No. S263972

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITY OF SANTA MONICA,

Defendant and Appellant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Plaintiffs and Respondents.

APPLICATION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE; [PROPOSED] REPLY

After a Decision by the Court of Appeal
Second Appellate District, Division Eight, Case No. B295935
Los Angeles County Superior Court Case No. BC616804
The Hon. Yvette M. Palazuelos, Judge Presiding

Gov't Code, § 6103

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APPLICATION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

The City of Santa Monica respectfully requests that the Court grant it leave to file a reply in support of its pending motion for judicial notice.

The California Rules of Court do not specifically provide for reply briefs in support of motions in the Supreme Court, but they do not preclude them either. (See Cal. Rules of Court, rule 8.54.) The leading practice guide indicates that reply briefs may be permitted if there is good cause. (See Eisenberg et al., Cal. Practice Guide: Civ. Appeals & Writs (The Rutter Group 2020) ¶ 5:254.)

Here, good cause exists to permit the City to respond to the multiple arguments that plaintiffs have raised in opposition to judicial notice. As explained below, the arguments in favor of (and against) taking judicial notice are distinct from the City's merits arguments on the issues to which the judicially noticed materials are relevant.

[PROPOSED] REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

Plaintiffs' theory of this case is that Latinos, especially those living in the "Latino-concentrated Pico Neighborhood," do not run and win often enough under the City's at-large election system, and that a district-based election system would result in more Latinos running for and winning seats on the City Council. (OB at pp. 22-24, 60-64, 72-73.) Plaintiffs insist that the

California Voting Rights Act requires the City to abandon the at-large system as soon as possible and replace it with a district-based system. Change is so urgently needed, they argue, that this Court should decide issues that the Court of Appeal never addressed, conclude that plaintiffs have proven every element of their CVRA claim, and reinstate the trial court's district-based remedy. (See, e.g., OB at pp. 12, 57.)

The City has asked the Court to take judicial notice of certain facts that cast doubt on the propriety of plaintiffs' demand that the Court abandon its usual practice of deciding only issues addressed by the Court of Appeal, and instead resolve the case in their favor in one fell swoop (see Ans. Br. at pp. 48-49)—namely, that six Latino candidates ran in the 2020 Council election, that three won, and that two of those three live in the Pico Neighborhood. (Mtn. at pp. 9-10, 13.)

Plaintiffs never meaningfully address—let alone dispute—these key facts in their opposition. Nor do they seriously argue that any of these facts are incapable of immediate and accurate determination by resort to sources of reasonable indisputable accuracy. Judicial notice is therefore appropriate under Evidence Code section 452, subdivision (h).

Rather than focusing on the propriety of judicial notice, plaintiffs resort to a series of distractions. The City will address each in turn.

1. The City is not introducing the 2020 election results in support of its arguments on racially polarized

voting. Plaintiffs suggest that the City seeks judicial notice so that the 2020 election could count in the City's favor in analyzing the question of *racially polarized voting*—that is, whether, absent "special circumstances," a white majority usually defeats Latino-preferred candidates. (E.g., Opp. at pp. 8-12.) But the City never said any such thing—not least because, in the City's view, it is impossible to determine which candidates were Latino-preferred in any election without expert analysis of voting behavior, and there is no such analysis for the 2020 election. (See Ans. Br. at pp. 52-56, 58-60.) Plaintiffs, by contrast, assume that Latino voters prefer only Latino-surnamed candidates. They contend that the election of such candidates determines whether a public entity has complied with the CVRA. (E.g., Opp. at pp. 8-9, 13-14.) The City seeks only to meet that argument on its own terms, and to show that no immediate remedy is required to place Latino-surnamed candidates or Pico Neighborhood residents on the Council; the Council currently has more of both than it would have under plaintiffs' preferred election system, highlighting the absence of any vote dilution. (Mtn. at p. 13.) As a result, the City's motion for judicial notice serves much more modest purposes than plaintiffs would have the Court believe.

2. **This Court may take judicial notice of post-judgment facts.** The City's motion expressly acknowledged that the 2020 election results "postdate the trial court's judgment,"

and thus these facts "were not presented to the trial court." (Mot. at p. 3.) It is true that appellate courts "generally" decline to take judicial notice of evidence not presented to the trial court. (*Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn.3.) But because post-judgment facts by definition are not something that trial courts could have considered before entering judgment, appellate courts' general reluctance to take judicial notice is "somewhat flexible"—for example, reviewing courts may judicially notice post-judgment facts that (as here) are not in dispute, which would "not usurp the fact-finding function of the trial court." (*Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 [taking judicial notice of party's post-judgment insolvency].) And judicial notice of post-judgment facts is also appropriate where a court is reviewing the propriety of an injunction—as plaintiffs have asked this Court to do. (See, e.g., *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1460, fn. 5 [on appeal from a preliminary injunction that restrained a high school superintendent from denying diplomas to students who passed the California high school exit exam, taking judicial notice of the exam results released after the trial court issued the injunction to illustrate the practical effect of that injunction].)

3. **The City is not asking for fact-finding.** Plaintiffs repeatedly argue that appellate courts may not engage in post-judgment fact-finding. (Opp. at pp. 1-2, 5.) But the

City is not asking the Court to resolve disputed questions of fact. The very purpose of judicial notice is to acknowledge facts that are *not* subject to reasonable dispute and that can be verified without the fact-finding process of a trial. (Evid. Code, § 452, subd. (h).) In plaintiffs' principal case, by contrast, this Court held that reviewing courts generally should not make findings of fact under Code of Civil Procedure section 909, and specifically should not rely on the unsworn statements of counsel presented for the first time on appeal. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405-408.) And notwithstanding this Court's decision in *Zeth S.*, courts have taken judicial notice of post-judgment facts, even in parental-rights cases. (E.g., *In re Marina S.* (2005) 132 Cal.App.4th 158, 166; *In re Karen G.* (2004) 121 Cal.App.4th 1384, 1390.)

4. **The City is not asking for judicial notice to secure a reversal.** Plaintiffs assert that a reviewing court may consider post-judgment facts only to affirm a judgment, not to reverse one. (Opp. at pp. 5, 7, fn. 2.) Yet the City *is* seeking affirmance here (the operative judgment is that of the Court of Appeal).

5. ***Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781 is irrelevant.** Plaintiffs cite *Jauregui* for the proposition that courts may not consider post-judgment elections. (Opp. at pp. 4, 9.) But *Jauregui* has no bearing on this case because there, the defendant city did not contest the trial court's findings that its election system

diluted minority voting strength. (226 Cal.App.4th at p. 792.) An election postdating the trial court's issuance of a preliminary injunction could not displace that concession, particularly when the results of that election were irrelevant to the two legal issues raised on appeal. Here, by contrast, the City has argued from the start of this case that plaintiffs cannot prove vote dilution—which is the very question plaintiffs are now urging this Court to decide.

6. **The Court may properly take judicial notice of who ran in and won the 2020 election.** Plaintiffs assert that the City may not seek judicial notice of the ethnicity of Council candidates, insisting that the only valid way to measure ethnicity is through a telephone survey. (See Opp. at pp. 13-14.) But the Latino ethnicity of two of the winning candidates—Councilmembers de la Torre and Davis—is already in the record. (Mtn. at pp. 10-11 [citing trial evidence and plaintiffs' briefing showing that Councilmembers de la Torre and Davis are Latino].) And Councilmember Parra (another winning candidate) and Jara, Gomez, and Muntaner (unsuccessful candidates) all have Latino surnames, which can be verified by evidence already in the record—the U.S. Census Bureau's list of Spanish surnames. (See Mtn. at pp. 10-11, citing 25AA11103 [Gomez], 25AA11143 [Muntaner], 25AA11156 [Parra]; see also 25AA11115 [Jara]; RT8714:17-20 [trial testimony from Ms. Jara confirming she is "a Latina woman"].) When plaintiffs refer to "Latino" candidates, that

is all they really mean—that the candidates have Spanish surnames. Plaintiffs did not prove at trial that all of the "Latino" candidates on whom the trial court focused (24AA10685-10686) were, in fact, Latino. Plaintiffs showed only that a handful of Santa Monica voters thought some of those candidates had Latino-sounding surnames. (See 13AA5129.)

7. **Residences.** Plaintiffs do not seriously dispute that Councilmembers Parra and de la Torre live in the Pico Neighborhood. They could not do so with respect to Councilmember de la Torre—he not only wrote as much on his candidate statement, but also testified to this fact at trial. (Mtn. at p. 16.) As for Councilmember Parra, the Court should, as plaintiffs themselves suggest, take judicial notice of the fact that she stated she lives in the Pico Neighborhood. (Opp. at pp. 12-13.) Plaintiffs argue that voter *perception* of candidates is all that matters (*id.* at pp. 13-14); if that were accurate, then Councilmember Parra's statement that she is a longtime resident of that neighborhood (Mtn., Ex. C) would undermine plaintiffs' contention that an immediate change in the City's election system is necessary to give the Pico Neighborhood a voice on the Council.

CONCLUSION

The Court should grant the City's motion for judicial notice.

DATED: April 12, 2021

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Kahn Scolnick
Kahn Scolnick

Attorneys for Defendant and Appellant City of Santa Monica

PROOF OF SERVICE

I, Daniel R. Adler, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years, and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, California 90071-3197. On April 12, 2021, I served:

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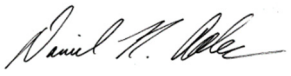

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S263972**
Lower Court Case Number: **B295935**

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4/12/2021

Date

/s/Daniel R. Adler

Signature

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