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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION and MARIA LOYA,

Plaintiffs,

v.

CITY OF SANTA MONICA, and DOES 1 through 100, inclusive,

Defendants.

CASE NO. BC616804

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE SUMMARY ADJUDICATION

[Declarations of David Ely, J. Morgan Kousser, Justin Levitt, Sergio Farias and Kevin Shenkman, and Separate Statement filed and served concurrently herewith]

Hearing Date: June 14, 2018
Time: 8:30 a.m.
Dept.: 28

Trial Date: July 30, 2018
[Assigned to the Honorable Yvette Palazuelos]

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I. INTRODUCTION.

Two essential elements are necessary to establish a violation of the California Voting Rights Act ("CVRA"): (1) at-large elections; and (2) racially polarized voting. Defendant's motion fails to rebut either element. Nor could it; Defendant has conceded it employs at-large elections, and Dr. J. Morgan Kousser's ecological regression analysis of the pertinent elections reveals racially polarized voting on a scale far greater than what was sufficient to show a violation of the CVRA in *Jauregui v. City of Palmdale*. (Kousser Decl. ¶¶ 3, 10, 55-59.)

Instead, Defendant advances a construction of the CVRA that is inconsistent with its text, its legislative history, and decisions of the California appellate courts. Moreover, Defendant regurgitates arguments about the unconstitutionality of the CVRA that were expressly rejected in *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660 ("*Sanchez*"). Contrary to Defendant's stubborn insistence, the CVRA does not require a showing of "dilution" separate and apart from racially polarized voting. But even if it did, Defendant's particular at-large elections would still violate the CVRA. Defendant's at-large elections dilute the Latino vote by any measure, and there are plenty of available remedies likely to be effective at solving that problem.

Nor is the CVRA unconstitutional as applied to Defendant, or otherwise. The CVRA is an appropriate exercise of the State of California's authority to mandate that *its* political subdivisions elect their governing boards in a fair manner, and to grant California residents greater protection from discrimination than federal law provides.

Finally, without submitting **any** evidence of its own negating the essential elements of Plaintiffs' Equal Protection claim, Defendant contends that Plaintiff lacks evidence of the discriminatory intent and impact of Defendant's selection of its current at-large election system. In truth, Plaintiffs have evidence more than sufficient to defeat an adverse motion for summary judgment (Kousser Decl. ¶¶ 11-17, 60-136) – indeed, more than other courts have found to be sufficient to prove similar Equal Protection claims in California.

II. DEFENDANT'S MOTION IS UNTIMELY AND MUST BE DENIED.

As a preliminary matter, Defendant's motion is untimely and should be denied for that reason alone. The minimum notice requirements of California's summary judgment statute are

mandatory and cannot be shortened by the court. (See Code Civ. Proc., § 437c, subd. (a)(2); *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 764–765, fn. 5; *McMahon v. Super. Ct.* (2003) 106 Cal.App.4th 112, 116.) Where a summary judgment motion is untimely, the motion is properly disregarded for that reason alone. (See *Cuff v. Grossmont Union High Sch. Dist.* (2013) 221 Cal.App.4th 582, 596.)

When served by mail, the required 75-day notice period for a summary judgment motion "***shall*** be increased by 5 days . . ." (Code Civ. Proc., § 437c, subd. (a)(2), emphasis added.) Here, Defendant's last day to serve the instant motion by mail was March 26, 2018 – 80 days prior to the June 14, 2018 hearing. Defendant served its motion and supporting papers by regular mail on March 29, 2018 – three days after the deadline. Therefore, Plaintiffs were not given proper notice and Defendant's untimely motion should, accordingly, be denied.

III. LEGAL STANDARD.

To prevail on summary judgment, a defendant must show that one or more essential elements of the "cause of action . . . cannot be established." (Code Civ. Proc., § 437c, subd. (p)(2).) If a defendant fails to meet that initial burden, its motion must be denied; plaintiff need not make any showing at all. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468; *Lopez v. Super. Ct.* (1996) 45 Cal.App.4th 705, 717.) In order to "avoid depriv[ing] the losing party of a trial on the merits," the court must "view the evidence in the light most favorable to plaintiffs . . . and liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*McDonald v. Antelope Valley Comm. Coll. Dist.* (2008) 45 Cal.4th 88, 96–97; *Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1107.)

IV. "AT-LARGE" ELECTIONS, LEGISLATIVE INTENT, AND THE CVRA.

The dilutive effect of at-large elections, and the background, remedial purpose and elements of the CVRA were discussed at length in connection with Plaintiffs' Opposition to Defendant's Motion for Judgment on the Pleadings, and Plaintiffs' Opposition to Defendant's Demurrer. Accordingly, that full discussion is not repeated here. What is most important in connection with the instant motion is what must be shown to establish a violation of the CVRA,

and the "Legislature['s] inten[t] to expand protections against vote dilution over those provided by the federal Voting Rights Act of 1965." (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 807 (*Jauregui*).)

While the CVRA is similar to Section 2 of the federal Voting Rights Act ("FVRA") (52 U.S.C. § 10301), it is also different in several key respects, as the Legislature sought to remedy the "restrictive interpretations given to the federal act." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.) So, while cases decided under the FVRA may provide some guidance, a more expansive view of the CVRA is warranted.

The CVRA is more expansive than the FVRA in several important ways. Most importantly, the California Legislature dispensed with the requirement in *Thornburg v. Gingles* (1986) 478 U.S. 30 ("*Gingles*") that a minority group demonstrate that it is sufficiently large and geographically compact to constitute a "majority-minority district." (*Sanchez,* 145 Cal.App.4th at 669.) Rather, the CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA, not the desirability of any particular remedy. (See Elec. Code, § 14028 ["A violation of Section 14027 ***is established*** if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision ***or*** in elections incorporating other electoral choices by the voters of the political subdivision . . . ."], emphasis added; see also Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 ["Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown."].) Once liability is established under the CVRA, the Court has a broad range of remedies from which to choose in order to provide greater electoral opportunity, including both district and non-district solutions. (See Elec. Code, § 14029; *Sanchez*, at p. 670; *Jauregui*, *supra*, 226 Cal.App.4th at p. 808 ["The Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act. It is incongruous to intend this expansion of vote dilution liability but then constrict the available remedies in the electoral context to less than those in the Voting Rights Act. The Legislature did not intend such an odd result."].) The key element under the

CVRA—"racially polarized voting"—consists of two interrelated elements: (1) "the minority group . . . is politically cohesive"; and (2) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances—usually to defeat the minority's preferred candidate." (*Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1413, quoting *Gingles* at pp. 50–51.) It is the combination of at-large elections and racially polarized voting that yields the harm the CVRA is intended to combat. *Jauregui*, *supra*, 226 Cal.App.4th at p. 789 [describing how vote dilution is proven in FVRA cases and how vote dilution is differently proven in CVRA cases].)

V. DEFENDANT HAS FAILED TO NEGATE ANY NECESSARY ELEMENT OF PLAINTIFF'S CVRA CLAIM.

A. There Are Two Elements to a CVRA Claim: (1) An "At Large Method of Election" and (2) "Racially Polarized Voting."

The unambiguous text of the CVRA makes clear that there are only two necessary elements to establish a claim under the CVRA—an "at large method of election" and "racially polarized voting":

> 14027. An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.
>
> 14028. (a) A violation of Section 14027 ***is established*** if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision . . . .

(Elec. Code, §§ 14027, 14028, emphasis added.) The legislative history too supports this straightforward reading of the CVRA. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, at p. 2 [The CVRA "addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity."] and at p. 3 ["Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)."].) And, the appellate courts that have addressed the CVRA have

likewise noted that showing racially polarized voting establishes the at-large election system dilutes minority votes and therefore violates the CVRA. (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1229 ["To prove a CVRA violation, the plaintiffs must show that the voting was racially polarized. However, they do not need to either show that members of a protected class live in a geographically compact area or demonstrate a discriminatory intent on the part of voters or officials."]; *Jauregui*, *supra*, 226 Cal.App.4th at p. 798 ["The trial court's unquestioned findings [concerning racially polarized voting] demonstrate that defendant's at-large system dilutes the votes of Latino and African American voters."].)

Defendant's entire motion rests on its contrary view—contrary to the plain text of the CVRA, its legislative history, and all of the applicable California case law—that the CVRA requires something more. Pointing only to cases interpreting the FVRA, which, unlike the CVRA, does require more than racially polarized voting, Defendant argues that this Court should disregard the Legislature's admonition to avoid conflating liability and the selection of a remedy, and instead require Plaintiffs to show that a majority-minority district is possible in Santa Monica. (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, at p. 3 ["Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)."]; *Jauregui*, *supra*, 226 Cal.App.4th at p. 789 ["[T]he California Voting Rights Act does not require that the plaintiff prove a 'compact majority-minority' district is possible for liability purposes."], quoting *Sanchez*, *supra*, 145 Cal.App.4th at p. 669.) Defendant's contrived view of the CVRA simply finds no support in the law; the FVRA cases cited by Defendant are inapposite because none of them address the CVRA—a law distinct from the FVRA, and "intended to provide a broader basis for relief from vote dilution than available under the federal Voting Rights Act." [1] (*Jauregui*, *supra*, 226 Cal.App.4th at p. 806, quoting *Sanchez*, *supra*, 145 Cal.App.4th at p. 669.)

[1] While ignoring the teachings of the controlling precedent of the *Jauregui, Rey* and *Sanchez* decisions, Defendant attempts to support its unduly limiting interpretation of the CVRA with a hypothetical that was expressly rejected in *Sanchez* (without, of course, mentioning that its argument had already been rejected in *Sanchez*). Specifically, Defendant argues that if racially polarized voting is alone sufficient to find a violation of the CVRA, "even a member of a protected class of one who voted for a different candidate than the racial majority could win a CVRA case." Even putting

Indeed, even the federal case authority interpreting the FVRA acknowledges that racially polarized voting is itself an injury and establishes the causal link between at-large elections and vote dilution. (See *Gingles*, 478 U.S. at p. 51 [explaining that racially polarized voting is an injury itself—it is by showing majority bloc voting sufficient to "usually defeat the minority group's preferred candidate[s]" that the "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives."]; *Gomez v. City of Watsonville* (1988) 863 F.2d 1407, 1413, citing *Gingles*, *supra*, at p. 51 ["[t]his showing of racial bloc voting establishes the required causal link between the use of a multimember district and the inability of the minority group 'to elect its chosen representatives.'"]; see also Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, at p. 2. [The CVRA "addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity."].)

Defendant attempts to escape this obvious interpretation of the CVRA demanded by the statutory text, legislative history and case law by concocting an argument that the CVRA might be unconstitutional and then pointing to the canon of constitutional avoidance. (Motion, at pp. 2-3). Defendant's reasoning falls apart, however, because the canon of constitutional avoidance "is not a license for the judiciary to rewrite language enacted by the legislature." (*United States v. Albertini* (1985) 472 U.S. 675, 680.) Rather, the intent of the Legislature, as demonstrated by the text and legislative history of the CVRA, must control the interpretation of the CVRA, regardless of the ability of Defendant's creative counsel to concoct an argument about the CVRA's constitutionality. (*Ibid.*; see also *United States v. Monsanto* (1989) 491 U.S. 600, 611.) Under that straightforward interpretation, the CVRA is not unconstitutional, contrary to Defendant's wishful thinking.

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aside the fact that this ridiculous hypothetical was rejected in *Sanchez* (145 Cal.App.4th at pp. 683–685), Latinos in Santa Monica are not an infinitesimally small minority group of just one person; there are over 10,000 Latinos in Santa Monica whose voting rights are violated by Defendant. And, the CVRA deals with this issue in an elegant, though indirect way. If a minority group is so small (as in Defendant's ludicrous hypothetical), "the methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting," namely homogenous precinct analysis and/or ecological regression, would not yield meaningful results, and that hypothetical plaintiff's claim would fail for that reason. (Elec. Code, § 14026, subd. (e).)

Though Defendant now argues that racially polarized voting—synonymous with the second and third *Gingles* factors—is not itself a showing of injury and causation, its counsel even conceded the point at the hearing on Defendant's motion for judgment on the pleadings:

> The City's Position is that the CVRA requires, as Plaintiffs concede, a showing of *Gingles* factors 2 and 3, which itself includes a showing that the minority votes are submerged within the majority vote and that that is, in essence, a causation-of-injury requirement."

Quite simply, all of the authorities (and even Defendant when it suited its purposes) agree—racially polarized voting (i.e. *Gingles* factors 2 and 3)[2] establishes the harm that the CVRA prohibits.

B. Defendant Employs An "At Large" Method of Electing Its City Council.

Defendant does not dispute that it employs an at large method of electing its governing board—in other words all of the voters residing in Santa Monica elect every member of its board of trustees. In fact, in the instant motion, Defendant admits this element. (Motion, at p. 4.)

C. The Relevant Elections Are Consistently Characterized By Racially Polarized Voting.

The CVRA defines "racially polarized voting" as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." (Elec. Code, § 14026, subd. (e).) The federal jurisprudence regarding "racially polarized voting" over the past thirty-two years finds its roots in Justice Brennan's decision in *Gingles*, and in particular, the second and third "*Gingles* factors." Justice Brennan explained that racially polarized voting is tested by two criteria: (1) that the minority group is politically cohesive; and (2) the majority group votes sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidates. (*Gingles*, *supra*, 478 U.S. at p. 451.) The extent of majority "bloc voting" sufficient to show racially polarized voting is that which

[2] Defendant misleadingly argues that Plaintiffs "define" "racially polarized voting" "as a bare difference in voting patterns across races." In truth, Plaintiffs have never defined "racially polarized voting" in that way. Rather, as discussed above, racially polarized voting is synonymous with the second and third *Gingles* factors.

allows the white majority to "usually defeat the minority group's preferred candidate." (*Ibid.*) As Justice Brennan wrote thirty-two years ago, it is through establishment of this element that impairment is shown—i.e. that the "at-large method of election [is] imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." (Elec. Code, § 14027; *Gingles*, *supra*, 478 U.S. at p. 51 ["In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives."].) Subsequent discussions in federal cases have offered definitions that track Justice Brennan's opinion in *Gingles*.[3]

The U.S. Supreme Court in *Gingles* also set forth appropriate methods of identifying racially polarized voting; since individual ballots are not identified by race, race must be imputed through ecological demographic and political data. The long-approved method of "ecological regression" yields statistical power to determine if there is racially polarized voting if there are not a sufficient number of racially homogenous precincts (90% or more of the precinct is of one particular ethnicity). (See *Benavidez v. City of Irving* (N.D. Tex. 2009) 638 F.Supp.2d 709, 723 ["HPA [(homogenous precinct analysis)] and ER [(ecological regression)] were both approved in *Gingles* and have been utilized by numerous courts in Voting Rights Act cases."].)

Dr. J. Morgan Kousser, a Caltech professor and voting rights expert for over 40 years, analyzed the elections specified by the CVRA: "elections for members of the governing body of the political subdivision . . . in which at least one candidate is a member of a protected class." (Elec. Code, § 14028; Kousser Decl. ¶¶ 3, 10, 55-59, Appx. A, B) Based on that extensive analysis, Dr. Kousser concludes, Santa Monica City Council elections are racially polarized, and with the lone exception of Tony Vazquez, the candidates most favored by Latino voters lose. (*Id.*) Dr. Kousser provides the details of his analysis, including group voting behavior estimates, for some of the more recent elections meeting the criteria of the CVRA, and concludes those elections demonstrate "stark racially polarized voting" that is "far more pronounced than in other

[3] See, e.g., J. Gerald Hebert, Donald B. Verrilli, Jr., Paul M. Smith, and Sam Hirsh, *The Realists' Guide to Redistricting: Avoiding the Legal Pitfalls* (Chicago: American Bar Assn., 2000), at pp. 41–44; Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (New York: Cambridge University Press, 1992), at pp. 82–108.

California jurisdictions including Palmdale, where [he] has analyzed elections for racially polarized voting and the courts ultimately found violations of the CVRA and FVRA." (Kousser Decl. ¶ 59.) In addition to Dr. Kousser's analysis, which alone is sufficient, the "other factors" that the CVRA identifies as "probative, but not necessary factors to establish a violation of [the CVRA]" are also abundantly present in Santa Monica.[4] (Elec. Code, § 14028, subd. (e).)

Defendant offers no competing evidence at all.

VI. A MAJORITY-MINORITY DISTRICT IS NOT REQUIRED BY THE CVRA

As might be expected by Defendant's failure to cite even a single case regarding the CVRA that supports its position, and only a dearth of federal voting rights act cases that do not stand for the propositions cited, Defendant's arguments simply miss the mark.

Citing only cases construing the FVRA[5], Defendant's entire motion is premised on the erroneous assertion that Latino vote "dilution," under the CVRA, requires the ability to draw a majority-minority district. The plain text of the CVRA dictates that Defendant's idea of "dilution" is not an element of establishing liability on a CVRA claim:

> "A violation of Section 14027 ***is established*** if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision."

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[4] Though not necessary to prove a violation, the CVRA lists "other factors" that are probative in a case under the CVRA:

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

(Elec. Code, § 14028(e). In this case, the historical discrimination against Latinos, the disparities in health, wealth and education between Latinos and non-Hispanic whites, and the racial appeals in Santa Monica political campaigns all contribute to Latinos' lack of influence in city council elections. Ely Decl. ¶¶ 17-24, Exs. 5-11 (disparities in health, wealth and education); Kousser Decl. ¶¶ 11-17, 60-136 (historical discrimination); Shenkman Decl. Ex. D (Vazquez Deposition 163:1 – 165:23: (describing overt racial appeals against Latino candidate for city council)).

[5] To the extent federal and state statutory schemes are analogous, reference to federal case law may be proper; where state law differs, however, federal interpretations of federal law are not relevant. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498–499 [rejecting federal authority regarding the running of the statute of limitations on employment actions because California's FEHA is different than federal law])

(Elec. Code, § 14028, subd. (a).) Rather, as discussed above, racially polarized voting—the regular defeat of candidates preferred by a cohesive minority, due to a bloc-voting majority—is the harm the CVRA is intended to combat. Whether Latinos are "not geographically compact or concentrated" to permit a majority-Latino district "may not preclude a finding of racially polarized voting, or a violation of [the CVRA]." (Elec. Code, § 14028, subd. (c).)

Defendant, seeking to add its preferred text to the statute, argues for an extra requirement to find "vote dilution." Most charitably, Defendant argues that if "vote dilution" is what the CVRA is meant to combat, the minorities' voting power must be measured from some baseline and therefore a consideration of available remedies is necessary in determining not only a remedy but also whether the CVRA has been violated. It cannot be a requirement that the courts settle on a particular remedy before establishing liability: that is precisely what the text and legislative history of the CVRA admonish courts not to do. (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, at p. 3 ["Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)."].) Instead, even if Defendant were correct that "dilution" were required for a finding of liability, it would logically require only a finding that there exists, hypothetically, at least one alternative to the present system that would provide the protected minority with greater electoral opportunity.

Defendant urges that the only available such alternative is "a contiguous, equipopulous, majority-Latino district." (Motion, at p. 9.) But Defendant's argument flies in the face of the text of the CVRA, its legislative history, and all of the cases discussing the CVRA. (Elec. Code, § 14028, subd. (c); *Jauregui*, *supra*, 226 Cal.App.4th at p. 789 ["[T]he California Voting Rights Act does not require that the plaintiff prove a "compact majority-minority" district is possible for liability purposes."], quoting *Sanchez*, *supra*, 145 Cal.App.4th at p. 669.) It is true that federal plaintiffs under the FVRA must show that a compact minority group or groups could comprise the majority in a district.[6] (*Bartlett v. Strickland* (2009) 556 U.S. 1, 14–15, 18–20 (plurality

[6] Defendant claims that federal courts have precluded multiple minority groups from establishing majority status as a coalition. (Motion, at p. 18.) In the Ninth Circuit, this is incorrect. If two different minority populations vote together as a politically cohesive bloc, they may together constitute a community protected by section 2. (See *Badillo v. City of Stockton* (9th Cir. 1992) 956

opinion).) But this is only the requirement of a specific federal statute, not a constitutional minimum. All of the quotes in all of the cases that Defendant has cited with respect to a "majority-minority district" concern the interpretation of that federal statute. California certainly has the authority to provide greater protection against discrimination by its own subdivisions than federal law provides for jurisdictions nationwide, and that is exactly what the California Legislature has done through the CVRA. (Cf. *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842 ["The FEHA offers greater protection and relief to employees than does title VII."])

Specifically, California has decided that plaintiffs need not show that a minority group constitutes the majority of a district, nor that a minority group be compact, nor even that the minority group show impairment of the ability to elect candidates of choice, rather than only impairment of the ability to influence the outcome of an election. (Elec. Code, § 14027; *Jauregui* 226 Cal.App.4th at p. 789 ["[T]he California Voting Rights Act does not require that the plaintiff prove a "compact majority-minority" district is possible for liability purposes."], quoting *Sanchez*, *supra*, 145 Cal.App.4th at 669.) Even leaving aside the influence standard, a minority bloc could demonstrate a "dilution" of their ability to elect candidates of their choice even without a majority-Latino district. For example, a minority group demonstrating racially polarized voting in the current system might show that they could regularly compete to win elections in an alternative "crossover" district, in which the minority bloc constituted less than half of the district but typically received "crossover" support from a portion of the majority group. (*Georgia v. Aschcroft* (2003) 539 U.S. 461, 470–471, 482 [finding that Georgia's legislative redistricting did not violate Section 5 of the FVRA even though it reduced the number of safe black districts, because it "increased the number of ["crossover"] districts with a black voting age population of

F.2d 884, 890–891; *Skorepa v. City of Chula Vista* (S.D. Cal. 1989) 723 F.Supp. 1384, 1390 ["The Court does recognize that the minority group for a § 2 case may consist of members of two or more different minority groups."]; cf. LULAC v. Clements (5th Cir. 1993) 999 F.2d 831, 863–864 (en banc) [acknowledging that two different minority groups may together form a cognizable group if sufficiently sizable and politically cohesive].) This cohesion must be demonstrated as fact, not just assumed—but it may be demonstrated as fact. By the same token, if two different racial or ethnic populations in the same region vote as a politically cohesive bloc, they may together constitute a majority serving to dilute the votes of a minority community protected by section 2. (See *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1409, 1416–1417 [finding bloc voting among the non-Hispanic majority, including Anglo, Asian, and Black citizens].)

between 25% and 50% by four," and noting "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."]; *Cooper v. Harris* (2017) 137 S. Ct. 1455, 1470 [reviewing such an effective "crossover" district].) Showing the potential for a "crossover" district does not meet the FVRA conditions of liability, but such districts are themselves constitutional, (*Bartlett v. Strickland*, *supra*, 556 U.S. at pp. 23–24 ["States that wish to draw crossover districts are free to do so where no other prohibition exists."]), and there is no reason why California could not under its own state law permit plaintiffs to show the "dilution" of an existing system based on the potential existence of a crossover district. Indeed, in this case, David Ely, whose council district maps have been adopted by several federal and state courts (including the only CVRA case where the court was required to pick between competing district maps) as well as California cities (e.g. Los Angeles), developed an illustrative Latino-opportunity crossover district based on the traditional districting criteria listed in Section 21620 of the Elections Code. (Ely Decl. ¶¶ 26-28, 30, Exs. 15, 16). While Latinos represent a much larger proportion in that district than in the city as a whole, race was not a predominant consideration in Mr. Ely's selection of district boundaries. (Ely Decl. ¶¶ 29, 30, Exs. 15, 16). Based on an evaluation of the demographics and past election results of that district, Professor Justin Levitt, an expert in districting and alternative voting systems, concludes that the district drawn by Mr. Ely is sufficient to show an alternative to the current system that demonstrates Latino vote dilution in Santa Monica. (Levitt Decl. ¶¶ 3, 23-27). As Professor Levitt correctly notes, the Latino proportion of a district is only one factor in its effectiveness at giving Latino voters the opportunity to elect candidates of their choice or influence the outcome of elections. (Levitt Decl. ¶¶ 23-27)

Similarly, a minority bloc could demonstrate a "dilution" of their ability to elect candidates of their choice even without a district at all, if an alternative system provided greater electoral opportunity.[7] In the Defendant's current system, each Santa Monica voter casts one vote for each seat, and the candidates with a plurality of the votes win; this structure is what allows the majority

[7] It is simply untrue that Plaintiffs have requested only districts as relief in this case. The First Amended Complaint, like the original Complaint, repeatedly calls for "district based elections ***or other alternative relief***." (Complaint, at p. 11; FAC, at p. 20, emphasis added.)

to reliably swamp the votes of the minority in every election. Alternative structures—like limited voting, cumulative voting, or ranked-choice voting—each entail a different structure for casting and counting ballots; without drawing district lines, these alternatives may allow minorities greater opportunity to win elections than an at-large plurality vote. Showing the availability of an alternative voting system does not satisfy the FVRA, but such systems are themselves constitutional,[8] and there is no reason why California could not under its own state law permit plaintiffs to show the "dilution" of an existing system based on the potential for one of these voting systems.

Indeed, in this case, Professor Levitt describes these other election systems, adopted as remedies in FVRA cases or used in California cities, and finds that they are sufficient alternatives to demonstrate dilution of Latino voters in Santa Monica. (Levitt Decl. ¶¶ 16-22). Professor Levitt examines the historical performance of those election systems in other jurisdictions and compares the Latino proportion of voters (calculated by Defendant's expert) to the relevant "threshold of exclusion" for demonstrating electoral opportunity, and concludes that if dilution is necessary to establish liability under the CVRA, cumulative, limited, and ranked choice voting could each also give the Latino community a sufficient opportunity to elect a candidate of their choice in Santa Monica *even without any crossover support from non-Latinos*. (Levitt Decl. ¶¶ 16-22, 29-34).

Once liability is established under the CVRA, the Court has a broad range of remedies from which to choose from, including both district and non-district solutions. The court in *Jauregui* made clear that Section 14029 of the CVRA gives California courts broad authority to order at least any remedy that the courts in FVRA cases have ordered, even where that remedy might otherwise violate some other statute. (*Jauregui*, *supra*, 226 Cal.App.4th at p. 808 ["The

[8] Indeed, limited and cumulative voting have each been adopted as a remedy in several FVRA cases—in Euclid, Port Chester, Sisseton ISD, Chilton Co. Bd of Ed., Peoria, and St. Martin, to name just a few—and Defendant's assertions that "the only remedy available under the FVRA is a majority-minority district" or "the Supreme Court has held repeatedly that a majority-minority district is the only constitutional remedy for federal vote-dilution claims" are demonstrably false. (Motion, at pp. 2, 16; See e.g., *U.S. v. Village of Port Chester* (S.D.N.Y. 2010) 704 F. Supp. 2d 411, 448–453 [ordering cumulative voting as remedy for violation of the FVRA and, coincidentally, rejecting the opinions of the expert retained here by the City of Santa Monica]; *U.S. v. Euclid City School Bd.* (N.D. Ohio 2009) 632 F. Supp. 2d 740, 755–770 [ordering limited voting as remedy for violation of the FVRA].)

Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act. It is incongruous to intend this expansion of vote dilution liability but then constrict the available remedies in the electoral context to less than those in the Voting Rights Act. The Legislature did not intend such an odd result. And, section 14029 must be broadly construed as it is a remedial statute."].)[9] Section 14029 states that upon finding liability, "the court shall implement appropriate remedies, including the imposition of district-based remedies, that are tailored to remedy the violation." Defendant seeks to rewrite the statute to read "the court shall implement district-based remedies tailored to remedy the violation." But the legislature knew what it was doing. The word "include" necessarily implies "is not limited to." While Defendant attempts to undermine the binding precedent of *Jauregui* in this respect by (impermissibly) citing to a trial court decision ruling that a general law city may not adopt cumulative voting through a settlement of a CVRA action, other trial courts have found the exact opposite even when presented with the trial court ruling referenced by Defendant. (Shenkman Decl. ¶ 3, Ex. B).

To be clear, it is not appropriate at this time to determine the appropriate remedy. Defendant has filed a motion for summary judgment premised on the notion that liability is impossible without proving "dilution." This is not the standard actually established by the CVRA. But even if it were, to find that the current system dilutes Latino voters' electoral opportunity, the Court need only find that there exists *an* alternative that provides greater opportunity. The discussion above shows that Plaintiffs have amply met that threshold.

Finally, Defendant confusingly argues that if the Court chose a remedy involving district-based elections, that would somehow reduce Latino voting power, because as many as two-thirds of Latino voters would reside outside of a Latino-opportunity district. (Motion, at p. 9). This

[9] Defendant argues that at-large remedies are impermissible because Government Code Section 34871 authorizes cities to employ district elections or at-large elections. (Motion, at pp. 15–16.) But that argument fails for a host of reasons. First, as discussed in *Jauregui,* the CVRA supersedes conflicting statutes that might otherwise limit the scope of available remedies. (*Jauregui*, *supra*, 226 Cal.App.4th at p. 807.) Second, cumulative voting, limited voting and ranked-choice voting are all "at large elections" just as much as the plurality first-past-the-post at-large system that Defendant characterizes as a "traditional at-large scheme," or the numbered-post at-large system employed by other California cities (e.g. Elk Grove and Santa Clara). (Shenkman Decl. ¶ 4, Ex. C). Nothing in Section 34871 limits at-large elections to "traditional" at-large elections, whatever that might mean. Third, section 34871 applies only to general law cities, not charter cities like Santa Monica. (See Cal. Const. Art. XI, Sec. 5.)

logic travels right through the looking-glass. The cohesive Latino community in Santa Monica faces racially polarized voting, which means that it is regularly prevented from electing a candidate of choice. A remedy that provides increased electoral opportunity for Santa Monica's Latino community cannot fail because each and every member of that community is not within the remedial scope: such a ruling would effectively preclude any remedy for any violation of either the CVRA or the FVRA. Perhaps that is why this very same reasoning was squarely rejected by the Ninth Circuit Court of Appeals in *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407—"The district court erred in considering that approximately 60% of the Hispanics eligible to vote in Watsonville would reside in five districts outside the two single-member, heavily Hispanic districts in appellants' plan . . . ." As the Fifth Circuit stated in *Campos v. City of Baytown, Texas*, (5th Cir. 1988) 840 F.2d 1240, 1244: "The fact that there are members of the minority group outside the minority district is immaterial." (*Gomez*, at p. 1414.). Perhaps recognizing that *Gomez* is fatal to its argument about the portion of Latino voters residing outside the Latino-opportunity district, Defendant suggests that the *Gomez* court's assertion that the percentage of minority voters outside the remedial district(s) is irrelevant, is limited to only where a majority-Latino district is drawn. But nothing in *Gomez* suggests that its discussion was so limited. Indeed, the wisdom of the *Gomez* court's complete rejection of the argument that harm is done to minority voters residing outside of a remedial district is just as clear when applied to a Latino-opportunity district of 49%, 40% or even 25% in a city that has a Latino proportion much lower than the proportion in the opportunity district. See *Georgia v. Aschcroft* (2003) 539 U.S. 461, 470–471, 482 [finding that Georgia's legislative redistricting did not violate Section 5 of the FVRA even though it reduced the number of safe black districts, because it "increased the number of ["crossover"] districts with a black voting age population of between 25% and 50% by four."].)

VII. THE CVRA IS NOT UNCONSTITIONAL

Ignoring the binding authority directly on point—*Sanchez v. City of Modesto*—Defendant next argues that the CVRA is unconstitutional if applied to Defendant. Defendant is plainly wrong.

A. The CVRA Is Not Subject to Strict Scrutiny

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

Defendant seems to suggest that even though the CVRA was not subject to strict scrutiny in Modesto, it must be subject to strict scrutiny in Santa Monica under *Shaw v. Reno* (1993), 509 U.S. 630, because any remedy in Santa Monica will inevitably be based predominantly based on race. No remedy has yet been offered in this case. And as such, this argument is fatally premature. Moreover, *Shaw* and its progeny do not require strict scrutiny every time that race is pertinent in electoral proceedings. Instead, the *Shaw* line of cases, which focus on the expressive harm to voters conveyed by particular district lines, require strict scrutiny when "race was the predominant factor motivating the legislature's decision to place a significant number of voters wtihin or without a particular district[.]" (*Alabama Legislative Black Caucus v. Alabama* (2015) 135 S. Ct. 1257, 1267, quoting *Miller v. Johnson* (1995) 515 U.S. 900, 916.) This standard does not govern liability under the CVRA, and does not govern the imposition of a remedy in the abstract (e.g., whether district lines should be drawn or an alternative voting system imposed), but rather it governs the imposition of particular lines in particular places affecting particular voters. That is precisely why the *Sanchez* court rejected the City of Modesto's similar reliance on *Shaw* in that case. *Sanchez*, *supra*, 145 Cal.App.4th at pp. 682–683.) The CVRA is silent on *how* district lines must be drawn, or even if districts are necessarily the appropriate remedy. *Sanchez*, at p. 687 ["Upon a finding of liability, [the CVRA] calls only for appropriate remedies, not for any particular, let alone any improper, use of race."].)

For example, if this Court finds liability, it may decide to impose an alternative voting system that does not draw districts at all, and, by definition, cannot predominantly sort individuals by race. In such a remedy, *Shaw* is irrelevant: the imposition of an alternative at-large structure does not "place a significant number of voters within or without a particular district" at all, much less predominantly based on race. *Alabama Legislative Black Caucus*, 135 S. Ct. at 1267. Or, if this Court finds liability, it may determine that district-based elections are the most appropriate remedy, but the Court will then presumably be guided by Section 21620 of the Elections Code, setting forth the appropriate criteria for drawing district lines in a charter city. If a Court considers race but also other important criteria in establishing district lines, such that the district lines do not entirely "subordinate[ ]. . . race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916, those lines will also not be subject to strict scrutiny under *Shaw*. The time for such a challenge to a potential court-imposed remedy is when the remedy is imposed, not at an assessment of liability, when no voters have been "placed" anywhere by the Court. Therefore, it is no wonder that Defendant fails to cite a single case, and Plaintiffs are not aware of any applicable case, finding a *Shaw* violation based on the adoption of district elections, as opposed to where lines are drawn.

B. The CVRA Easily Passes the Rational Basis Test

The State of California has a legitimate—indeed compelling—interest in preventing race discrimination in voting and in particular curing vote dilution. This interest is consistent with and reflects the purposes of the California Constitution as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. See Cal. Elec. Code § 14027 (identifying vote dilution as the end to be prohibited); *id.* § 14031 (indicating that the CVRA was "enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution"); see also Cal. Const., Art. I, § 7 (guaranteeing, among other rights, the right to equal protection of the laws); *id.* Art. II, § 2 (guaranteeing the right to vote); *Sanchez*, 51 Cal. Rptr. 3d at 837–38 (identifying "[c]uring vote dilution" as a purpose of the CVRA). The CVRA, which provides a private right of action to seek remedies for vote dilution, is rationally related to

the State's interest in curing vote dilution. See Cal. Elec. Code § 14032; Sanchez, 51 Cal. Rptr. 3d at 837–38.

As demonstrated by the analysis of Dr. Kousser, Defendant's election system has resulted in vote dilution – the very injury that the CVRA is intended to prevent and remedy. And, though not required by the CVRA, there are several remedial options this Court may choose to effectively remedy that vote dilution. Accordingly, the CVRA is constitutional easily passes the rational basis test, in general and in its specific application to Defendant.

C. The CVRA Would Even Pass Strict Scrutiny

Even if strict scrutiny were found to apply to the CVRA, the CVRA is narrowly tailored to achieve a compelling state interest and therefore passes that test also. First, California has compelling state interests in protecting all of its citizens' rights to vote and to participate equally in the political process and in ensuring that its laws and those of its subdivisions do not result in vote dilution in violation of its robust commitment to equal protection of the laws. See Cal. Const., Art. I, § 7, Art. II, § 2; Elec. Code §§ 14027, 14031; *Jauregui*, 226 Cal. App. 4th at 798-802).

Second, the CVRA is narrowly tailored to achieve its compelling interests in eliminating vote dilution. As discussed above, the CVRA requires a person to demonstrate the existence of racially polarized voting to prove a violation. Elec. Code § 14028; see supra at V(A). Where racially polarized voting does not exist, the CVRA will not require a remedy. Moreover, although the CVRA does not require a finding of compactness among members of a protected class to establish a violation of the Act, compactness "may be a factor in determining an appropriate remedy." Id. § 14028(c). Therefore, even if racially polarized voting has occurred, if an effective district cannot be drawn, whether it be a "majority-minority" district or a "coalition" district or a "crossover" district, another suitable remedy may be selected. Elec. Code § 14029. Both the findings of liability and the establishment of a remedy under the CVRA do not rely on assumptions about race, but rather on factual patterns specific to particular communities in particular geographic regions, based on electoral evidence. And though federal cases have not considered the CVRA specifically in this regard, the Supreme Court has repeatedly implied that

remedies narrowly drawn to combat racially polarized voting and vote dilution will survive strict scrutiny.[10] In theory, it is conceivable that a particular court's remedy, *if* strict scrutiny is even appropriate based on the remedy imposed, might be insufficiently tailored to eliminating vote dilution in a particular instance, but there has been no insinuation that this Court will inevitably make such a mistake. As a result, the CVRA sweeps no wider than necessary to secure for Californians their rights to vote and to participate in the political process free from dilutive electoral systems.

VIII. DEFENDANT'S SELECTION OF AT-LARGE ELECTIONS WAS DONE WITH DISCRIMINATORY INTENT, AND HAS HAD A DISCRIMINATORY IMPACT.

"Summary judgment law in this state [] continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." *Aguilar v. Atlantic Richfield* (2001) 25 Cal. 4th 826, 854. Here, Defendant fails to present ***any*** evidence negating any element of Plaintiffs' Equal Protection claim – no historical documents, no expert opinions, not even any discovery responses or deposition testimony. Rather, Defendant does exactly what the California Supreme Court in *Aguillar* confirmed is ***in***sufficient to carry its initial burden – Defendant merely *argues* that Plaintiff cannot show discriminatory intent or impact without presenting any evidence of its own to show the absence of discriminatory intent or impact. Defendant has not met its initial burden, and its motion should be denied for that reason alone.

Defendant's argument (unsupported by any evidence) is also wrong because Plaintiffs have ample evidence that Defendant's selection and maintenance of at-large elections was done with discriminatory intent and has had a discriminatory impact. At each stage – beginning with Defendant's adoption of its current at-large council election system in 1946, continuing with the

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

rejection of Proposition 3 in 1975, and finally the rejection by Defendant's city council in 1992 of the recommendation of the Charter Review Commission to scrap the at-large election system – the relevant decisionmakers (whether they be the Board of Freeholders, or City Council, or the Santa Monica electorate) understood well that at-large elections would prevent racial minorities from eliecting candidates of their choice, and chose at-large elections because of that predicted effect (Kousser Decl. ¶¶ 11-17, 60-136). As Dr. Kousser explains in his detailed declaration, there is far more evidence of discriminatory intent in this case than in many others in which he testified and the courts ultimately found intentional discrimination, including the landmark case, *Garza v. County of Los Angeles,* 756 F. Supp. 1298 (C.D. Calif. 1990), aff'd 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991). And the at-large election system has had exactly the racially discriminatory impact that was predicted – since the adoption of the current at-large election system in 1946 sixteen Latinos have sought election to the Santa Monica City Council and all but one (more than 40 years after the at-large council system was adopted) have been unsuccessful. (Kousser Decl. Table 2 at pp. 33-34) Indeed, Defendant has been aware of this discriminatory intent and impact since at least 1992 when many of these same facts were reported to a Charter Review Committee impaneled by Defendant, which then (by a near-unanimous vote) advised Defendant to change its discriminatory at-large election system. (Kousser Decl. ¶¶ 116-120). But Defendant's city council, content with their power regardless of the means necessary to keep it, decided to keep that discriminatory at-large election system. (*Id.*)

IX. CONCLUSION

Defendant has failed to refute, much less disprove, any element of any of Plaintiffs' claims, and the CVRA is not unconstitutional. Therefore, Defendant's motion for summary judgment should be denied.

Dated: May 31, 2018

Respectfully submitted:
SHENKMAN & HUGHES PC

By: _____
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