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17 NICHOLAS GUTIERREZ,  
18  
19 *Plaintiff,*  
20 vs.  
21 CITY OF BURBANK, and DOES 1 through 100,  
22 inclusive,  
23  
24 *Defendants.*

Case No.: 23 ST CV 25587

**DEFENDANT CITY OF  
BURBANK'S NOTICE OF  
DEMURRER AND DEMURRER  
TO COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

*[Request for Judicial Notice,  
Declaration of Marguerite Mary Leoni,  
and [Proposed] Order Filed  
Concurrently]*

**HEARING: Res. No. 160213940159**  
DATE: January 16, 2024  
TIME: 8:30 a.m.  
DEPT: 30  
JUDGE: Hon. Barbara M. Scheper

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD**

2 **PLEASE TAKE NOTICE** that on January 16, 2024 at 8:30 a.m., or as soon thereafter as  
3 the matter may be heard in Department 30 of the above-captioned court, located at 111 N. Hill St.  
4 Los Angeles CA 90012, defendant City of Burbank (“City”) will, and hereby does, demurrer to the  
5 complaint filed herein on October 19, 2023, pursuant to Code of Civil Procedure section 430.10  
6 subdivision (e), and (f) on the following grounds:

7 **GROUND FOR DEMURRER TO COMPLAINT**

8 **Demurrer To Plaintiff’s First Cause Of Action**

9 **For A Violation Of The California Voting Rights Act (“CVRA”)**

10 Plaintiff’s Complaint fails to state facts sufficient to constitute a cause of action. (Code Civ.  
11 P. § 430.10, subd. (e).)

12 **Demurrer To Plaintiff’s Second Cause Of Action**

13 **For A Violation Of California’s Equal Protection Clause**

14 Plaintiff’s Complaint fails to state facts sufficient to constitute a cause of action. (Code Civ.  
15 P. § 430.10, subd. (e).)

16 **Demurrer To Plaintiff’s Entire Complaint**

17 Plaintiff’s Complaint fails to allege which racial or ethnic minority group has suffered  
18 impairment or abridgment of its right to vote under the California Voting Rights Act (“CVRA”) or  
19 California’s Equal Protection Clause. (Code Civ. P. § 430.10, subd. (f).)

20 The complaint seeks injunctive relief pertaining to the City’s use of its historical at-large  
21 electoral system and a declaration that the City’s use of its current at-large electoral system violates  
22 the CVRA and the California Constitution. Yet the sparse relevant factual allegations fail to state a  
23 cause of action under the CVRA or the California Constitution’s Equal Protection Clause. The  
24 Complaint does not set forth any facts establishing either of two requisite elements of the first cause  
25 of action under the CVRA – racially polarized voting and dilution of the ability of the plaintiff  
26 protected class to elect chosen candidates. Also, Plaintiff does not set forth the factual showing of  
27 discriminatory purpose and discriminatory effects required to maintain a claim for purposeful  
28

1 discrimination under California's Equal Protection Clause in Plaintiff's second cause of action.  
2 Finally, the Complaint fails to allege whose voting rights have been impaired or abridged.


3 Through counsel, the City met and conferred by letter and telephonically with Plaintiff on  
4 December 7, 2023 under Code of Civil Procedure section 430.41, subdivision (a), but Plaintiff  
5 declined to amend or dismiss the Complaint. The City therefore brings this demurrer as to both causes  
6 of action alleged and as to the entire Complaint.

7 This demurrer is based on (1) this notice of demurrer and demurrer; (2) the attached  
8 memorandum of points and authorities; (3) the concurrently filed request for judicial notice and all  
9 other matters of which this Court may take judicial notice under sections 451, 452, and 453 of the  
10 California Evidence Code; (4) the Declaration of Marguerite Mary Leoni; (5) the records and files  
11 in this matter; and (6) such other evidence and argument of counsel as this Court may permit.

12  
13 Dated: December 18, 2023

NIELSEN MERKSAMER  
PARRINELLO GROSS & LEONI LLP

14  
15  
16 By: \_\_\_\_\_



Marguerite Mary Leoni  
Christopher E. Skinnell  
David J. Lazarus  
*Attorneys for Defendant*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Complaint levels serious allegations of race-based discrimination against the City of  
4 Burbank (“City”), without alleging any of the facts that the law clearly requires. Plaintiff Nicholas  
5 Gutierrez (“Plaintiff”) claims that the City has used its longstanding system of at-large elections for  
6 the purpose of discriminating against residents based on their race and ethnicity, and that City  
7 elections are plagued by racially polarized bloc voting that impairs the ability of minorities to elect  
8 the candidates of their choice. These are particularly serious charges to level against a city that prides  
9 itself on its diversity and inclusivity. Yet, the Complaint fails to satisfy the core factual pleading  
10 elements to sustain claims under the CVRA or California’s Equal Protection Clause.

11 The Complaint does not set forth any facts to support its contention under the CVRA that  
12 racially polarized voting or vote dilution has occurred in Burbank. Basic pleading standards require  
13 far more than reciting a list of statewide ballot measures and baldly stating that “[t]here is evidence  
14 of racially polarized voting” in the City. (Compl. ¶ 30.) The core of these claims is intensely factual  
15 and “intensely local,” and decades of state and federal case law clearly establish the plaintiff’s burden  
16 to allege that local elections feature (1) cohesive voting by protected class voters, (2) cohesive voting  
17 by the majority, and (3) a clash of those blocs that results in the defeat of the protected class’s  
18 preferred candidates. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 46 (“*Gingles*”); *Pico Neighborhood*  
19 *Assn v. City of Santa Monica* (2023) 15 Cal.5th 292, 306, 318 (“*Pico*”).) The Complaint does not  
20 provide any facts showing cohesive voting by protected class voters or by the rest of the electorate  
21 in City elections. No concrete electoral results in actual elections are cited. (*Gomez v. City of*  
22 *Watsonville* (9th Cir 1988) 863 F.2d 1407, 1415 [“the issue of political cohesiveness [shall] be judged  
23 primarily on the basis of the voting preferences expressed in actual elections.”].) No minority-  
24 preferred candidates are ever described, nor does the Complaint allege any minority-preferred  
25 candidates that were defeated as a result of the alleged majority bloc voting.

26 Plaintiff similarly fails to plead facts sufficient to establish the necessary element of dilution.  
27 (*Pico, supra*, 15 Cal.5th at 315 [a plaintiff cannot prevail based “solely on proof of racially polarized  
28 voting” and must meet their burden on dilution, which is “a separate element under the CVRA”].)

1 Contrary to the California Supreme Court’s recent explanation as to what a CVRA plaintiff must  
2 plead to satisfy this element, Plaintiff does not identify a reasonable alternative voting practice or  
3 allege facts demonstrating that the lawful alternative would improve the protected class’s ability to  
4 elect preferred candidates. (*Id.* at 315, 322.) The Complaint’s bare invocation of the term “dilution”  
5 in several paragraphs does not suffice. (See Compl. ¶¶ 5, 29, 31, 33, 65.)

6 Finally, the Complaint fails to allege facts demonstrating a violation of California’s Equal  
7 Protection Clause under either the discriminatory purpose prong or the discriminatory effects prong.  
8 Plaintiff is required to allege facts supporting that a substantial motivation of the City Council in  
9 using at-large elections, was to discriminate against protected class voters. (Cf. *Dem. Nat’l Comm.*  
10 *v. Hobbs* (9th Cir. 2020) 948 F.3d 989, 1038 (“*Hobbs*”).) In addition, Plaintiff must allege  
11 discriminatory effects, that is, impairment or abridgment of the right to vote through racially  
12 polarized voting and vote dilution. Plaintiff has not alleged facts to demonstrate either.

## 13 **II. FACTUAL BACKGROUND AND ALLEGATIONS OF THE COMPLAINT**

### 14 *a. City of Burbank Formation and Elections*

15 The City of Burbank was incorporated on July 8, 1911, and adopted a charter on January 13,  
16 1927. (Cal. Uncod. Init. Measures & Stats Deer 1927-18 Burbank City Charter.) Since then, elections  
17 for the five members of the City Council have been conducted at-large. Terms are staggered, such  
18 that two or three council offices appear on the ballot every two years. (Compl. ¶¶ 18-20.)

### 19 *b. The City’s Diversity and Inclusivity*

20 A point of pride for the City and its residents is its diversity. Plaintiff alleges that the total  
21 population of the City is 44.2 percent races other than non-Latino white. (Compl. ¶ 6.) Plaintiff is  
22 Latino (Compl. ¶ 24), and the Latino population of the City according to the 2020 Census is  
23 approximately 24 percent. (RJN Ex. 1.) Latinos who are eligible to vote constitute approximately 22  
24 percent of all eligible voters. (RJN Ex. 2.) The Urban Institute’s recent nationwide survey of  
25 community levels of inclusivity, measured in terms of income segregation, rent burden, share of  
26 population who are not in school and have not graduated, and working poor, concluded that the City  
27 ranked 8th out of 274 cities across the country in terms of overall inclusion. (RJN Ex. 3.)  
28

1           c.       *City Diversity as Reflected in Its Leadership*

2           According to the Complaint, the City is and historically has been led by a council of diverse  
3 members. (See Compl. ¶ 21 [alleging the election of a person of Hispanic origin to the City Council  
4 in 2001, 2005, 2009, 2013, 2017, and 2022].) Of the current five members of the City Council, (1)  
5 Council Member Nikki Perez is descended from immigrants from El Salvador and Guatemala, and  
6 is an indigenous and openly LGBTQIA+ elected official (she received a record breaking 17,958  
7 votes in the 2022 election) (RJN Ex. 4 & 5); (2) Council Member Zizette Mullins was born in Cairo,  
8 Egypt, and emigrated to the United States from Egypt at the age of 13, not speaking a word of English  
9 (RJN Ex. 6); and (3) Mayor Konstantine Anthony is the first openly autistic elected official in the  
10 western part of the United States (he received then a record breaking 17,529 votes in the 2020  
11 election). (RJN Ex. 7 & 8; see also Compl, ¶ 22.)

12           Diverse candidates from a wide range of backgrounds have experienced electoral success  
13 over the past twenty years, including Latina Marsha Ramos, who was elected for two terms (2001  
14 and 2005), Latino Jess Talamantes, who was elected to three terms (2009, 2013, and 2017), Latino  
15 Robert Frutos, who was elected to two terms (2013 and 2017), and Latino Jef Vander Borgh, who  
16 was elected to two terms (1999 and 2003). (Compl. ¶ 21; RJN Ex. 9.) Of the thirty-two races for City  
17 Council seats from 2001 to the present (see Compl. ¶ 6, setting time frame), at least nine were won  
18 by members of protected classes, specifically individuals who self-identify as Hispanic or Latino  
19 (28%). (Compl. ¶¶ 21 & 22.) This 28 percent exceeds proportional representation for the 22 percent  
20 of eligible Latino voters of the City.

21           d.       *The City's Consideration of a Transition to District-Based Elections.*

22           The Complaint acknowledges that, when the City received correspondence from Plaintiff's  
23 counsel in August 2022 claiming voting rights violations, it acted quickly and seriously. It hired  
24 counsel, a demographer, and outreach consultants at substantial expense; it adopted a Resolution of  
25 Intent ("Resolution") to make a transition from at-large to by-district systems; it created a new  
26 website and mapping tools to enable the public to shape the process of map drawing; it engaged in  
27 extensive public outreach, including by convening a total of six public hearings, eight community  
28 hearings, and five community forums to discuss a transition to by-district elections; and it thoroughly

1 debated the merits of a wide range of potential maps most of which had been submitted by members  
2 of the public. (RJN Ex. 10.) After taking these steps, the City Council paused to await the decision  
3 and guidance of the California Supreme Court in *Pico Neighborhood Association v. City of Santa*  
4 *Monica*, which involved the interpretation of several key provisions of the CVRA, including the  
5 requirement of proving vote dilution under the law. (*Id.*) Following issuance of a decision in *Pico*  
6 and after thoroughly debating the merits of a transition to district elections, all five members of the  
7 Council voted not to adopt a district map at this time. (Compl. ¶ 49 & fn. 15.) Rather, the Council  
8 voted to study an alternative reform, cumulative voting, while referring additional questions about  
9 the structure of City government to the City’s Charter Review Commission. (*Id.* at fn. 15  
10 [commencing at 1:55:35].) Further, the Council invited Plaintiff, who had not participated at all in  
11 the districting process, to provide feedback “to ensure any potential outcome addresses the concerns  
12 posed by the initial notice” of a voting rights violation. (*Id.*; see Compl. ¶¶ 36-52).

### 13 **III. LEGAL STANDARD**

14 “[T]he party against whom a complaint . . . has been filed may object, by demurrer,” including  
15 on the grounds that “[t]he pleading does not state facts sufficient to constitute a cause of action,” and  
16 “[t]he pleading is uncertain,” meaning it is “ambiguous and unintelligible.” (C.C.P. § 430.10, subd.  
17 (a), (d)-(f).) “The reviewing court accepts as true all facts properly pleaded in the complaint in order  
18 to determine whether the demurrer should be overruled.” (*Guardian N. Bay, Inc. v. Superior Court*  
19 (2001) 94 Cal.App.4th 963, 971.) However, courts do not assume the truth of “contentions,  
20 deductions or conclusions of fact or law.” (*Cansino v. Bank of Am.* (2014) 224 Cal.App.4th 1462,  
21 1468; *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537 [“It is settled law  
22 that a pleading must allege facts and not conclusions, and that material facts must be alleged directly  
23 and not by way of recital.”].) In addition, a court ignores allegations in the body of the complaint  
24 that are contrary to documents incorporated by reference in it<sup>1</sup> and treats the documents as  
25 controlling over their characterization in the pleading. (*Exec. Landscape Corp. v. San Vicente*  
26 *Country Villas IV Ass’n* (1983) 145 Cal.App.3d 496, 499.) Finally, the CVRA is a statutory cause of

27 \_\_\_\_\_  
28 <sup>1</sup> The Complaint includes 19 footnotes incorporating links to electronic versions of official documents of the City of Burbank. All these documents are part of the Complaint and subject to judicial notice. For the convenience of the Court, copies of the relevant documents are filed with this demurrer for ease of reference.

1 action which must be pleaded with particularity (see *Covenant Care, Inc. v. Superior Court* (2004)  
2 32 Cal.4th 771, 790; *Lopez v. So. Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795), meaning  
3 plaintiff must allege the who, where, when, what, and how (see *Lazar v. Superior Court* (1996) 12  
4 Cal.4th 631, 645).

#### 5 **IV. ARGUMENT**

##### 6 **A. The First Cause of Action for Violation of the CVRA Should Be Dismissed For** 7 **Failure to Properly Allege Racially Polarized Voting or Dilution of the Ability to** 8 **Elect Chosen Candidates of the Protected Class Voters.**

###### 9 *1. There Is No Showing Of Racially Polarized Voting.*

10 Both the CVRA and the Federal Voting Rights Act (“VRA”) “require a plaintiff to show  
11 racially polarized voting – i.e., that protected class members vote as a politically cohesive unit, while  
12 the majority votes ‘sufficiently as a bloc usually to defeat’ the protected class’s preferred candidate.”  
13 (*Pico*, 15 Cal.5th at 306, 313, quoting *Gingles*, 478 U.S. at 56; accord Elec. Code § 14028(a).) It is  
14 black letter law that a vote dilution plaintiff must establish these *Gingles* bloc voting conditions and  
15 their impact (“*Gingles* factors”) at the outset of their case. (*League of United Latino American*  
16 *Citizens v. Perry* (2006) 548 U.S. 399, 425-426 [bloc voting facts are a “threshold condition[] for  
17 establishing a § 2 violation”].)<sup>2</sup> “At the *heart* of vote dilution law is the concept of racially polarized  
18 voting.” (Chris Elmendorf, *Racially Polarized Voting*, U. Chi. L. Rev. (2016) 587, 589; *McNeil v.*  
19 *Springfield Part Dist.* (7th Cir. 1988) 851 F.2d 937, 942-943 [bloc voting is critical threshold that  
20 “appropriately clos[es] the courthouse to marginal cases”].)

21 The CVRA specifies that racially polarized voting is evaluated based on standards in federal  
22 cases interpreting and applying Section 2 of the federal VRA. (Elec. Code § 14026(e); *Yumori-Kaku*  
23 *v. City of Santa Clara* (2020) 59 Cal.App.5th 385, 395 [“CVRA directs California courts assessing  
24 racially polarized voting to federal case law on section 2 of the federal Voting Rights Act of 1965”].)

25 Though the Complaint mentions racially polarized voting in several paragraphs,<sup>3</sup> nowhere

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26 <sup>2</sup> It is widely accepted that the *Gingles* factors serve an “essential manageability function” that would  
27 otherwise make the concept of vote dilution “open-ended subject to no principled means of application”  
28 (*McGhee v Granville County, North Carolina* (4th Cir 1988) 860 F2d 110, 116) and that would require courts  
to decide vote dilution cases on the basis of “highly political judgments” (*Bartlett v. Strickland* (2009) 556  
U.S. 1, 17 (Kennedy) (plurality)); see Elmendorf, *infra*, at 604.

<sup>3</sup> See Compl. ¶ 26 [“Elections held within the City of Burbank are characterized by racially polarized

1 does it address the factual elements of racially polarized voting (the *Gingles* factors) i.e., “that the  
2 protected class members vote as a politically cohesive unit [for particular candidates or positions],  
3 while the majority votes ‘sufficiently as a bloc usually to defeat’ the protected class’s preferred  
4 candidate.” (*Pico*, 15 Cal.5th at 306.) There are no facts alleged that satisfy these core pleading  
5 requirements; the Complaint lacks a single fact showing any voting preference by any group in any  
6 actual election. The Complaint does not contain a single fact showing that any racial minority group  
7 in the City is politically cohesive. (See, e.g., *Gomez*, *supra*, 830 F.2d at 1414-1417 [analyzing  
8 “political cohesiveness of Hispanics”].) Nor does it contain a single fact showing that any group  
9 votes as a bloc against the plaintiff-protected class. In fact, the Complaint does not allege a single  
10 instance of a minority-preferred candidate, let alone a minority-preferred candidate that was defeated  
11 due to majority bloc voting. (Cf. *Gingles*, 478 U.S. at 56 [third *Gingles* factor is “legally significant”  
12 majority bloc voting that enables it “usually to defeat the minority’s preferred candidates”].) Thus,  
13 Plaintiff fails the very “first” pleading requirement – to “demonstrate the existence of racially  
14 polarized voting.” (*Pico*, 15 Cal.5th at 318.)

15         The Complaint’s bare list of past *statewide ballot measures* does not establish the elements  
16 of racially polarized voting in *City* elections, or “endogenous” elections. (Compl. ¶ 31 [listing  
17 Proposition 61 (2016), Prescription Drug Prices, and Proposition 21 (undated), Rent Control].) These  
18 *exogenous* elections are far less probative than *endogenous* elections and cannot supplant  
19 endogenous elections where, as here, there are a substantial number of relevant endogenous elections  
20 (i.e., the City Council elections discussed in the Complaint, none of which is alleged to be  
21 characterized as featuring racially polarized voting). (See *Sanchez v. Colorado* (10th Cir. 1996) 97  
22 F.3d 1303, 1324-1325 [exogenous elections are “less probative than elections involving the specific  
23 office at issue”]; *United States v. Blaine County* (9th Cir. 2004) 363 F.3d 897, 912 [“exogenous

24 \_\_\_\_\_  
25 voting.”], ¶ 27 [“Racially polarized voting exists within the City of Burbank.”], ¶ 28 [definition of racially  
26 polarized voting], ¶ 29 [“[R]acially polarized voting and vote dilution have the effect of impeding  
27 opportunities for protected class voters to elect candidates of their choice.”], ¶ 30 [“Voters from protected  
28 classes are harmed by racially polarized voting.”], ¶ 31 [“There is evidence of racially polarized voting and  
vote dilution in the City of Burbank on state ballot measures since 2008.”], ¶ 33 [“There is also evidence of  
racially polarized voting and vote dilution in the City of Burbank on ballot measures at the local level in recent  
years, and for candidates for local and state office in the City of Burbank.”], and ¶ 75 [“Racially polarized  
voting has occurred, and continues to occur, in elections in the City of Burbank ...”].

1 elections alone could not prove racially polarized voting,” quoting *Citizens for a Better Gretna v.*  
2 *Gretna* (5th Cir. 1987) 834 F.2d 496, 502, *cert. denied*, 492 U.S. 905 (1989)]; *Clay v. Bd. of Educ.*  
3 (8th Cir. 1996) 90 F.3d 1357, 1361 fn. 9 [“expert’s analysis relies on exogenous elections, which  
4 should be used only to supplement the analysis of the specific election at issue.”].) Even if statewide  
5 elections were relevant, a plaintiff must still allege the *Gingles* factors regarding those elections,  
6 which Plaintiff has not done. Nor has Plaintiff alleged that the statewide ballot measures have a  
7 bearing on the rights of protected class members, such that they are relevant to a polarized voting  
8 analysis. (See Elec. Code § 14028(b); *Montes v. City of Yakima* (2014) 40 F.Supp.3d 1377, 1402  
9 [single ballot measure included in list of candidate elections because it involved issue of  
10 “importance” to minority group].) In sum, the Complaint fails to set forth sufficient facts about the  
11 ballot measure elections to satisfy Plaintiff’s burden (e.g., what were the positions preferred by  
12 protected class voters and the majority bloc of the rest of the voters, were the positions different,  
13 what were the outcomes of the elections and were the positions of protected class voters defeated.

14                   2.       *The Complaint Also Fails to Set Forth Facts Showing Dilution.*

15               The demurrer can separately be sustained on the separate ground that the Complaint fails to  
16 allege facts showing dilution, that “the protected class has less ability to elect its preferred candidate  
17 than it would have if the at-large system had not been adopted.” (*Pico, supra*, 15 Cal.5th at 314-315.)

18               The California Supreme Court has recently specified the elements of the dilution prong of a  
19 CVRA claim. A vote dilution plaintiff must: (1) “identify a reasonable alternative voting practice to  
20 the existing at-large electoral system” (*Pico*, at 315.); (2) allege facts demonstrating the lawful  
21 alternative would improve the Plaintiff class’s ability to elect preferred candidates and would not  
22 make the class worse off by a loss of its potential to elect candidates of choice elsewhere in the  
23 locality (*id.* at 322); and (3) allege facts going to the totality of the circumstances demonstrating vote  
24 dilution (e.g., number of candidates running; campaign appeals; polarization in voting) (*id.* at 308).

25               Plaintiff mentions the word “dilution” in five paragraphs: 5, 29, 31, 33, & 65. However, none  
26 contain any of the facts required by *Pico*. The Complaint does allege in paragraphs 67 and 76, “An  
27 alternative method of election exists — district-based elections — that will provide an opportunity  
28 for the members of protected classes as defined by the CVRA to elect candidates of their choice in

1 City of Burbank elections.” But the Complaint does not set forth any facts showing a comparison  
2 between anticipated Latino electoral performance under district-based elections and performance  
3 under the current system of at-large elections. (Cf. *Pico*, *supra*, 15 Cal. 5th at 318 [the plaintiff must  
4 show that, “assuming the same degree of racial polarization, the greater concentration of protected  
5 class voters in the hypothetical district would nonetheless be sufficient to enable them to elect their  
6 preferred candidate when combined with the available crossover votes” or “demonstrate sufficient  
7 voting strength where racially polarized voting by other voters in the hypothetical district is lower  
8 than in the community as a whole”]; *Sanchez v. City of Modesto* (2006)145 Cal.App.4th 660, 670  
9 [discussing cross-over and coalitional districts].)

10 The Complaint simply provides no facts to satisfy the Plaintiff’s burden to “demonstrate that  
11 some lawful alternative method of election would improve the protected class’s overall ability to  
12 elect its preferred candidates.” (*Pico*, at 322.) It does not set forth facts establishing the current  
13 opportunity for Latino voters to win elections. The Complaint does not allege which candidates  
14 preferred by protected class voters have been unable to win elections in the City’s at-large electoral  
15 system. Nor does it establish that members of protected classes would have an improved opportunity  
16 to elect candidates of their choice in district-based elections relative to at-large elections. Instead, the  
17 Complaint offers mere labels and legal conclusions that need not be accepted as true. (See *Cansino*,  
18 *supra*; Compl. ¶¶ 5 [at-large election method “has resulted in vote dilution”], 29 [“polarized voting  
19 and vote dilution have the effect of impeding opportunities”], 31 [“There is evidence of [] vote  
20 dilution [] on state ballot measures”].)

21 To illustrate, the Complaint alleges that from 2001 to 2022, there were almost always two  
22 elected Latino members of the City Council. (Compl. ¶ 21(f) & (r).) Plaintiff fails to allege that  
23 protected class voters preferred different candidates from those actually elected. Even assuming  
24 Latinos did prefer different candidates, the Complaint does not allege any facts demonstrating the  
25 protected class voters could form a sufficiently large voting bloc in a single-member district in which  
26 they could overcome the effect of racially polarized voting and have an opportunity to elect their  
27 alternative preferred candidates.

28 On the other hand, if the elected candidates were the chosen candidates of protected class

1 voters, the Complaint does not allege a single fact demonstrating that the plaintiff class would not be  
2 “worse off” concentrated in a single-member district compared to the success they have achieved in  
3 the at-large voting system. And finally, the Complaint does not allege facts substantiating how  
4 improved performance would result under the specific “characteristics” of the City taking into  
5 account the totality of the circumstances. (*Pico*, 15 Cal.5th at 320 [“intensely local appraisal” of  
6 contested electoral mechanism and proposed alternative methods is required].)

7 Furthermore, the actual facts alleged in the Complaint undercut any notion of vote dilution  
8 in the City against Latino voters. Of the thirty-two races for Council seats since 1997 (see Compl. ¶  
9 6), at least ten were won by persons of Latino origin, a 31 percent success rate (Compl. ¶¶ 21 & 22).  
10 This exceeds proportional representation for the 22 percent of the City’s eligible voter population  
11 that is Latino. Persistent proportional representation undermines the allegation that Latino voters lack  
12 an equal opportunity to elect their preferred candidates. (See *Gingles*, 478 U.S. at 77; see Elec. Code  
13 § 14028(b) [relevant fact is “extent to which candidates who are members of a protected class and  
14 who are preferred by voters of the protected class [] have been elected to the [relevant] governing  
15 body”]; cf. *Montes*, *supra*, 40 F. Supp. 3d at 1405 [absence of successful Latino candidates, despite  
16 Latinos representing one-third of voting age population and one-quarter of CVAP is “powerful  
17 evidence” that majority will usually defeat minority’s preferred candidate].)

18 **B. Plaintiff Fails to Allege any Facts That Plausibly Support the Second Cause of**  
19 **Action for Violation of the Equal Protection Clause of the California Constitution.**

20 A plaintiff bringing a racial discrimination claim under the Equal Protection Clause may  
21 prevail only upon proof of purposeful discrimination and discriminatory effects. (*Washington v.*  
22 *Davis* (1976) 426 U.S. 229, 239; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* (1985) 429  
23 U.S. 252, 265; *Pers. Admin. of Mass. v. Feeney* (1979) 442 U.S. 256, 274; *Kim v. Workers’ Comp.*  
24 *Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361-1362.) This standard applies to voting rights claims  
25 under both the U.S. Constitution and article I, section 7 of the state Constitution. (*Jauregui v. City of*  
26 *Palmdale* (2014) 226 Cal.App.4th 781, 800 [“California decisions involving voting issues quite  
27 closely follow federal Fourteenth Amendment analysis,” citing *Canaan v. Abdelnour* (1985) 40  
28 Cal.3d 703, 715, overruled on other grounds in *Edelstein v. City and County of San Francisco* (2002)

1 29 Cal.4th 164, 183].) Such claims “require a showing of intentional discrimination,” which is  
2 “notoriously difficult” to make “absent direct evidence of a discriminatory rationale.” (*Smith v.*  
3 *Henderson* (D.D.C. 2013) 982 F.Supp.2d 32, 49.) Plaintiff has not cleared that hurdle.

4 Plaintiff alleges that the City adopted and maintains Charter §§ 300 and 305, providing for  
5 at-large elections, for the purpose of discriminating against racial minorities. (Compl. ¶¶ 83-85.) Yet,  
6 there is not one word in the Complaint about the adoption of Charter §§ 300 and 305. Moreover, the  
7 factual allegations about the City’s 2023 districting process do not demonstrate a purpose to  
8 discriminate against Latino voters in the maintenance of an at-large voting system. Finally, as  
9 discussed at length above, there are no factual allegations about a discriminatory effect of the  
10 electoral system on the opportunity of protected class voters to elect preferred Council candidates  
11 either because of racially polarized voting or dilution.

12 *1. Plaintiff must allege facts demonstrating that a discriminatory purpose was a*  
13 *motivating factor behind the offending law.*

14 To prevail on an intentional discrimination claim, the plaintiff bears the initial burden of  
15 pleading facts demonstrating that a discriminatory purpose was a “substantial or motivating factor”  
16 behind the enactment or maintenance of the violative law. (*Hobbs, supra*, 948 F.3d 989, 1038; *N.C.*  
17 *State Conf. of the NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 233 [“discriminatory racial  
18 intent [must] motivate[] the enactment” of challenged provision] (“*McCrory*”).)

19 The plaintiff must allege *indicia of a prohibited discriminatory purpose*, such as: (1) a  
20 historical pattern of laws producing discriminatory results; (2) departures from the normal legislative  
21 process that shed light on the decisionmaker’s purposes; (3) the legislative history, specifically  
22 statements by legislators evincing a racial or pretextual motivation; and (4) whether the law has a  
23 disparate impact on a particular racial group. (*Hobbs, supra*, 948 F.3d at 1038, citing *Arlington*  
24 *Heights, supra*, 429 U.S. 252.) Intentional discrimination requires more than knowledge of  
25 consequences. (*Feeney, supra*, 442 U.S. 256, 270, 274-281 [rejecting gender-based challenge  
26 premised on veterans hiring where legislators knew nearly all veterans at the time were men].)

27 *2. The case law requires robust allegations under Arlington Heights.*

28 Substantial facts must be alleged to state a claim for purposeful discrimination. Conclusory  
allegations of discriminatory purpose, without supporting facts, are insufficient. (See *Moss v. United*

1 *States Secret Serv.* (9th Cir. 2009) 572 F.3d 962, 970-71 [dismissing discrimination claim that was  
2 unsupported by actual facts].) In *McCrary, supra*, plaintiffs made a thorough showing of purposeful  
3 race-based discrimination when the North Carolina Legislature adopted a sweeping omnibus  
4 elections bill that passed along party lines and without the vote of a single African-American  
5 legislator, and which created a strict photo identification requirement, shortened the early voting  
6 period, eliminated same-day voter registration, and eliminated pre-registration for 16 and 17-year  
7 olds, among other restrictive changes, all of which would have an outsized impact on the state’s  
8 growing African-American population. (831 F.3d at 218-223.) Specific facts in that case established  
9 that “North Carolina has a long history of race discrimination generally and race-based vote  
10 suppression,” among other forms of official discrimination, federal courts and the DOJ had  
11 determined repeatedly that the General Assembly “acted with discriminatory intent,” and the  
12 legislation had been rushed through the process; in fact, the State itself conceded that voting  
13 restrictions were targeted for counties that “were disproportionately black.” (*Id.* at 223-224.)

14 Similarly, in *Hobbs, supra*, plaintiffs challenged the State of Arizona’s policy of discarding  
15 ballots cast in the wrong precinct and adoption of a statute criminalizing the collection and delivery  
16 of another person’s ballot. The Court found that the “Arizona legislature has a long history of race-  
17 based discrimination, disenfranchisement, and voter suppression,” that the measure’s adoption was  
18 preceded by an unfounded and racially-tinged advocacy video, and that DOJ had previously rejected,  
19 while the state was subject to pre-clearance, legislation to criminalize the collection of another  
20 person’s ballot because the drafter himself had admitted the provision was “targeted at voting  
21 practices in [] Hispanic areas.” (948 F.3d at 1007-1008, 1039.)

22 Other cases finding intentional race discrimination have involved similar egregious facts of  
23 official discrimination, race-based appeals, and previous determinations of purposeful official  
24 discriminatory action. (See *Williams v. Dallas* (N.D. Tex. 1990) 734 F. Supp. 1317, 1408-1410  
25 [discrimination found when configuration of single-member districts packed and cracked African-  
26 American population to maintain “political power of whites,” and where there was a history of racial  
27 appeals in elections, a previous judicial finding of intentional discrimination, and other indicia];  
28 *Political Civil Voters Org. v. Terrell* (N.D. Tex. 1983) 565 F. Supp. 338, 340-342 [candidates in at-

1 large system required to own real property, a “direct governmentally sanctioned exclusion similar to  
2 the poll tax,” and City discarded popular vote result to hold by-district elections].)

3 A plaintiff cannot meet their burden of alleging purposeful racial discrimination by simply  
4 stating, as Plaintiff does here, that a city uses at-large elections and that those elections dilute a  
5 minority group’s electoral influence. (See *Rodgers v. Lodge* (1982) 458 U.S. 613, 617 [at-large  
6 elections are not unconstitutional *per se*; rather, to violate Equal Protection, at-large elections must  
7 be conceived and operated as purposeful devices to further racial discrimination].)

8 3. *The Complaint does not allege facts supporting a racially discriminatory*  
9 *purpose in the establishment and maintenance of an at-large voting system.*

10 The Complaint does not offer any facts, let alone any comparable to Arizona or North  
11 Carolina above, that demonstrate purposeful discrimination under *Arlington Heights*. Plaintiff does  
12 not set forth a shred of historical background or legislative history showing that the City initially  
13 adopted its system of at-large elections in Charter §§ 300 and 305 for the purpose of discriminating  
14 against racial minorities. (See *City of Mobile v. Bolden* (1980) 446 U.S. 55, 70 fn.15 [at-large  
15 elections were “universally heralded not many years ago”].) Nor does he set forth any historical  
16 background showing that the City maintained its current election system for an impermissible  
17 purpose. The fact that the Council adopted a resolution in 2020 acknowledging past private  
18 discrimination in the City and committing to “review and assess City policies, procedures,  
19 ordinances, values, goals, and missions through an anti-racism lens to foster an unbiased and  
20 inclusive environment that is free of discrimination”— cuts deeply against Plaintiff’s allegation that  
21 the City maintains at-large voting for the purpose of racial discrimination. Contrary to Plaintiff’s  
22 characterization, the resolution itself states that “no official ordinance or law of the City of Burbank  
23 has been found imposing sundown restrictions.” (Compl. ¶ 32 & fn. 7; RJN Ex. 11.) A court ignores  
24 allegations in the body of the complaint that are contrary to documents incorporated by reference in  
25 it and treats the documents as controlling over their characterization in the pleading. (*Exec.*  
26 *Landscape Corp., supra*, 145 Cal.App.3d at 499.) The City’s acknowledgment of past private  
27 discrimination, and its commitment to use its public tools to advance racial equity should be  
28 applauded, not cynically hung around the City’s neck as an albatross.

The Complaint also does not show that the City diverged from the standard legislative

1 process, such as by failing to provide notice of public meetings or by rushing to adopt a measure in  
2 the dead of night. (Cf. *McCrary, supra* [in immediate aftermath of U.S. Supreme Court’s *Shelby*  
3 *County* decision invalidating federal oversight under VRA § 4 of local voting changes, legislature  
4 vastly expanded earlier version of restrictive voting legislation, delayed public release of final  
5 legislative text and rushed to adopt it through party-line and racially divided vote].) To the contrary,  
6 the Complaint’s factual allegations (not its labels or conclusions, which need not be credited) show  
7 that the City followed standard procedures and was diligent and thorough in evaluating Plaintiff’s  
8 demand letter; it adopted a Resolution of Intent to initiate a transition to district elections and held  
9 two initial public hearings and three community hearings, followed by four public hearings and five  
10 additional community forums to consider and debate potential district maps, all within seven months  
11 of adoption of the Resolution. (Compl. ¶¶ 8-9 & 36-49; RJN Ex. 10.) Further, the City’s process is  
12 consistent with the statutory framework governing transitions to district elections. (Elec. Code §  
13 10010.) Nor does the Complaint set forth any statements by officials evincing a purpose to  
14 discriminate against City residents (there are none). That the City’s process was more extensive than  
15 the statutory requirements or the process pursued by the local school district (Compl. ¶ 9 & fn. 4; *id.*  
16 ¶ 53 & fn. 18, 29, & 20) does not support a cause of action for intentional discrimination.<sup>4</sup>

17 While the Complaint alleges that the Council deferred adopting an ordinance transitioning to  
18 by-district elections, it fails to set forth facts showing that the deferral was racially motivated. To the  
19 contrary, the Complaint alleges that the City first delayed a decision to await the California Supreme  
20 Court’s seminal decision in *Pico* construing the CVRA (Compl. ¶ 46 & fn. 14), and then ultimately  
21 deferred adopting by-district elections to: (1) consider other options such as cumulative voting (as  
22 suggested in *Pico, supra*, 15 Cal. 5th at 317 [“Though the parties have focused in this court on  
23 district elections, the trial court found that, in addition to district elections, several alternative at-  
24 large election methods—cumulative voting, limited voting, and ranked choice voting—would each

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26 <sup>4</sup> Plaintiff misstates the law in asserting the City was required to adopt a districting plan within 90 days of  
27 adopting its Resolution and failed to meet that deadline. (Compl. ¶ 8(c) & (d), citing Elec. Code §  
28 10010(a)(1)(B) which does not exist.) There is no deadline for the City to act under Section 10010, however  
if it does adopt a districting plan within 90 days of adopting a Resolution, it is protected from litigation during  
that period: “If a political subdivision passes a resolution pursuant to subparagraph (A), a prospective plaintiff  
shall not commence an action [] within 90 days of the resolution’s passage.” (Elec. Code § 10010(e)(3)(B).)

1 enhance Latino voting power and their ability to elect candidates of their choice.”)]; (2) refer certain  
2 questions to the Charter Review Committee; and (3) reach out to Plaintiff about his concerns.  
3 (Compl. ¶¶ 47-49 & fn. 15 & 16; RJN Ex. 10.) None of these allegations plausibly support an  
4 allegation that the Council’s deferral had a racially discriminatory purpose. Instead, they allege City  
5 race-neutral purposes.

6 Plaintiff’s suggestion that the City Attorney’s recommendation to adopt a districting plan  
7 supports the conclusion that failure to adopt a plan was purposefully discriminatory is entirely at  
8 odds with the facts set forth in the Complaint. (See Compl. ¶ 10.) The City Attorney’s staff report  
9 does not reveal any such concerns. (RJN Ex. 10.) In fact, the Resolution expressly states that the  
10 Council does not believe the City is in violation of the CVRA or any law and that it is considering  
11 by-district elections to avoid expensive litigation under the CVRA. (Compl. ¶ 36 & fn. 10; RJN. Ex.  
12 12 [“Council has determined that the public interest is better served by initiating a process for  
13 transition to a district-based election system and thereby avoiding the risk and costs associated with  
14 defending a lawsuit under the CVRA.”].)

15 The Complaint also lacks a single fact showing that the City has engaged in a pattern of  
16 official discrimination, such as would be established through past judicial or administrative fact-  
17 finding. (Cf. *Williams v. Dallas*, 734 F. Supp. at 1408-1410 [extensive history of official  
18 discrimination].) That a Charter Review Committee, comprised of diverse citizen leaders, at first  
19 proposed to study by-district elections for City Council elections but then decided not to do so, does  
20 not “acknowledge[] the existence of discrimination within Burbank” as Plaintiff concludes. (Compl.  
21 ¶¶ 34, fn. 8 & 35 fn. 9; RJN Ex. 13.) No facts can reasonably suggest that the Committee viewed the  
22 City’s at-large election system as a form of race-based discrimination when it voted to dismiss the  
23 topic as an area for study and recommendation. Finally, true to the adage “no good deed goes  
24 unpunished,” the Committee’s adoption of a recommendation to insert a social equity and anti-  
25 discrimination clause into the Charter does not support a conclusion the City maintained *its election*  
26 *system* for the purpose of discriminating on the basis of race, rather than its dedication to racial  
27 equity. Nothing in the record indicates that the Committee’s recommendation was even related to,  
28 let alone intended to, recognize or counter official discrimination in the City’s electoral system.

1 Finally, Plaintiff concedes that a race-neutral and non-discriminatory purpose animated the  
2 decision to defer adopting districts at this time. According to the Complaint, the decision to maintain  
3 at-large elections was not motivated by intent to discriminate against racial minorities, but rather was  
4 “politically motivated.” (Compl. ¶ 82.) Plaintiff further pleads on information and belief that the  
5 Council postponed adopting a districting map because certain members of the Council are worried  
6 that district elections “could mean the end of the line for some of the councilmembers.” (Compl. ¶  
7 49.) Such conclusory allegations, even if true, do not support a cause of action for an equal protection  
8 violation. (See *League of Women Voters of Chi. v. Wolf* (N.D. Ill. 2013) 965 F. Supp. 2d 1007, 1017  
9 [“The political motivation alleged, to favor certain incumbent alderman and to disadvantage certain  
10 ‘independent’ aldermen, does not by itself implicate the Equal Protection Clause.”]; cf *Garza v.*  
11 *County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 771 [30-year history of discriminatory  
12 redistricting cracking the Latino voting bloc to prevent the evolution of a Latino majority  
13 supervisorial district demonstrated intent to create the very discriminatory result that occurred].)

14 **C. The Complaint Is Uncertain for Failure to Allege Which Protected Class Has**  
15 **Suffered Injury to its Voting Rights.**

16 Plaintiff alleges he is Latino but makes no allegations about the voting rights of Latinos in  
17 the City. What’s worse, the Complaint does not set forth which protected class is unable to elect  
18 candidates of their choice. (See Compl. ¶¶ 6 [alleging 44% of the City’s population constitutes  
19 “protected classes”], ¶¶ 23, 24 [discussing Asian and Armenian candidates].) The Complaint’s  
20 generalized allegations about “protected classes” do not provide the City with notice about whose  
21 rights are at issue. (See *Sanchez, supra*, 145 Cal.App.4th at 666 [“The reality in California is that no  
22 racial group forms a majority. As a result, any racial group can experience the kind of vote dilution  
23 the CVRA was designed to combat, including Whites.”].) For example, the Complaint does not  
24 allege which candidates are or were candidates of choice for which unidentified protected class, any  
25 facts establishing group voting behavior and by whom (Whites? Whites and Asians? Armenians?),  
26 or whether the candidate of choice of the unspecified protected class was defeated. (See *supra*, at  
27 IV(A).) For this reason, the Complaint is so uncertain the City cannot reasonably respond to it. (Code  
28 Civ. P. § 430.10, subd. (f) & § 430.80(a); see *Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1085 fn.  
4 [failure to raise demurrer for uncertainty waives the objection].)

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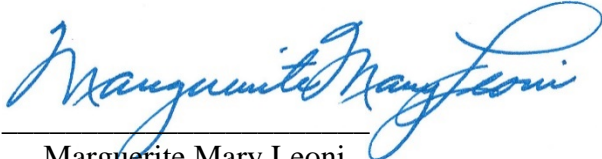
**V. CONCLUSION**

For the foregoing reasons, Plaintiff does not set forth the facts necessary to meet his burden. Defendant respectfully requests that the Court sustain the demurrer.

Respectfully submitted,

Dated: December 18, 2023

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## Make a Reservation

### NICHOLAS GUTIERREZ vs CITY OF BURBANK

Case Number: 23STCV25587 Case Type: Civil Unlimited Category: Civil Rights/Discrimination  
Date Filed: 2023-10-19 Location: Stanley Mosk Courthouse - Department 30

#### Reservation

Case Name: NICHOLAS GUTIERREZ vs CITY OF BURBANK	Case Number: 23STCV25587
Type: Demurrer - without Motion to Strike	Status: RESERVED
Filing Party: City of Burbank (Defendant)	Location: Stanley Mosk Courthouse - Department 30
Date/Time: 01/16/2024 8:30 AM	Number of Motions: 1
Reservation ID: 160213940159	Confirmation Code: CR-VJAM7U4XTUJJKGTSRR

#### Fees

Description	Fee	Qty	Amount
Demurrer - without Motion to Strike *** Fees Exempted by Gov Code 6103.1 ***	60.00	1	0.00
TOTAL			\$0.00

#### Payment

Amount: \$0.00	Type: GOVT_EXEMPT
Account Number: n/a	Authorization: n/a
Payment Date: 1969-12-31	

Print Receipt

Reserve Another Hearing