authorize unconstitutional racial classification of per-
23 sons or command public entities to engage in odious racial stereotyping. In some cases, like this one,
24 the CVRA's departures from federal law, including its purported abandonment of the compactness
25 requirement, render the statute unconstitutional, to the extent the CVRA is applied to allow a finding
26 of liability and/or the imposition of remedies absent cognizable proof of vote dilution.

27 Here, Latinos are not numerous or compact enough to comprise the majority of a contiguous,
28 equipopulous district—the only remedy the FAC expressly seeks. (See FAC ¶¶ 3, 34, 51.) That such

1 a district is impossible means “there neither has been a wrong nor can be a remedy.” (*Grove, supra*,
2 507 U.S. at pp. 40–41; see also *Gomez, supra*, 863 F.2d at p. 1413 [“unless the minority group could
3 constitute a majority in a single-member district, there is no sense in which ‘the *multimember form of*
4 *the district*’ is responsible for any inability of the minority group to participate equally”].)

5 Although plaintiffs have previously contended that racially polarized voting, which they define
6 as a bare difference in voting patterns across races, is itself a harm demanding a remedy, governments
7 do not have a compelling interest in eradicating any and all discernible racial voting patterns. To the
8 contrary, such patterns do not become harmful until they result in vote dilution. (See *League of United*
9 *Latin Am. Citizens v. Perry* (2006) 548 U.S. 399, 433 (opn. of Kennedy, J.) (*LULAC*) [“Under § 2 . . .
10 the injury is vote dilution”]; *Shaw, supra*, 517 U.S. at p. 917 [districts are drawn to remedy “vote-
11 dilution injuries”].) If bare differences in voting were enough to require electoral change, even a pro-
12 tected “class” of one person who voted in demonstrably different ways from the racial majority could
13 bring a voting-rights claim. But voting-rights statutes do not and cannot command perfectly racially
14 proportional representation. (See, e.g., *Nipper v. Smith* (11th Cir. 1994) 39 F.3d 1494, 1516–1517,
15 1525 (en banc); see also 52 U.S.C. § 10301 [“nothing in this section establishes a right to have members
16 of a protected class elected in numbers equal to their proportion in the population”].)

17 Here, there is no triable issue of Latino vote dilution because plaintiffs cannot show that the
18 districted elections scheme that they seek (FAC ¶¶ 3, 34, 51) would produce electoral outcomes more
19 favorable to Latinos than the current system. (Morrison Decl. ¶ 25.) Without a showing of Latino vote
20 dilution, there can be no compelling interest that would justify requiring the City to draw districts along
21 predominantly racial lines; indeed, it is impossible to narrowly tailor a race-conscious remedy to cure
22 a harm (vote dilution) that does not exist.⁴ Thus, to the extent the CVRA would impose liability to

23
24 ⁴ It is not just Latinos’ small numbers, but also their broad dispersion, that causes the constitutional
25 difficulties in this case. Even if the Latino population were substantially larger, the distribution of
26 Latino voters all throughout the City would make it impossible to create any district that would pass
27 constitutional muster. (See Morrison Decl. ¶ 14 [Latinos account for at least one in ten adults in almost
28 60% of precincts].) Any effort to draw a district would produce not a contiguous shape that hews to
traditional districting principles, but instead a plainly unconstitutional Rorschach blot whose contours
are defined predominantly—and therefore unlawfully—by race. (See *id.* Fig. 5 [contiguous district
with largest possible Latino citizen voting-age population is unconstitutionally irregular]; see also, e.g.,
Shaw, supra, 517 U.S. at p. 906; *Miller, supra*, 515 U.S. at p. 916; *Stabler v. Cty. of Thurston* (8th Cir.
1997) 129 F.3d 1015, 1025; *Reed v. Town of Babylon* (E.D.N.Y. 1996) 914 F.Supp. 843, 871–874.)

1 authorize necessarily race-predominant remedies based solely on a showing of racially polarized vot-
2 ing, it is unconstitutional as applied to the facts of this case.

3 **4. Alternatively, summary judgment is appropriate because the districting remedy**
4 **plaintiffs seek is constitutionally unavailable.**

5 Alternatively, the court need not reach the as-applied unconstitutionality of the CVRA, and may
6 instead grant summary judgment on the independent basis of the constitutional unavailability of the
7 districting remedy that Plaintiffs seek. With respect to remedy, the CVRA expressly allows consider-
8 ation of the “fact that members of a protected class are not geographically compact or concentrated.”
9 (§ 14028(c).) Thus, in addressing remedies, the CVRA does not purport to prohibit, and instead en-
10 courages, consideration of the first *Gingles* requirement. CVRA remedies, moreover, must conform to
11 the Supreme Court’s vote-dilution-remedy cases. (*See Sanchez, supra*, 145 Cal.App.4th at pp. 668–
12 669, 690 [recognizing constitutional limitations on remedies for vote dilution].) For all the reasons
13 discussed above, because plaintiffs cannot present evidence to satisfy the first *Gingles* requirement,
14 they cannot demonstrate that the current at-large system has caused Latino vote dilution, and so they
15 cannot demonstrate that a switch to districted elections would serve, much less be narrowly tailored to
16 serve, any compelling interest. To the contrary, based on the undisputed demographics of Santa Mon-
17 ica, any switch to districted elections is likely to *dilute* Latino voting power. (Morrison Decl. ¶ 26; see
18 *Shaw, supra*, 517 U.S. at 915–916 [remedial action must “at a minimum, remedy the anticipated vio-
19 lation or achieve compliance to be narrowly tailored”].)

20 Plaintiffs may contend that summary judgment is inappropriate because the remedies theoreti-
21 cally available under the CVRA might be more expansive than under the FVRA. (See § 14029 [upon
22 finding liability, “the court shall implement appropriate remedies, including the imposition of district-
23 based elections, that are tailored to remedy the violation”].) Even though it is impossible to create a
24 majority-Latino district in Santa Monica, plaintiffs might suggest various alternatives, including a La-
25 tino “influence” district, a “coalition” district containing a majority of Latinos and voters of another
26 protected class, or even some variation on an at-large scheme, such as ranked-choice voting. But plain-
27 tiffs cannot prove entitlement to any hypothetical alternative potential arrangement.

28 *First*, hypothetical alternative remedies are not authorized under California law. Elections in

1 this State are, by statute, held on either an at-large or districted basis. (See Gov. Code, § 34871 [au-
2 thORIZING cities to adopt district elections in lieu of at-large elections]; Educ. Code, §§ 5027, 5028, 5030
3 [authorizing at-large or district elections for school boards]; Elec. Code, § 10508 [same for special
4 districts].) Nothing in the relevant statutes authorizes variations either on traditional at-large schemes,
5 such as ranked-choice voting, or on traditional districted schemes, such as “influence districts.”⁵

6 *Second*, plaintiffs have neither pleaded hypothetical alternative remedies nor supported any
7 such remedies in their discovery responses. And they cannot justify them with admissible evidence in
8 opposition to summary judgment. Though plaintiffs have occasionally noted the abstract possibility of
9 other remedies, from the very outset of the case they have demanded district elections alone. (See FAC
10 ¶¶ 3, 34, 51.) “[T]he pleadings delimit the scope of the issues on a summary judgment motion,” and
11 “[a] party may not oppose a summary judgment motion based on a claim, theory, or defense . . . not
12 alleged in the pleadings.” (*Cal. Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3.)⁶

13 *Third*, alternative hypothetical remedies would in any event be unconstitutional, at least under
14 the circumstances presented by this case. It is no accident that the only remedy available under the
15 FVRA is a majority-minority district. As is explained below, federal courts have considered and re-
16 jected, on constitutional grounds, a wide array of alternatives, holding that the only remedy consistent

17
18 ⁵ Some of these remedies, such as cumulative voting, have been squarely rejected in vote-dilution
19 cases. (See, e.g., *Aldasoro v. Kennerson* (S.D.Cal. 1995) 922 F. Supp. 339, 355, fn. 4 [noting that
20 cumulative voting “is rarely used in this country . . . and it is not legally authorized by the California
21 Legislature as a method of electing School Board trustees”]; Ex. D [Los Angeles Superior Court finding
22 that “a California City may not adopt a cumulative voting method pursuant to a settlement of a lawsuit
23 alleging violations of the California Voting Rights Act”]; see *ibid.* [letter from California Secretary of
24 State explaining that there is no “express statutory authority for the use of cumulative voting in Cali-
25 fornia by a general law city,” nor has the Secretary ever certified such a system]; see also *Cousin v.*
Sundquist (6th Cir. 1998) 145 F.3d 818, 822, 829–831.) Courts have been similarly hostile to other
potential remedies in Section 2 cases, including single-transferable-vote schemes (see *Brantley v.*
Brown (S.D.Ga. 1982) 550 F.Supp. 490, 493, fn. 2), and increasing the size of the governing board
(*Holder v. Hall* (1994) 512 U.S. 874, 880–885). Such alternative remedies not only were not pleaded
by plaintiffs, but also raise much the same constitutional difficulties as influence and coalition districts
discussed below. Then, too, these alternatives are all at-large systems, and would thereby leave the
City vulnerable to further challenges under the CVRA. (See § 14027.)

26 ⁶ Neither the FAC nor plaintiffs’ interrogatory responses support any other remedy. Plaintiffs’ years-
27 long near-silence on these alternative remedies precludes them from relying on them now to stave off
28 summary judgment. (See *Government Emps. Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98
& fn. 4 [“the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers”].) And
plaintiffs have no admissible evidence creating triable issues of fact regarding any other remedies,
anyway.

1 with the Equal Protection Clause is a majority-minority district narrowly tailored to cure a demonstra-
2 ble problem of vote dilution. (See *Bartlett*, *supra*, 556 U.S. at p. 21 [“To the extent there is any doubt
3 whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitu-
4 tional concerns under the Equal Protection Clause.”].)

5 Although the CVRA may have been intended to allow for the creation of “influence” districts,
6 federal courts have rejected such districts as standardless and beset by constitutional perils. “Influence
7 districts” are unconstitutional because they reflect a lack of injury—and thus a lack of any compelling
8 state interest to classify persons on the basis of race. If Section 2 protected mere “influence,” “it would
9 unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”
10 (*LULAC*, *supra*, 548 U.S. at p. 446.) Influence claims are inherently unmanageable, as there is no
11 reasonable lower bound for the number of voters who could be said to “influence” the outcome of an
12 election: “A single voter is the logical limit.” (*Illinois Legislative Redist. Comm’n v. LaPaille* (N.D.Ill.
13 1992) 786 F.Supp. 704, 716.) Federal courts therefore reject influence districts in favor of an objective,
14 constitutionally sound marker of injury: legally cognizable vote dilution, as shown by the possibility
15 of a majority-minority district. “[A] minority group cannot be awarded relief on a vote dilution claim
16 unless it can demonstrate that a challenged structure or practice impedes its ability to determine the
17 outcome of elections.” (*Dillard v. Baldwin Cty. Comm’rs* (11th Cir. 2004) 376 F.3d 1260, 1267 [re-
18 jecting influence districts as viable remedy and collecting cases showing “‘influence dilution’ concept
19 . . . has been consistently rejected by other federal courts”].)

20 Even if influence districts were lawful remedies, they would nevertheless pose insuperable
21 problems in this case. As an initial matter, such districts would threaten to disenfranchise the bulk of
22 Latino voters. No more than 31.6% of the citizen voting-age population of any hypothetical contiguous
23 district could consist of Latinos. (Morrison Decl. ¶ 23.) If it were assumed for the sake of argument
24 that “there is racially polarized voting” in the City, then “the more [Latino] voters that are packed into
25 a single legislative district, *short of a majority*, the less the [Latino] voting power or influence in the
26 [City] as a whole.” (*Turner v. Arkansas* (E.D.Ark. 1991) 784 F.Supp. 533, 571.) An influence district,
27 far from enhancing Latino voting strength, would likely depress it by submerging the bulk of Latino
28 votes into largely white districts—in contrast to the current system, where Latino-preferred candidates

1 can draw strength from Latino voters citywide. This adverse effect of an influence district is yet another
2 reason why constitutional principles preclude their use as a remedy. Indeed, the fracturing of minority
3 votes across multiple districts is often itself the basis of vote-dilution claims. (E.g., *Bartlett, supra*,
4 556 U.S. at pp. 18–19 [“where a majority-minority district is cracked by assigning some voters else-
5 where, then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect
6 a candidate of choice is a present and discernible wrong”]; *Voinovich v. Quilter* (1993) 507 U.S. 146,
7 153 [“Dividing the minority group among various districts so that it is a majority in none may prevent
8 the group from electing its candidate of choice”].)

9 Moreover, the demographic evidence demonstrates beyond doubt that any district whose citizen
10 voting-age population is above even 30% Latino would have to be “so bizarre on its face that it is
11 unexplainable on grounds other than race.” (*Shaw, supra*, 509 U.S. at p. 644, internal quotation marks
12 omitted; see Morrison Decl. Fig. 4 [showing bizarre district].) Such a district, designed to include
13 “individuals who belong to the same race, but who are otherwise widely separated by geographical and
14 political boundaries, and who may have little in common with one another but the color of their skin,
15 bears an uncomfortable resemblance to political apartheid.” (*Shaw, supra*, 509 U.S. at p. 647.)

16 Other district-based remedies, such as a “coalition” district of Latino and African-American
17 voters, would fare no better. For one thing, plaintiffs did not plead anything of the sort, as they have
18 not alleged, even in a conclusory way, that African-Americans and Latinos vote cohesively. For an-
19 other, federal courts have conclusively rejected coalition districts, which demand unlawful maximiza-
20 tion of voting strength and threaten to “transform the Voting Rights Act from a law that removes dis-
21 advantages based on race into one that creates advantages for political coalitions.” (*Hall v. Virginia*
22 (4th Cir. 2004) 385 F.3d 421, 431.) But perhaps the biggest problem with a coalition-district proposal
23 is that, as with a Latino-majority district, it is impossible to create a Latino-and-African-American-
24 majority district anywhere in the City. (See Morrison Decl. ¶¶ 28–34.) And any hypothetical district
25 containing even close to a majority of Latino and African-American voters would be so highly irregular
26 in shape as to be plainly, and unconstitutionally, racially gerrymandered. (*Id.* ¶¶ 30–34.)

27 Because no constitutional electoral alternative could enhance Latino voting strength, Latino
28 voters have not suffered any vote dilution that could serve as a compelling interest in making otherwise

1 invidious racial classifications. Plaintiffs therefore cannot demand any remedy at all, much less one
2 unconstitutionally dependent on race. Thus, whether on liability or the unavailability of remedy, the
3 Court should grant summary judgment on plaintiffs' CVRA claim.⁷

4 **B. There Is No Triable Issue of Material Fact on the Equal Protection Claim**

5 To survive summary judgment on their Equal Protection claim, plaintiffs must adduce evidence
6 that the relevant decisionmakers in 1946 enacted the City's current at-large electoral system for the
7 purpose of discriminating against ethnic minorities, and that the City Charter has had a disparate impact
8 on them. (*Personnel Adm'r of Mass. v. Feeney* (1979) 442 U.S. 256, 279; *Vill. of Arlington Heights v.*
9 *Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 266.) Plaintiffs have no such evidence.

10 **1. There is no admissible evidence of disparate impact.**

11 Plaintiffs have no admissible evidence of disparate impact for much the same reason that they
12 have no evidence of vote dilution: They cannot prove that the City's at-large electoral system is re-
13 sponsible for any purported racial discrepancies in electoral outcomes. Plaintiffs cannot make even a
14 prima facie case for discrimination without showing a causal link between the challenged at-large elec-
15 toral system and purportedly adverse impacts on ethnic minorities. (*Watson v. Fort Worth Bank &*
16 *Trust* (1988) 487 U.S. 977, 994.) This "robust causality requirement ensures that racial imbalance does
17 not, without more, establish a prima facie case of disparate impact and thus protects defendants from
18 being held liable for racial disparities they did not create." (*Texas Dept. of Housing & Cmty. Affairs v.*
19 *Inclusive Cmty. Project, Inc.* (2015) 135 S.Ct. 2507, 2523, internal quotation marks omitted.)

20 Plaintiffs cannot satisfy this causality requirement, as no evidence suggests that now or at any
21 other time an alternative electoral system would have produced results more favorable to Latino voters.
22 (See Part IV.A.2, *supra*.) That absence of evidence is fatal to a disparate-impact claim. (See, e.g.,

23 _____
24 ⁷ The Ninth Circuit's decision in *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543 (per curiam)
25 does not preclude a grant of summary judgment premised on the unavailability of any constitutionally
26 permissible remedy. There, considering allegations of a VRA violation, the Court found "premature"
27 the district court's grant of summary judgment based on its "determination that any relief provided to
28 plaintiffs would not survive strict scrutiny." (*Id.* at pp. 558-559.) In so holding, the court recognized
the Supreme Court's assumption that FVRA compliance can be a compelling state interest, meaning
that the remedy inquiry would reduce to an analysis of narrow tailoring. Here, to the contrary, plaintiffs
cannot establish any minority vote dilution, the harm that justifies treating FVRA compliance as a
compelling state interest. As a result, summary judgment based on Plaintiff's inability to demonstrate
an entitlement to any necessarily race-based remedy remains appropriate.

1 *Elston v. Talladega Cty. Bd. of Educ.* (11th Cir. 1993) 997 F.2d 1394, 1407, 1415.)

2 **2. There is no admissible evidence of discriminatory intent.**

3 In addition, plaintiffs have no evidence that the relevant decisionmakers *intended* a disparate
4 impact. (See *Feeney, supra*, 442 U.S. at p. 279 [decisionmakers must have decided to amend the City
5 Charter in 1946 “because of, not merely in spite of, [the amendment’s] adverse effect upon an identi-
6 fiable group”].) Although plaintiffs have never identified who, exactly, the relevant decisionmakers
7 were (FAC ¶¶ 35, 42 [suggesting they may have been the Board of Freeholders or, alternatively, the
8 voting public]), plaintiffs also have failed to identify admissible evidence demonstrating that *anyone*
9 who could have been a decisionmaker was not only aware that the City’s current electoral system could
10 disadvantage ethnic minorities, but affirmatively wanted it to do so. Nor is this even a plausible theory
11 given undisputed facts about what the challenged 1946 Charter amendment accomplished. From 1915
12 until 1946, City residents elected the three members of the governing board on an at-large basis. (St.
13 ¶ 1.) Candidates could run for only one of three distinct commissioner positions, and so a majority of
14 the vote was required to ensure victory. With the Charter amendment in 1946, the size of the board
15 was expanded from three to seven seats, and candidates no longer ran for a single seat, but one of three
16 or four seats. (*Id.* ¶¶ 1, 2.) As now only one-third or one-fourth of the vote could guarantee victory,
17 the changes wrought in 1946 could only have made it easier for relatively small but cohesive voting
18 groups to succeed in electing candidates of their choice. If the relevant decisionmakers wished to
19 discriminate against ethnic minorities, they picked an illogical and ineffective way to do it.

20 **V. CONCLUSION**

21 There is no triable issue of material fact regarding plaintiffs’ claims, which contradict the un-
22 disputed demographic facts. Accordingly, the Court should grant summary judgment, or, at a mini-
23 mum, summary adjudication, including on plaintiffs’ district-elections theory of liability and remedy.

24 DATED: March 29, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 

William L. Thomson

Attorneys for Defendant, *City of Santa Monica*

1 **PROOF OF SERVICE**

2 I, Cynthia Britt, declare:

3 I am employed in the County of Los Angeles, State of California. My business address is 333
4 South Grand Avenue, Los Angeles, California 90071. I am over the age of eighteen years and not a
party to the action in which this service is made.

5 On March 29, 2018, I served the City of Santa Monica’s Motion for Summary Judgment or, in
6 the Alternative, Summary Adjudication on the interested parties in this action by causing the service
delivery of the above document as follows:

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- 17 **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above, on the
18 above-mentioned date. I am “readily familiar” with the firm’s practice of collection and
19 processing correspondence for mailing. It is deposited with the U.S. Postal Service on that
20 same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course
21 of business. I am aware that on motion of party served, service is presumed invalid if postal
22 cancellation date or postage meter date is more than one day after date of deposit for mailing
23 an affidavit.
- 24 **BY ELECTRONIC SERVICE:** As a courtesy, I caused the documents to be emailed to the
25 persons at the electronic service addresses listed above.

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

28 Executed on March 29, 2018, in Los Angeles, California.


Cynthia Britt