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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' CLOSING STATEMENT** Trial Date: August 1, 2018 Dept.: 28 [Assigned to the Honorable Yvette Palazuelos]

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I. INTRODUCTION.

Nothing is more fundamental in our democracy than the right to have an equal voice in government. Whether it be through the outright denial of minorities' right to cast a vote, relatively blunt devices such as poll taxes and language and literacy tests, or the more subtle mechanism of at-large elections in the face of racially polarized voting, that fundamental right to representation in government has been assailed throughout our history by those unwilling to cede power.

To combat such racially discriminatory vote dilution, the State of California enacted the California Voting Rights Act ("CVRA") in 2002, prohibiting at-large elections where there is "racially polarized voting."[1] The CVRA prohibits a city from "impos[ing] or appl[ying] [at-large elections] in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." (§ 14027).[2] The CVRA also specifies what must be shown to establish a violation: "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." (§ 14028(a)).

In this case, the analyses of both sides' respective experts on racially polarized voting, J. Morgan Kousser and Jeffrey Lewis, both show that Defendant's at-large elections over the past twenty-four years reveal a consistent pattern of racially-polarized voting. In one election after another, Latino voters prefer the Latino candidate running for Defendant's city council, but, despite that support, the Latino candidate loses. As a result, though Latino candidates are generally preferred by the Latino electorate in Santa Monica, only one Latino has been elected to the Santa Monica City Council in the 72 years of the current election system – 1 out of 71 to serve on the city council. Even a majority of Santa Monica voters prefer district elections over the current at-large system, yet Defendant still insists on locking its Latino citizens out of the democratic process by denying them a fair opportunity at an effective voice in city government.

It is no surprise in Santa Monica that the at-large election system diminishes Latino voting power; that fact has been known for decades. In the early 1990s, the Charter Review Commission, impaneled by Defendant's city council, concluded that "a shift from the at-large plurality system currently in use" was necessary "to distribute empowerment more broadly in Santa Monica,

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[1] *Thornburg v. Gingles* (1986) 478 U.S. 30, 47

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

particularly to ethnic groups ..." (Tr. Ex. 127-24). Even back in 1946, it was understood that at-large elections would "starve out minority groups" (Tr. Ex. 266), leaving "the Jewish, colored [and] Mexican [no place to] go for aid in his special problems" "with seven councilmen elected AT-LARGE ... mostly originat[ing] from [the wealthy white neighborhood] North of Montana [and] without regard [for] minorities." (Tr. Ex. 31). Yet, in each instance Defendant chose to maintain its at-large system.

Discriminatory elections, and the consequential inequitable representation of racial minorities, have dire consequences, and despite its purported liberal bona fides, that is all too apparent in Santa Monica. Just as at-large elections were intended to do, the racially polarized at-large elections for Santa Monica's city council have resulted in the significant Latino minority being frozen out of local government. For all of their claims to have taken good care of the Latino community, the disturbing imbalance of burdens – the freeway, city yards, trash facility, hazardous waste and, most recently, the Expo maintenance yard, among other things – reveals that the historically all-white council has been, at best, apathetic and willfully ignorant to the concerns of the poorer and more-largely Latino and African American residents of the Pico Neighborhood.

This is precisely the political circumstance that the CVRA aims to prevent. The experts' respective analyses of racially polarized voting leave no doubt - Defendant's city council elections violate the CVRA. Defendant has refused to remedy that violation, or even propose a remedial plan, so it is now incumbent upon this Court to do exactly that. The undisputed evidence presented at trial shows that district-based elections should cure the problem, and is the most effective remedy available to this Court. Regardless of the particular remedy, one thing is abundantly clear – Defendant's discriminatory election system violates the CVRA and must change.

II. DEFENDANT'S CITY COUNCIL ELECTIONS VIOLATE THE CVRA.

Plaintiffs' Trial Brief sets out the text, purpose and history of the CVRA, which will not be repeated here, but is attached for reference (see Attachment A, pp. 9-12). One point, however, is worth repeating because Defendant has repeatedly sought to add complications: the unambiguous text of the CVRA makes clear that there are two necessary elements to 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 . . . .

(§§ 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 v. City of Palmdale* (2014) 226 Cal.App.4th 781, 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."].)

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

Defendant does not dispute that it employs an at-large plurality method of electing its city council – all of the voters residing in Santa Monica elect every member of its city council, and the candidates with a plurality of the votes win the available seats. Not only has Defendant admitted this element in response to Plaintiff's written discovery, its election results demonstrate that simple undeniable fact as well. (See, e.g., Tr. Exs. 1547, 1550, also see Tr. 2884:17 – 2885:16).

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

The consistent presence of racially polarized voting in elections for Defendant's governing board—the city council—is also beyond any doubt. The analyses of Plaintiffs' ***and*** Defendant's experts reveal the same thing—Defendant's elections are racially polarized.

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." (§ 14028, Tr. 723:11 – 724:7, 765:17 – 769:7, 773:5 – 773:23, Tr. Ex. 269). Dr. Kousser provided the details of his analysis, and concluded those elections demonstrate legally significant racially polarized voting. (Tr. 1754:16 – 1754:24, Tr. Exs. 269-291, 312).

While it may not be surprising that Plaintiffs' expert testified that Santa Monica's elections exhibit racially polarized voting, what is unusual here is that even the analysis of Defendant's expert confirms that **each and every one** of the relevant elections in Santa Monica that he analyzed exhibits racially polarized voting. (Tr. 2078:22 – 2081:22, 2085:9 – 2085:25, 2087:5 – 2087:15, 2093:2 – 2093:13, 2095:22 – 2096:21, 2098:8 – 2099:1, Tr. Exs. 297 (pp. 11-27, 34-44), 1652-81). Though he has done so in other cases, Defendant's expert, Dr. Lewis,[3] claims to have reached no conclusions about racially polarized voting in this case. (Tr. 2088:11 – 2089:8, 2118:12 – 2118:19) But Professor Levitt evaluated the results of Dr. Lewis' ecological regression ("ER") and ecological inference ("EI") analyses, and came to the inescapable conclusion that Dr. Lewis avoided – all of the relevant elections exhibit racially polarized voting that is so "stark" that it is similar to the polarization "in the late '60s in the Deep South." (Tr. 2863:2 – 2865:28)

1. The definition of racially polarized voting and how it is determined.

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

[3] Dr. Lewis is perhaps the fourth racially polarized voting expert retained by Defendant in the course of this case. (Tr. 2912:5 – 2913:2 [admitting Defendant's retention of Karin MacDonald, which Defendant's counsel had unequivocally denied just days earlier], 2089:10 – 2090:6 [Dr. Lewis testifying that two other racially-polarized-voting experts were retained prior to his work]) It stands to reason that some of those other experts reached conclusions about racially polarized voting in this case; Defendant's failure to call any of them to testify, and failure to call any witness at all to refute the existence of racially polarized voting in its elections, speaks volumes. (See *Williamson v. Superior Court* (1978) 21 Cal. 3d 829, 836 fn. 2).

(*Thornburg v. Gingles* (1986) 478 U.S. 30, 51) A minority group is politically cohesive where it supports candidates who are members of the minority group to a significantly greater degree than the majority group supports those same minority candidates. (See *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F. 2d 1407, 1416 ["The district court expressly found that predominantly Hispanic sections of Watsonville have, in actual elections, demonstrated near unanimous support for Hispanic candidates. This establishes the requisite political cohesion of the minority group."].) The extent of majority "bloc voting" sufficient to show racially polarized voting is that which allows the white majority to "usually defeat the minority group's preferred candidate." (*Ibid.*) As Justice Brennan 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." (§ 14027; *Gingles*, at p. 51 ["In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives."].) Subsequent discussions in federal cases have offered definitions that track Justice Brennan's opinion in *Gingles*.[4]

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

Perhaps the simplest way to understand racially polarized voting is to consider the U.S.

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[4] 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.

Supreme Court's approach in *Gingles*. Specifically, the Court in *Gingles*, and many lower courts since then, test for racially polarized voting by focusing on the level of support for minority candidates from minority voters and majority voters respectively. (See *Gingles*, *supra*, 478 U.S. at pp. 58–61 ["We conclude that the District Court's approach, which tested data derived from three election years in each district, and *which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, **satisfactorily addresses each facet of the proper legal standard***."], emphasis added; see also, e.g., *Garza v. County of Los Angeles* (C.D. Cal. 1990) 756 F.Supp. 1298, 1335–1337, *aff'd*, 918 F.2d 763 (9th Cir. 1990); *Benavidez v. Irving Indep. Sch. Dist.* 2014 WL 4055366, *11–12 (N.D. Tex. Aug. 15, 2014) [finding racially polarized voting based on Dr. Engstrom's analysis which the court described as follows: "Dr. Engstrom then conducted a statistical analysis . . . to estimate the percentage of Hispanic and non-Hispanic voters who voted for the Hispanic candidate in each election . . . . Based on this analysis, Dr. Engstrom opined that voting in Irving ISD trustee elections is racially polarized."].) Comparing the levels of support for minority candidates, from minority voters and majority voters, respectively, is particularly telling because it best reveals white bias and unwillingness to vote for minorities for the particular governing body at issue. (See *Gingles* [Appendix A – providing Dr. Grofman's ecological regression estimates for support for black candidates from, respectively, white and black voters]). That same analytical method is also what Dr. Kousser used to determine whether Palmdale's elections were racially polarized, and the court in that case adopted Dr. Kousser's analysis, finding it to be "persuasive," and the appellate court affirmed the trial court's finding of racially polarized voting. (*Jauregui*, *supra*, 226 Cal.App.4th at p. 790; Tr. 678:3 – 678:10, 678:28 – 679:22)

2. Dr. Kousser's analysis.

Just as the U.S. Supreme Court did in *Gingles*, Dr. Kousser[5] focused his attention on minority candidates, estimating the support for each minority candidate through ecological regression analysis. (Tr. 723:11 – 724:7, 765:17 – 769:7, 773:5 – 773:23, Tr. Ex. 269) Dr. Kousser evaluated the 7 elections for Santa Monica City Council between 1994 and 2016 that involved at least one Spanish-surnamed candidate:

[5] Every court that has adjudicated a CVRA case at trial has adopted Dr. Kousser's racially polarized voting analysis. (Tr. 677: - 679:22)

Weighted Ecological Regression[6]

Year	Latino Candidate(s)	% Latino Support	% Non-Hispanic White Support	Polarized	Won?
1994	**Vazquez**	145.5 (28.0)[7]	34.9 (1.9)	Yes	No
1996	**Alvarez**	22.2 (12.9)	15.8 (1.1)	No	No
2002	**Aranda**	82.6 (12.6)	16.5 (1.3)	Yes	No
2004	**Loya**	106.0 (12.3)	21.2 (2.0)	Yes	No
2008	**Piera-Avila**	33.3 (5.2)	5.7 (0.8)	Yes	No
2012	**Vazquez** **Gomez** **Duron**	92.7 (9.0) 30.4 (3.3) 5.0 (2.6)	19.1 (2.0) 2.9 (0.7) 4.4 (0.6)	Yes Yes No	Yes No No
2016	**de la Torre** **Vazquez**	88.0 (6.0) 78.3 (9.0)	12.9 (1.5) 36.6 (2.3)	Yes Yes	No Yes

(Tr. 816:2 – 819:8, Tr. Ex. 269). Non-Hispanic whites voted statistically significantly differently from Latinos in 6 of the 7 elections. (Tr. 1775:4 – 1778:19, Tr. Exs. 259, 312) In all but one of those six elections, the Latino candidate most favored by Latino voters lost, making the racially polarized voting legally significant. (*Id.*) The ecological regression analyses of these elections also reveals that when serious Latino candidates run for the Santa Monica City Council, Latino voters cohesively support those Latino candidates – in 5 out of the 7 elections, a Latino candidate received the most Latino votes, but only once (2012—Tony Vazquez) did that Latino candidate prevail. (Tr. 1759:22 – 1761:26, Tr. Exs. 271-291, 312). Even in that one instance the Latino candidate barely won, coming in fourth in a four-seat race in that unusual election, in which none of the incumbents who had won four years earlier sought re-election. (*Id.*; see also *Gingles*, *supra*, 478 U.S. at p. 57, fn. 26 ["Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest. This list of special circumstances is illustrative, not exclusive."].)

In 1994, Latino voters heavily favored the lone Latino candidate—Tony Vazquez-- but he lost. (Tr. 750:22 – 756:26, Tr. Exs. 272, 105). In 2002, the lone Latina candidate and resident of the Pico Neighborhood—Josefina Aranda—was heavily favored by Latino voters, but she lost. (Tr. 761:1 – 764:25, Tr. Ex. 278). In 2004, the lone Latina candidate and resident of the Pico Neighborhood—

[6] Dr. Kousser's unweighted ER and ecological inference ("EI") results were also presented at trial. (Tr. 819:9 – 831:24, Tr. Exs. 271, 273, 274, 276, 277, 279, 280, 282, 283, 285, 286, 288, 289, 291). For the sake of brevity, they are not duplicated here.

[7] The numbers in parentheses in all of the charts indicate the corresponding standard errors.

Maria Loya—was heavily favored by Latino voters, but she lost. (Tr. 769:6 – 770:12, 772:2 – 772:15, Tr. Ex. 281). In 2008, the lone Latina candidate and resident of the Pico Neighborhood—Linda Piera-Avila—received significant support from Latino voters, even though she was not a particularly serious candidate.[8] (Tr. 775:15 – 782:12, Tr. Ex. 284). In 2012, two incumbents—Richard Bloom and Bobby Shriver—decided not to run for re-election, and the two other incumbents who had prevailed in 2008 – Ken Genser and Herb Katz – died during their 2008-12 terms. (Tr. 803:16 – 804:17, Tr. Exs. 284, 287). The three Latino candidates—Tony Vazquez, Robert Gomez and Steve Duron—were collectively favored by Latino voters but did not receive nearly as much support from non-Hispanic white voters. (Tr. 803:16 – 805:16, 813:8 – 814:5, Tr. Ex. 287). Tony Vazquez was able to eke out a victory, coming in fourth place in this four-seat race. (Tr. 804:27 – 804:28, 805:13 – 805:16, Tr. Ex. 287). Finally, in 2016, a race for four city council positions, Oscar de la Torre—a Latino resident of the Pico Neighborhood—was heavily favored by Latinos, but lost. (Tr. 814:16 – 815:22, Tr. Ex. 290). Importantly, in 2016, Mr. de la Torre received more support from Latinos than did Mr. Vazquez. (*Id.*) With the lone exception of 2012, ***all*** of the top choices of non-Hispanic whites were all elected; Latinos did not even have the ability to veto any of the choices of non-Hispanic whites. (Tr. 2862:1 – 2863:1). This is the prototypical illustration of legally significant racially polarized voting – Latino voters favor Latino candidates, but they lose. (See *Gingles*, *supra*, 478 U.S. at pp. 58–61 ["We conclude that the District Court's approach, which tested data derived from three election years in each district, and *which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did,* ***satisfactorily addresses each facet of the proper legal standard***."], emphasis added). All of this led Dr. Kousser to conclude: "[b]etween 1994 and 2016 [] Santa Monica city council elections exhibit legally significant racially polarized voting" (Tr. 1754:16 – 1754:24) and "the at-large election system in Santa Monica result[s] in Latinos having less opportunity than non-Latinos to elect representatives of their choice" to the city council (Tr. 841:28 – 842:3, 850:22 – 851:12).

3. Dr. Lewis' analysis.

[8] At trial, Dr. Kousser explained that even though Ms. Piera-Avila did not receive support from a majority of Latinos, the contrast between the levels of support she received from Latinos and non-Hispanic whites, respectively, nonetheless demonstrate racially polarized voting, just as the *Gingles* court found very similar levels of support for Mr. Norman in the 1978 and 1980 North Carolina House races to likewise be consistent with a finding of racially polarized voting. (Tr. 1804:3 – 1807:6; *Gingles* at 81, Appx. A).

Though he refused to opine on whether any elections exhibited racially polarized voting (Tr. 2088:11 – 2089:8), as he had done in past cases (Tr. 2118:12 – 2118:19), Dr. Lewis confirmed all of the indicia of racially polarized voting in all of the Santa Monica City Council elections he analyzed involving at least one Latino candidate, as well as in other elections. (Tr. 2078:22 – 2081:22, 2085:9 – 2085:25, 2087:5 – 2087:15, 2093:2 – 2093:13, 2095:22 – 2096:21, 2098:8 – 2099:1, Tr. Exs. 297 (pp. 11-27, 34-44), 1652-81). Specifically, Dr. Lewis confirmed that his ER and EI results demonstrate: (1) that the Latino candidates for city council generally received the most votes from Latino voters; (2) that those Latino candidates received far less support from non-Hispanic whites; and (3) the difference in levels of support between Latino and non-Hispanic white voters were statistically significant applying even a 95% confidence level. (Tr. 2099:20 – 2100:9). Indeed, in **each and every** contested election for city council for which Dr. Lewis provides the results of his ER analysis, there is a stark contrast in the level of support each candidate recognized as Latino, with the exception of Steve Duron, receives from Latino and non-Hispanic white voters:

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

(Tr. Ex. 297 (pp. 22-27), accord Tr. 2843:21 – 2861:28, 2882:16 – 2883:25). Dr. Lewis' analyses showed that this statistically significant difference in voting behavior between Latinos and non-Hispanic whites is not confined to city council elections—it also holds true in elections for other local offices (e.g. school board and college board) and ballot measures such as Propositions 187 (1994), 209 (1996) and 227 (1998):

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

	Escarce	68 (6)	36 (1)
2008 – college board	**Quinones-Perez**	58 (6)	35 (1)
2010 – school board	**de la Torre**	94 (8)	33 (1)
2012 – school board	**Leon-Vazquez** **Escarce**	92 (7) 62 (6)	32 (1) 29 (1)
2014 – school board	**de la Torre**	88 (7)	33 (1)
2014 – college board	**Loya**	84 (3)	27 (1)
2014 – rent board	**Duron**	46 (8)	23 (1)
2016 – college board	**Quinones-Perez**	85 (5)	36 (1)

(*Id.*; also see Tr. 2083:12 – 2084:21, 2085:27 – 2087:3, 2091:1 – 2093:1, 2093:14 – 2095:10, 2096:22 – 2098:3, 2099:2 – 2099:19, 2360:7 – 2362:4, Tr. 2877:1 – 2882:15, Tr. Ex. 1652 (pp. 74, 76, 78))

With Dr. Lewis unwilling to opine on whether his results demonstrate racially polarized voting or not, Professor Levitt put a finer point on the results of Dr. Lewis' analyses: all of the relevant elections analyzed by Dr. Lewis exhibit racially polarized voting and in many it is so "stark" that it is similar to the polarization "in the late '60s in the Deep South." (Tr. 2863:2 – 2865:28)

4. Dr. Lewis' Misguided Serial Attempts to Undermine ER and EI.

Unable to refute the conclusion of racially polarized voting based on the ER and EI results, Dr. Lewis instead disputes the propriety of the methodology. Dr. Kousser bases his analysis on the methods specifically endorsed in the CVRA, and Dr. Lewis contends that the California Legislature should not have endorsed those methods—an argument more appropriately made to the Legislature. Both statistical practice and legal authority support the use of ER and EI to determine the existence of racially polarized voting in Santa Monica.

First, Dr. Lewis attempts to undermine the validity of these long-approved statistical methods by showing that the "neighborhood model" yields different estimates. (Tr. 2040:10 – 2040:25) But, as shown at trial, the neighborhood model does not fit real-world patters of voting for particular candidates, which may be why that same argument has been rejected by the courts. (*Garza* at 1334).

Second, Dr. Lewis claims that the lack of data from predominantly Hispanic precincts renders the ecological regression and ecological inference estimates unreliable. (Tr. 2057:17 – 2064:3). Specifically, Dr. Lewis notes that the most Latino precinct in Santa Monica was only about 41% Latino in voter turnout, and so ecological regression and ecological inference estimates cannot be trusted. (*Id.*) But, that argument too has been rejected by the courts. (See, e.g., *Fabela v. Farmers Branch* (N.D. Tex. Aug. 2, 2012) 2012 WL 3135545, *10-11, n. 25, n. 33 [relying on EI despite the absence of "precincts with a high concentration of Hispanic voters"]; *Benavidez v. City of Irving* (N.D.

Tex. 2009) 638 F.Supp.2d 709, 724-25 [approving use of ER and EI where the precincts analyzed all had "less than 35%" Spanish-surnamed registered voters]; *Perez v. Pasadena Indep. Sch. Dist.* (S.D. Tex. 1997) 958 F.Supp. 1196, 1205, 1220-21, 1229, *aff'd* (5th Cir. 1999) 165 F.3d 368 [relying on ER to show racially polarized voting where the polling place with the highest Latino population was 35% Latino]).[9] Indeed, accepting Dr. Lewis' argument would undermine the very purpose of the CVRA. Specifically, section 14028(c) provides that "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting." Yet, if ER and EI estimates were rejected because of the absence of racially homogenous precincts, that would introduce into the racially polarized voting analysis the very racial compactness or concentration requirement that the California Legislature expressly disavowed.

Third, Dr. Lewis argues that using Spanish-surname matching to estimate the Latino proportion of voting precincts causes a "skew." (Tr. 2042:16 – 2042:20) Even putting aside that Dr. Lewis acknowledged that Spanish surname matching is the best method for estimating the Latino proportion of each precinct (Tr. 2042:16 – 2043:25), Dr. Lewis' own analysis makes clear that the conclusion of racially polarized voting in this case would not change, even if the estimates were adjusted as Dr. Lewis suggests. (Tr. 2046:22 – 2049:17, 2051:12 – 2054:22, Tr. Ex. 1652 (pp. 46, 49, 51)).

Finally, Dr. Lewis attempts to discredit ER and EI by showing that they do not produce accurate estimates of Democratic party registration among Latinos. (Tr. 2072:26 – 2075:8) But that same rationale improperly conflates patterns of party registration with patterns of voting for particular candidates despite significant differences in the relevant voting behavior, and was recently rejected by the court in *Luna v. County of Kern* (E.D. Cal. 2018) 291 F.Supp.3d 1088 for all of the reasons identified by Professor Levitt. (*Id.* at 1123-25; Tr. 3135:28 – 3137:4, also see Tr. 2354:22 – 2355:8 [Dr. Lewis acknowledging that aggregation bias in estimates of Latino Democratic registration does not evidence aggregation bias in estimates of vote by Latinos for Spanish-surnamed candidates).

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

Indeed, all of these exact same attempts by Dr. Lewis to undermine ER and EI were recently rejected in the only other case in which he has testified. Dr. Lewis should know that, but he purportedly never read that court's decision, though it was sent to him by email and he opened it on his computer. (Tr. 2044:12 – 2044:27, 2062:7 – 2062:14).

5. Dr. Lewis' Mechanical Approach to the Identification of "Latino-Preferred" Candidates Invites Legal Error.

Searching for some way to avoid the inescapable consequence of the racially polarized voting revealed by his ER and EI analyses, Dr. Lewis uses a definition of "Latino-preferred" provided to him by Defendant's counsel to show that most of those candidates succeed in Defendant's elections. (Tr. 2015:14 – 2016:23). But Dr. Lewis' analysis is both factually meaningless and legally irrelevant. As discussed more fully in Plaintiffs' Trial Brief at pp. 34-37, the Ninth Circuit in *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543 chastised the district court for accepting the same analysis that Dr. Lewis presents here. (*Id.* at 554). Santa Monica voters do not currently rank their choices for city office: elections are won and lost based on the number of votes received. Dr. Lewis' error, as in the *Ruiz* case, is ignoring the fact that Latinos demonstrated their preferences by casting more votes for Latino candidates than for others. (*Ibid.*) In 5 of the 6 city council elections involving at least one Latino candidate evaluated by Dr. Lewis, a Latino candidate received the most votes from Latino voters, and in all but one instance that Latino candidate lost. (Tr. Ex. 297 (pp. 22-27), accord Tr. 2843:21 – 2861:28, 2882:16 – 2883:25) Just as the *Ruiz* court suggested would be consistent with a finding of racially polarized voting, in 1994, 2002 and 2004 there was only one Latino candidate—Tony Vazquez, Josefina Aranda and Maria Loya, respectively—they were the choice preferred by more Latinos than any other, and then Latinos' second, third and fourth choices were unavoidably non-Hispanic whites. (Tr. 2882:16 – 2883:25, 2843:21 – 2847:14, Tr. Ex. 297-11, 1652-81). In 2016, Latinos' first and second choices were the Latino candidates, and their first choice—Mr. de la Torre—lost, while Latinos' third and fourth choices were unavoidably non-Hispanic whites. (Tr. 2860:10 – 2861:28, Tr. Ex. 297-14) In all of these elections, the candidates preferred by most Latino voters usually lose; in other words Latinos are generally unable to elect the candidates that garner most support from the Latino community, and it doesn't matter who Latinos vote for because, with only one unusual exception, non-Latinos always choose the winners. (Tr. 2862:12 – 2862:22, Tr. Ex. 297 (pp. 11-14). That is exactly what the *Ruiz* court noted was perfectly consistent with racially polarized

voting.[10] Moreover, Dr. Lewis' analysis is meaningless because in uncontested elections (e.g. 2014 rent control board) 100% of what Defendant's counsel defined as "Latino-preferred" candidates necessarily prevail; and, as conceded by Dr. Lewis, even in contested elections where Latino voters strongly support a single Latino candidate and that Latino candidate loses, his analysis may necessarily indicate as much as 75% of "Latino-preferred" candidates won. (Tr. 2106:25 – 2107:23, 2112:7 – 2117:9, Tr. Ex. 318)

Compounding the impropriety of his analysis, Dr. Lewis points to the success of "Latino-preferred" candidates (using the definition provided to him by Defendant's counsel) in "exogenous" elections, to undermine the indisputable evidence of racially polarized voting in the relevant elections for Defendant's governing board. (Tr. Ex. 1652-72). The CVRA explicitly specifies that it is "elections for members of the governing body of the [defendant]," not the elections for some other governing board of a different political subdivision, that are relevant to whether the defendant is in violation of the CVRA. (§ 14028, subd. (a).)[11] As discussed more fully in Plaintiffs' Trial Brief at pp. 31-34, exogenous elections may never be used to undermine a finding of racially polarized voting in endogenous elections, even under the FVRA. (See *Cottier v. City of Martin* (8th Cir.2006) 445 F.3d 1113, 1121–1122 [reversing district court's reliance on exogenous elections to undermine racially polarized voting in endogenous elections]; *Rural West Tenn. African American Affairs Council v. Sundquist* (W.D. Tenn. 1998) 29 F.Supp.2d 448, 457 ["Certainly, the voting patterns in exogenous elections cannot defeat evidence, statistical or otherwise, about endogenous elections."], quoting *Cofield v. City of LaGrange* (N.D.Ga.1997) 969 F.Supp. 749, 773.) The claim in this case is that the Latino community does not have an equitable opportunity to influence the election of candidates to the

[10] The Court in *Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, summed it up best. In that case, the court was presented with the situation where "[c]andidates favored by blacks can win, but only if the candidates are white." (*Id.* at p. 1318.) In light of those circumstances, the court had no problem finding racially polarized voting and even setting aside the results of the last election held under the challenged system. (*Ibid.*; also see *Clarke v. City of Cincinatti* (6th Cir. 1994) 40 F.3d 807, 812 [voting rights laws' "guarantee of equal opportunity is not met when [] candidates favored by [minority voters] can win, but only if the candidates are white."])

[11] The focus on endogenous elections is particularly appropriate in this case because, as several witnesses confirmed, the political reality of Defendant's city council elections is very different than that of elections for other governing boards such as school board and rent board. (Tr. 1052:8 – 1052:20, 2713:2 – 2713:27) If anything, Dr. Lewis' ER and EI analyses show that non-Hispanic white voters in Santa Monica will support Latino candidates for the lower offices but not for city council. For example, according to Dr. Lewis, Mr. de la Torre received votes from 88% of Latino voters and 33% of non-Hispanic white voters in his school board race in 2014, and when he ran for city council just two years later he received essentially the same level of support from Latino voters (87%) but much less support from non-Hispanic whites (14%) than he had received in the school board race. (Tr. 2101:19 – 2105:8)

city council, and Defendant cannot defeat that claim by offering other offices with lesser jurisdiction as an ostensible consolation prize. To hold otherwise would only serve to perpetuate the sort of glass ceiling that the CVRA and FVRA are intended to eliminate.

C. The Qualitative Factors Supplement Plaintiffs' Quantitative Evidence of Racially Polarized Voting

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

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

(see also Assembly Committee Analysis of SB 976 (Apr. 2, 2002). At trial, Plaintiffs provided ample evidence of these other factors in Santa Monica.

1. History of discrimination.

In *Garza, supra,* 756 F.Supp. at pp. 1339-1340, the court detailed how "[t]he Hispanic community in Los Angeles County has borne the effects of a history of discrimination." (Tr. Ex. 317) The court described the many sources of discrimination endured by Latinos in Los Angeles County: "restrictive real estate covenants [that] have created limited housing opportunities for the Mexican-origin population"; the "repatriation" program in which "many legal resident aliens and American citizens of Mexican descent were forced or coerced out of the country"; segregation in public schools; exclusion of Latinos from "the use of public facilities" such as public swimming facilities; and "English language literacy [being] a prerequisite for voting" until 1970. (*Id.* at 1340-41). Since Santa Monica is within Los Angeles County, Plaintiffs do not need to re-prove this history of discrimination in this case. (See *Smith v. Clinton* (E.D. Ark. 1988) 687 F.Supp. 1310, 1317 ["We do not believe that this history of discrimination, which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act."].) Nonetheless, at trial Plaintiffs presented evidence that this same sort of discrimination was perpetuated specifically against Latinos *in Santa Monica.* (Tr. 1099:28 – 1102:9 [restrictive real estate covenants, and approximately 70% of Santa Monica voters voting in favor of Proposition 14 in 1964 to repeal the Rumford Fair Housing Act and therefore again allow racial discrimination in housing]; Tr. 3937:19 – 3938:4 [segregation in the

use of public swimming facilities]; Tr. 3985:8 – 3986:13, 3992:17 – 3994:24 [repatriation and voting restrictions applicable to all of California, including Santa Monica]).

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

As Professor Levitt explained, the staggering of Defendant's city council elections enhances the dilutive effect of its at-large election system. (Tr. 2885:17 – 2886:21; see also *City of Lockhart v. United States* (1983) 460 U.S. 125, 135 ["The use of staggered terms also may have a discriminatory effect under some circumstances, since it . . . might reduce the opportunity for single-shot voting or tend to highlight individual races."]; *City of Rome v. United States* (1980) 446 U.S. 156, 183 [same].)

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

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

The differences in education and economics between Whites and Hispanics in Santa Monica are troubling. As revealed by the most recent Census, Whites enjoy significantly higher income levels than their Hispanic and African American neighbors in Santa Monica—a difference far greater than the national disparity. (Tr. 263:20 – 266:16 [objection to this testimony later overruled at 334:10 – 334:11], 335:12 – 337:3, Tr. Ex. 264). This is particularly problematic for Latinos in Santa Monica's at-large elections because of how extraordinarily expensive those elections have become. (Tr. 2922:5 – 2923:11, Tr. Ex. 295). Even more troubling is the severe achievement gap between White students and their African American and Hispanic peers in Santa Monica's schools, a gap that Defendant's witness called the result of "institutional racism." (Tr. 4075:28 – 4080:2, Tr. Ex. 333-3).

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

Tony Vazquez identified some of the more heinous racial appeals he has had to deal with in his bids for the city council. In 1994, after opponents of Mr. Vazquez advertised that he had voted to allow "Illegal Aliens to Vote" and characterized him as the leader of a Latino gang, causing Mr.

Vazquez to lose that election, he let his feelings be known to the Los Angeles Times: "Vazquez blamed his loss on 'the racism that still exists in our city . . . . The racism that came out in this campaign was just unbelievable.'" (Tr. Ex. 231-71). More recent racial appeals, though less overt, have been used to defeat other Latino candidates for Santa Monica's city council. For example, when Maria Loya ran in 2004, she was frequently asked whether she could represent all Santa Monica residents or just "her people" – a question that non-Hispanic white candidates are not asked. (Tr. 167:1 – 167:23). These sorts of racial appeals are particularly caustic to minority success, because they make it more difficult for minority candidates to win ***and*** they discourage minority candidates from even running.

5. Defendant has demonstrated a lack of responsiveness to the Latino Community.

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

The most undesirable elements of the city - the freeway, the trash facility, the city's maintenance yard, a park that continues to emit poisonous methane gas, hazardous waste collection and storage, and, most recently, the train maintenance yard – have all been dumped on the Latino-concentrated Pico Neighborhood. (Tr. 150:7 – 151:2, 3512:20 – 3532:22, Tr. Exs. 305, 328) While at trial Defendant attempted to deflect responsibility to State and County authorities for the location of all those environmental hazards, most of them originate from Defendant's operations and/or land owned by Defendant, the precise location of the freeway was agreed upon by Defendant (Tr. Ex. 337-3) and the Expo Authority was chaired by Pam O'Connor (a Santa Monica city council member) when it chose to place the train maintenance yard in the Pico Neighborhood (Tr. 4381:18 – 4382:14). Further demonstrating the disconnect between the Latino community and the City Council, Councilmember Gleam Davis even testified that these environmental hazards are "a benefit to the Pico neighborhood specifically." (Tr. 4378:7 – 4380:4) But, when not testifying in court to avoid complying with a law with which they disagree (the CVRA), Defendant's leadership has openly acknowledged that residents outside the Pico Neighborhood would protest mightily if those same environmental hazards were placed in their respective neighborhoods. (Tr. 3581:11 – 3582:1, 2411:2 – 2412:28).

In Santa Monica, the lack of responsiveness to the Latino community perpetuates itself. In at least the last 25 years, there have been two appointments to the City Council, and both were filled by members of the Planning Commission, a body that is wholly appointed by the City Council. (Tr. 4386:28 – 4388:7). But the Planning Commission is, as the City Council has generally been, all white. (Tr. 162:2 – 162:7, 4101:3 – 4101:8, Tr. Ex. 335 (pp. 36-38)). The City's other commissions are likewise nearly devoid of Latinos. As of March of this year, out of the 106 commissioners appointed by the City Council, only one (1) is Latina—Ana Jara, appointed to the Social Services Commission. (Tr. 4103:25 – 4104:14, Tr. Ex. 335, also see Tr. 4393:9 – 4393:15). Ms. Jara confirmed that disturbing absence of Latinos when she testified that she knew and socialized with the other commissioners, but could not identify a single commissioner other than herself as being Latino. (Tr. 4091:21 – 4105:11).

III. DEFENDANT MAINTAINED ITS AT-LARGE ELECTIONS WITH A DISCRIMINATORY PURPOSE.

The fact that Santa Monica's at-large election system has impaired the ability of Latinos to elect candidates of their choice or influence the outcome of city council elections, is no surprise to Defendant. Defendant has been aware of that problem for several decades, and indeed the at-large system was maintained for that purpose. For that reason alone, the at-large election system cannot be allowed to stand.[12] Rather, when voting rights are implicated, "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all . . . .' (*N. Carolina NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239 [surveying Supreme Court cases]; see also generally, *Garza v. County of Los Angeles* (1990) 918 F.2d 763, cert. denied 111 S.Ct. 681 (1991).[13]

[12] While discriminatory intent is the cornerstone of Plaintiffs' claim under the Equal Protection Clause, it is **not** an element of Plaintiffs' claim under the CVRA. (§ 14028(d) ["Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required."])

[13] Defendant has argued that, in addition to discriminatory intent, a discriminatory impact must also be shown to establish a claim under the Equal Protection Clause. While Plaintiffs believe the better view is that discriminatory impact is an indicator of discriminatory intent (See *Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 265), the discriminatory impact of Defendant's at-large election scheme was also amply shown at trial. The consistent, nearly unbroken record of losses by Latino candidates for Defendant's city council, particularly in the elections shortly after the at-large system was maintained, is one demonstration of discriminatory impact. (Tr. 728:14 – 732:22, Tr. Ex. 268; *See Bolden v. City of Mobile* (S.D. Ala. 1982) 542 F.Supp. 1070, 1076 (relying on the lack of success of black candidates over several decades to show disparate impact, even without a showing that black voters voted for each of the particular black candidates going back to 1874)). Additionally, the palpable harm to the Latino-concentrated Pico Neighborhood discussed in Section II(C)(5) above, likewise demonstrates the discriminatory impact of Defendant's at-large election scheme.

Defendant's at-large election system has a long and sordid history that is best understood with reference to the deliberations in the early 1990s. With the issue of at-large elections diluting minority vote receiving more attention in Santa Monica and throughout California, Defendant appointed a 15-member Charter Review Commission to study the issue and make recommendations to the City Council. (Tr. Ex. 127-1) As part of their investigation, the Charter Review Commission sought the analysis of Dr. Kousser, who had just completed his work in *Garza* regarding the discriminatory intent in the way Los Angeles County's supervisorial districts had been drawn. (Tr. 851:18 – 853:18). Dr. Kousser was asked whether Santa Monica's at-large election system was adopted or maintained for a discriminatory purpose, and Dr. Kousser concluded that it was. (Tr. 853:23 – 854:24, Tr. Ex. 299 (pp. 1, 18-19)) Dr. Kousser's report pointed to statements by proponents and opponents of the at-large system alike, bluntly recognizing that the at-large system would impair minority representation, and the strong correlation between voting in favor of the at-large charter provision and against the contemporaneous Proposition 11 to ban racial discrimination in employment – a pure measure of attitude on racial discrimination. (Tr. Ex. 299 (pp. 12-13, 16-18)). Based on their extensive study and investigations, the near-unanimous Charter Review Commission recommended that Defendant's at-large election system be tossed into the scrap heap of history with other vote-diluting relics. (Tr. Ex. 127-24) The principal reason for that recommendation was that the at-large system prevents minorities and the minority-concentrated Pico Neighborhood from having a seat at the table. (*Ibid.*)

That recommendation went to the City Council in July 1992. One speaker after another – members of the Charter Review Commission, the public, a MALDEF attorney and even a former councilmember – urged Defendant's City Council to change its discriminatory election system. (Tr. 880:23 – 926:11, Tr. Ex. 267). Though the City Council understood well that the at-large system prevented racial minorities from achieving representation – that point was made by the Charter Review Commission's report and several speakers and was never challenged – they refused by a 4-3 vote to allow the voters to change the system that had elected them. (Tr. 927:18 – 929:5, Tr. Exs. 267, 299 (pp. 58-59)). Councilmember Zane explained his professed reasoning – in a district system, Santa Monica would no longer be able to dump affordable housing into the minority-concentrated Pico Neighborhood, where, according to the unrefuted remarks at the July 1992 council meeting, the majority of the city's affordable housing was already located, because the Pico Neighborhood district's representative would oppose it. (Tr. 953:14 – 960:20, Tr. Ex. 267). While this professed rationale

could be characterized as not demonstrating that Mr. Zane or his colleagues "harbored any ethnic or racial animus toward the . . . Hispanic community," it nonetheless reflects intentional discrimination—Mr. Zane understood that his action would harm Latinos' voting power, and he took that action to maintain his power to continue dumping affordable housing in the Latino-concentrated neighborhood despite their opposition. (See *Garza v. County of Los Angeles* (1990) 918 F.2d 763, 778 (J. Kozinski, concurring) [finding that incumbents preserving their power by drawing district lines that avoided a higher proportion of Latinos in one district was intentionally discriminatory despite the lack of any racial animus], cert. denied 111 S.Ct. 681 (1991).)

At trial, Dr. Lichtman argued that Mr. Zane's motivation is nothing like that of Supervisor Edelman found to be intentional discrimination in *Garza* because Mr. Zane indicated his intent to not seek reelection. (Tr. 3482:7 – 3483:7). But Dr. Lichtman's argument completely misses the point. Dr. Kousser never stated that Mr. Zane voted to maintain the at-large system to ensure his own reelection; rather, as Mr. Zane admitted, he did so to maintain his power, through his political organization, Santa Monicans for Renters' Rights, to continue dumping affordable housing in the Latino-concentrated neighborhood. (Tr. 959:5 – 960:20, 964:13 – 964:22, Tr. Ex. 267). Other than that meaningless distinction between individual power and group power to advance a particular pet-cause, Dr. Lichtman completely fails to address Mr. Zane's comments, the *conclusion* of the Charter Review Commission report, or any of the discussion at the July 1992 council meeting. Instead, Dr. Lichtman provided no explanation for his view that these items – the most direct evidence of the City Council's intent – somehow "sustains" the opinions he reached before ever viewing any of them. (Tr. 3870:3 - 3870:17). And, though Mr. Zane was on Defendant's witness list, Defendant did not call him to testify to rebut Plaintiffs' contention that he acted with discriminatory intent.

Rather than address this direct evidence of discriminatory intent, Dr. Lichtman instead focused on actions of Defendant having nothing to do with its election system and occurring at times separated by years from the decisions to maintain the at-large system, and claimed that the inability to draw a Latino-majority district in Santa Monica exculpates Defendant.[14] But that same contention was rejected by the Ninth Circuit in *Garza*. (*Garza v. County of Los Angeles* (1990) 918 F.2d 763, 771, cert.

[14] Tracking Dr. Lichtman's meandering and ever-changing opinions in this case was exceptionally difficult because, unlike what he did in nearly every other case he has ever worked on over more than 30 years, Dr. Lichtman failed to prepare a report in this case, consistent with the instruction of Defendant's counsel. (Tr. 3893:26 -3894:11)

denied 111 S.Ct. 681 (1991) ["The County cites a number of cases in support of its argument that *Gingles* requires these plaintiffs to demonstrate that they could have constituted a majority in a single-member district as of 1981. None dealt with evidence of intentional discrimination. To impose the requirement the County urges would prevent any redress for districting which was deliberately designed to prevent minorities from electing representatives in future elections governed by that districting. This appears to us to be a result wholly contrary to ... the equal protection principles embodied in the fourteenth amendment."]). Dr. Lichtman further ignored the fact that Dr. Leo Estrada had developed a district in 1992 with a combined Latino and African American majority. (Tr. 983:11 – 984:11, Tr. Ex. 127 (pp. 23, 62-63)). And, Dr. Lichtman ignored other evidence of discriminatory intent in 1992, such as the support for district elections from Santa Monica's minority leaders (e.g. Tony Vazquez and Doug Willis), even though he relied heavily on the absence of that same evidence to conclude no discriminatory intent in earlier decisions in 1946 and 1975 to maintain the at-large system. (Tr. 4006:24 – 4009:13)

No doubt, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. ... [including] the historical background of the decision," but that does not excuse ignoring the most direct evidence. *Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 266-68. Even when the *Arlington Heights* factors are each considered, as they should be in the absence of the sort of "smoking gun" admission by Mr. Zane in this case, those non-exhaustive factors all militate in favor of finding discriminatory intent in this case. (Tr. 979: - 994:14).[15] And though Dr. Lichtman

[15] Dr. Lichtman also bends the *Arlington Heights* factors more to his liking. For example, Dr. Lichtman reads the discussion of "substantive deviations" in *Arlington Heights* to command a comparison of the adopted system to the previous system, but the actual language in *Arlington Heights* does not support Dr. Lichtman's view. (See *Arlington Heights* at 267, n. 17 ["Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."]). The relevant comparison is not to the previous system at all; the relevant comparison is between the election systems being considered – in this case, at-large vs. district elections. (See *Bolden v. Mobile* (S.D. Ala. 1982) 542 F.Supp. 1050, 1060-61, 1074-76 [finding that the maintenance of at-large elections in 1874, rather than reverting to the district election system employed prior to the elections of 1870, was intentionally discriminatory, and thus violated the Equal Protection Clause, and finding that the 1911 adoption of an "at-large commission system" also violated the Equal Protection Clause, despite the fact that "blacks [had already been] effectively disfranchised by the 1901 Constitution."]) As set forth in *Bolden*, disparate impact is measured by whether the current election system has been worse for a racial minority group than the majority group, not whether the current electoral system has been worse than the system before, which may itself have operated to dilute the minority vote. To rule otherwise, as Defendant requests, would only serve to reward past discrimination, intentional or otherwise.

claims that Defendant's maintenance of at-large elections *could* be explained by "good-government" motivations, "plaintiffs are not required to show that [discriminatory] intent was the sole purpose of the [challenged government decision]," or even the "primary purpose," just that it was "*a* purpose." (*Brown v. Board of Com'rs of Chattanooga, Tenn.* (E.D. Tenn. 1989) 722 F. Supp. 380, 389, citing *Arlington Heights* at 265 and *Bolden v. City of Mobile* (S.D. Ala. 1982) 543 F. Supp. 1050, 1072).

While the maintenance of at-large elections with a discriminatory intent at any point in time constitutes a violation of Equal Protection, in this case, the maintenance of at-large elections was motivated by a discriminatory intent in both 1946 and 1992. (See *Brown, supra* 722 F. Supp. at pp. 389 [striking at-large election system based on discriminatory intent in 1911 even absent discriminatory intent in maintaining that system in decisions of 1957, the late 1960s and early 1970s]). On each occasion, the decisionmakers understood that district elections would mean ethnic minority representation, while at-large elections would impede minority representation. In 1946 that was made clear by the local newspaper, and in 1992 the video of the city council meeting at which the issue was discussed shows one person after another, including council members, making that point with no rebuttal offered by anyone. (Tr. 880:23 – 971:15, 995:23 – 1007:1, 1108:3 – 1109:13, Tr. Exs. 28, 29, 31, 266, 267) Yet, in both 1946 and 1992, the decisionmakers (the Board of Freeholders (1946) and the City Council (1992)) refused to give voters the choice of district elections, leaving proponents of the district system that would empower racial minorities no means of expressing their preference. Similarly, just before the trial in this case, Defendant's Mayor and Mayor Pro Tem published an op-ed in the Los Angeles Times railing against the CVRA and suggesting that "[i]f Santa Monica voters believe that district-based voting will best serve [Santa Monica], we can go to the ballot box to make that choice," yet at trial the Mayor Pro Tem revealed that while this case was pending the City Council rejected a proposal to give voters the opportunity to make the choice for district elections at the ballot box, just as Defendant's self-interested council members had done in 1992. (Tr. 4418:17 – 4419:5).

IV. REMEDIES

Just as is the case with other statutory violations, where a jurisdiction violates the CVRA or Equal Protection clause, there is always a remedy. *See* Civ. Code § 3523. The CVRA also specifies that the implementation of appropriate remedies is mandatory:

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

(§ 14029 (emphasis added)). The federal courts in FVRA cases have similarly and unequivocally held that once a violation is found, a remedy ***must*** be adopted. *See, e.g. Williams v. Texarkana, Ark.*, 32 F.3d 1265, 1268 (8th Cir. 1994) (Once a violation of the FVRA is found, "[i]f [the] appropriate legislative body does not propose a remedy, the district court ***must*** fashion a remedial plan") (emphasis added); *Bone Shirt v. Hazeltine*, 387 F.Supp.2d 1035, 1038 (D.S.D. 2005) (same); *also see Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.").

Likewise, when voting rights are implicated, "[t]he Supreme Court has established that official actions motivated by discriminatory intent 'have no legitimacy at all . . . .' Thus, the proper remedy for a legal provision enacted with discriminatory intent is invalidation." (*N. Carolina NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 239 [surveying Supreme Court cases].) Once intentional discrimination is shown, "the 'racial discrimination must be eliminated root and branch' " by "a remedy that will fully correct past wrongs." (*Ibid.*, quoting *Green v. Cty. Sch. Bd.* (1968) 391 U.S. 430, 437–439, *Smith v. Town of Clarkton* (4th Cir. 1982) 682 F.2d 1055, 1068.)

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. (See § 14029 ["Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation."]; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 670; *Jauregui, supra*, 226 Cal.App.4th at p. 807 ["Thus, the Legislature intended to expand the protections against vote dilution provided by the federal Voting Rights Act of 1965. It would be inconsistent with the evident legislative intent to expand protections against vote dilution to narrowly limit the scope of . . . relief as defendant asserts. Logically, the appropriate remedies language in section 14029 extends to . . . orders of the type approved under the federal Voting Rights Act of 1965."].)

At trial, Plaintiffs presented the Court with several options – district-based elections, cumulative voting, limited voting and ranked-choice voting. Plaintiffs further presented the Court with a specific district plan. (Tr. Ex. 261). In contrast, stubbornly insisting on maintaining its discriminatory at-large system, Defendant offered no alternatives. As the unrebutted testimony of

Professor Levitt demonstrates, each of the potential remedies presented by Plaintiffs will enhance Latino voting power in Santa Monica. (Tr. 2889:1 – 2889:28, 2980:10 – 2980:23).

A. By-District Elections.

Requiring by-district elections is certainly the most common remedy in CVRA as well as FVRA cases. In fact, with very limited exception, each and every CVRA case resolved in the fifteen-year history of the CVRA resulted in the defendant political subdivision changing its system of electing its board from an at-large system to a by-district system. The Legislature has certainly expressed its preference for district elections since the enactment of the CVRA, as it has made it easier for political subdivisions to adopt district elections.[16]

At trial, demographics and districting expert, David Ely, presented a seven-district map (Tr. Ex. 261) that complies with all legal requirements. The districts are compact, contiguous and generally equal in population. (Tr. 301:14 – 304:13, Tr. Exs. 261, 262). Race was not a predominant consideration in drawing the districts; rather, Mr. Ely considered the traditional districting criteria specified in Section 21620 of the Elections Code, and the public input collected from Santa Monica residents. (*Id.*, Tr. 474:14 – 475:1).

All of the evidence presented at trial leads to the inescapable conclusion that Mr. Ely's district plan would be effective in remedying the vote dilution that has plagued Santa Monica's city council elections. On a national scale, courts have long recognized that at-large elections "tend to submerge electoral minorities and over-represent electoral majorities," and thus the courts favor single-member-district elections. (*Connor v. Finch* (1977) 431 U.S. 407, 415. The recognition of the perils of at-large elections, when combined with racially polarized voting, is precisely what prompted the California Legislature to enact the CVRA. Focusing on just California, the jurisdictions that have switched from at-large elections to by-district elections as a result of CVRA cases, reveals that by-district elections have resulted in a pronounced increase in Latino representation in just one election cycle, ***even in***

[16] In just the past three years, the California Legislature has passed, and the Governor has signed, several such laws, including: Assembly Bill 277 (2015), declaring that vote dilution by at-large elections is a matter of statewide concern, and "codify[ing] the holding in *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781"; Assembly Bill 2389 (2016) permitting special districts to convert from at-large elections to district-based elections without a vote of the electorate "in furtherance of the purposes of the California Voting Rights Act of 2001"; Senate Bill 493 (2015) permitting cities with less than 100,000 population to convert from at-large elections to district-based elections without a vote of the electorate "in furtherance of the purposes of the California Voting Rights Act of 2001"; and Assembly Bill 2220 (2016) permitting cities with more than 100,000 population to convert from at-large elections to district-based elections without a vote of the electorate "in furtherance of the purposes of the California Voting Rights Act of 2001".

districts that are not majority-Latino. (Tr. 2927:14 – 2927:26, 2930:24 – 2937:20). Even in districts where the minority group is one-third or less of a district's electorate, minority candidates previously unsuccessful in at-large elections win district elections. (Tr. 2930:24 – 2933:18; Florence Adams, Latinos and Local Representation: Changing Realities, Emerging Theories (2000), at pp. 49–61).

Even more important than statewide and nationwide experiences, the particular demographics and electoral experiences of Santa Monica suggest that Mr. Ely's district plan would result in minority-preferred candidates achieving more electoral success in Santa Monica than provided by the current system. First, Mr. Ely's analysis of various elections shows that the Latino candidates preferred by Latino voters perform much better in the Pico Neighborhood district of Mr. Ely's plan than they do in other parts of the city – while they lose citywide, they often receive the most votes in the Pico Neighborhood district. (Tr. 289:7 – 296:19, 299:5 – 301:5, Tr. Exs. 164-168). Second, the Latino proportion of eligible voters is much greater in the Pico Neighborhood district than the city as a whole. In contrast to 13.64% of the citizen-voting-age-population in the city as a whole, Latinos comprise 30% of the citizen-voting-age-population in the Pico Neighborhood district. (Tr. 2938:20 – 2942:21, 2943:27 – 2944:21, Tr. Exs. 261, 262) That portion of the population and citizen-voting-age-population falls squarely within the range the U.S. Supreme Court deems to be an influence district. (*Georgia v. Aschcroft* (2003) 539 U.S. 461, 470–471, 482 [defining "influence district" as a "district[] with a black voting age population of between 25% and 50%" 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."].) Third, as discussed by Professor Levitt, Latinos in the Pico Neighborhood are politically organized, and have devoted political leaders. (Tr. 2945:20 – 2948:28, Tr. Exs. 208, 256). Fourth, districts tend to reduce the effects of wealth disparities between the majority and minority communities, which are pronounced in Santa Monica. (Tr. 2914:27 – 2924:27, Tr. Ex. 295) As Professor Levitt explained, all of these analytics suggest that Latino-preferred candidates will fare well in the Pico Neighborhood district, and district elections will improve Latinos' voting power in Santa Monica. (Tr. 2949:1 – 2949:6, 2998:28 – 2999:22) Though Dr. Morrison opined that a Latino-majority district is not possible, he did not refute the findings of Mr. Ely and Professor Levitt that district elections would improve Latinos' voting power. (Tr. 1950:25 – 1950:28). While no election result can be guaranteed, Mr. Ely's district plan would at least guarantee Latinos a **fair opportunity**, and that is all the law demands or allows.

B. Cumulative Voting, Limited Voting and Ranked Choice Voting

Justin Levitt also testified regarding cumulative voting, limited voting and ranked-choice voting – three alternative at-large methods of election that improve the ability of minorities to elect representatives of their choice. (Tr. 2949:8 – 2980:9) The workings of each of these remedies is discussed in Plaintiffs' Trial Brief at pages 53-57, and is not repeated here.

The degree to which these remedies improve minority prospects over the current at-large plurality system is generally measured by comparing the "threshold of exclusion" with the minority proportion of eligible voters, though Professor Levitt explained that cumulative and limited voting have been successful even where the minority proportion is below the threshold of exclusion – even as low as 10.2%. (Tr. 2957:6 – 2959:7) In Santa Monica, the 13.6% Latino proportion of eligible voters exceeds the 12.5% threshold of exclusion applicable to any of these remedies in an election for the seven seats on the City Council, and so these remedies can be expected to deliver a more equitable opportunity for the Latino electorate to influence elections or elect candidates of their choice.[17]

V. CONCLUSION.

This is not a close case. The racially polarized voting in Defendant's elections revealed by the analyses of both parties' experts, is stark and consistent. That should come as no surprise to Defendant; the dilutive effect of its at-large election system, and even the discriminatory purpose behind the at-large system, were exposed in 1992, and yet Defendant's self-interested city council chose to maintain that system. District-based elections have proven to be an effective remedy to the sort of vote dilution seen in Santa Monica. It is time to allow **all** Santa Monica residents an equitable voice in their city government by: 1) prohibiting Defendant from continuing to impose its discriminatory election system; and 2) implementing district-based elections, or other appropriate remedy, for Defendant's city council.

Dated: September 25, 2018

By: _____
Kevin Shenkman,
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[17] At trial, Defendant attempted to undermine this simple comparison of the Latino citizen voting age population proportion to the threshold of exclusion used by several courts. (*U.S. v. Village of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411; *U.S. v. City of Euclid* (N.D. Ohio 2008) 580 F.Supp.2d 584.) Specifically, Defendant suggested that this Court should consider the Latino proportion of voter turnout rather than the Latino proportion of citizen voting age population. But that same argument was rejected by the court in *Village of Port Chester* when one of Defendant's experts—Peter Morrison—argued the same thing in that case. (See *Village of Port Chester*, at pp. 425–427.)