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Electronically FILED by  
Superior Court of California,  
County of Los Angeles  
5/14/2024 4:18 PM  
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF LOS ANGELES

11 NICHOLAS GUTIERREZ, ) Case No.: 23 ST CV 25587  
12 )  
13 Plaintiff, ) PLAINTIFF'S OPPOSITION TO DEMURRER  
14 ) TO FIRST AMENDED COMPLAINT;  
15 v. ) MEMORANDUM OF POINTS AND  
16 ) AUTHORITIES  
17 CITY OF BURBANK, and DOES 1 through 100 )  
18 inclusive, )  
19 ) DATE: May 30, 2024  
20 ) TIME: 8:30 a.m.  
21 ) DEPT: 30  
22 ) JUDGE: Hon. Barbara M. Scheper  
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1 Plaintiff, Nicholas Gutierrez (“Plaintiff”), through undersigned counsel, hereby submits this  
2 “Memorandum of Points and Authorities” in Opposition to the Defendant’s Demurrer to the First  
3 Amended Complaint (“FAC”). The demurrer lacks merit as it fails to acknowledge the substantial and  
4 factual allegations raised in the complaint which, if proven true at trial, would entitle Plaintiff to relief  
5 under the California Voting Rights Act (“CVRA”) and the Equal Protection Clause of the California  
6 Constitution:

7 **I. INTRODUCTION**

8 The CVRA supports the rights of voters in California who would otherwise have their vote  
9 diluted when racially polarized voting occurs. The Equal Protection clause of the California Constitution  
10 prohibits cities from intentionally setting up a voting scheme that disparately impacts racial minorities.  
11 The crux of the demurrer is how much the Plaintiff needs to allege at this point. California courts have  
12 not, to the knowledge of either party, granted a demurrer on a CVRA case. It is the very nature of voting  
13 rights cases that require full development of the facts through discovery, as seen in all of the cases  
14 marshalled by both parties. At this stage, Plaintiff needs only to put Defendant on notice of these causes  
15 of action and allege the facts that support these causes. This low threshold was easily met in this case by  
16 the FAC. These causes of action will likely rise or fall on expert testimony, which will analyze voter  
17 data, election history, and other evidence to make conclusions related to dilution and polarization. The  
18 allegations and other factual contentions in the FAC have evidentiary support and are likely to have  
19 further evidentiary support after a reasonable opportunity for further investigation or discovery.

20 **II. PLAINTIFF STATES A CLAIM FOR VIOLATION OF THE CVRA**

21 The FAC states facts sufficient to constitute the first cause of action, a violation of the CVRA.

22 **A. The FAC states facts alleging racially polarized voting.**

23 Defendant acknowledged that the FAC “mentions” racially polarized voting in several  
24 paragraphs. (Defs’ Memo 13:14). The allegations are found, for example, at paragraphs 38-41:  
25 “...Racially polarized voting exists within the City of Burbank. There is a clear difference between the  
26 choice of candidates and other electoral choices that are preferred by voters from protected classes and  
27 the choice of candidates and other electoral choices that are preferred by voters in the rest of the  
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1 electorate....” Though substantial evidence will be adduced at discovery and introduced by experts at  
2 trial, the FAC does provide electoral and social history evidence to support its allegation, including a list  
3 of Latino protected class member city council candidates who lost their elections (FAC ¶ 25), special  
4 circumstances that show why certain results do not defeat a conclusion of polarization (FAC ¶ 26, 31),  
5 identification of exogenous elections showing polarization ((FAC ¶ 42, 46), history of discrimination  
6 ((FAC ¶ 43-45), history of Korean American, Armenian American, and African American candidates  
7 lack of success (FAC ¶ 25). These are factors that courts have looked at in finding voting rights  
8 violation. (Elec. Code § 14028(e); See *Gomez v. City of Watsonville* (9th Cir. 1988) 863 F.2d 1407,  
9 1412-1414 (identifying seven factors approved by U.S. Senate Judiciary Committee Report.)

10 **B. The FAC states facts alleging dilution.**

11 Defendant acknowledges that the FAC asserts dilution in eleven paragraphs of the FAC. (Defs’  
12 Memo 9:26-27.) In paragraph 5, the FAC states, “the City of Burbank's at-large method of election has  
13 resulted in vote dilution for residents of protected classes and has denied them effective political  
14 participation in elections to the City of Burbank City Council.” This mirrors the language of the  
15 California Supreme Court, which states, “Dilution occurs when an at-large system denies a protected  
16 class the potential to elect its preferred candidate or influence the election's outcome.” (*Pico*  
17 *Neighborhood Assn v. City of Santa Monica* (2023) 15 Cal.5th 292, 339.) The Court goes on to say,  
18 “[t]he plaintiff in a CVRA action must identify a lawful alternative to the existing at-large electoral  
19 system that will serve as the benchmark undiluted voting system.” (*Ibid.*) Plaintiff plainly does so in  
20 paragraph 83 of the FAC: “An alternative method—district-based elections—exists that will provide an  
21 opportunity for the members of a protected class as defined by the CVRA to elect candidates of their  
22 choice in City of Burbank City Council elections.” The Supreme Court states that the lawful alternative  
23 electoral system may include, but is not limited to, single-member district elections. (*Id.* at 308.) Finally,  
24 the Court says that a court presented with a dilution claim should undertake a searching evaluation of the  
25 totality of circumstances and remand the case to the appellate court for further review. (*Id.* at 339.) In  
26 other words, the dilution may be the conclusion drawn by the finder of facts after the evidence has been  
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1 discovered, admitted, and argued. The Defendants proffering novel facts and attacking the facts in the  
2 FAC is misguided as premature and should be preserved until trial.

3 In paragraph 34, the FAC again asserts dilution: “This system, by diluting the voting strength of  
4 minority groups, potentially undermines the efficacy of his vote and the representation of his  
5 community. The dominance of the non-Latino population in elections for the past two decades  
6 demonstrates the harm of racially polarized voting and voter dilution.”

7 The Defendant’s attempt to counter the allegations with its own facts provides strong support for  
8 finding that Plaintiff has supported the causes of action with factual allegation, otherwise the Defendant  
9 would have nothing to argue against. Further, because Defendant has delved into defending itself against  
10 the causes of action, it shows that the Defendant has sufficient and specific enough notice of the causes  
11 of action to defend itself and a demurrer should be denied.

12 In a voting rights case, a plaintiff is required to allege facts that state a claim that is plausible on  
13 its face and not specifically delineate the extent of the harm. (*Luna v. Cnty. of Kern* (E.D. Cal. Sep. 2,  
14 2016) No. 1:16-cv-00568-DAD-JLT, 12.) The plaintiffs in *Luna* survived a challenge to their pleading  
15 that stated that voting is polarized between Latino and non-Latino voters without a statistical analysis.  
16 (*Id.* at 2.) Plaintiff’s FAC sets out several historical facts and electoral results that state a claim of  
17 polarized racial voting, dilution, and impairment, an amount of facts that are greater than in *Luna*. The  
18 next level of evidence is the superior statistical evidence which will be adduced during discovery.  
19 Tellingly, the Defendant does not cite a single voting rights case addressing a pleading challenge, much  
20 less a case that remotely supports a demurrer in this context.

21 Defendant does cite to a case where the government wins a summary judgment motion. The  
22 procedural history of that case, however, favors the Plaintiff: Those Plaintiffs had time for the discovery  
23 phase of trial on the critical issues, which Defendants are trying to deny Plaintiffs in this court. (*McNeil*  
24 *v. Springfield Part Dist.* (7th Cir. 1988) 851 F.2d 937, 942.) That holding lends itself to discovery for  
25 voting rights cases, or at worst is inapposite to an attack on the pleadings, which come earlier than  
26 discovery. The Court notes that summary judgment would be inappropriate because they generally call  
27 for substantial and complex factual determinations, in the absence of *Gingles*. (*Id.* at 941.)  
28

1 In any event, under California law, the holding in *McNeil* has been legislatively overruled.  
2 Plaintiffs *McNeil* lost summary judgment because they had not provided evidence of geographically  
3 compactness and that impairment was not sufficient. The CVRA was passed in 2001, over a decade after  
4 *McNeil* (1988) was decided and left out the geographically compactness requirement of the federal  
5 Voting Rights Act of 1965 (“VRA”). The CVRA was passed to provide greater protection to California  
6 voters than the VRA and makes it easier to challenge at-large districts in two respects. (*Pico* at 306.)  
7 First, the CVRA, unlike the VRA, upon which *Gingles* is based, does not require a plaintiff to  
8 demonstrate that the members of the protected class would be geographically compact or concentrated  
9 enough to constitute a majority of a hypothetical single-member district. (*Ibid.*) Second, while a plaintiff  
10 can succeed under either the CVRA or the VRA by showing that the at-large method dilutes a protected  
11 class's voting power by impairing its ability "to elect" candidates of its choice, only the CVRA allows  
12 the plaintiff to win by showing that the at-large method impairs the class's ability to influence the  
13 outcome of an election. (*Id.* at 307.)

14 The dilution claim is a complicated one that requires a searching a searching evaluation of the  
15 totality of the facts and circumstances including: the characteristics of the specific locality, its electoral  
16 history, the history of discrimination, the use of electoral devices or other voting practices or procedures  
17 that may enhance the dilutive effects of at-large elections, denial of access to those processes  
18 determining which groups of candidates will receive financial or other support in a given election, the  
19 extent to which members of a protected class bear the effects of past discrimination in areas such as  
20 education, employment, and health, which hinder their ability to participate effectively in the political  
21 process, and the use of overt or subtle racial appeals in political campaigns, a very local appraisal of the  
22 design and impact of the contested electoral mechanisms, and the design and impact of the potential  
23 alternative electoral system. (*Pico Neighborhood Assn v. City of Santa Monica* (2023) 15 Cal.5th 292,  
24 308.) These facts have been alleged to the extent possible before discovery in the FAC.

25 **C. Defendant attempts to assign weight to evidence, as if it is the Finder of Fact**

26 The Defendant tries to suggest that its facts have greater weight than the Plaintiff’s. For example,  
27 it claims a “news” article (how many voters actually read the Burbank Leader?) containing a bracketed  
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1 parenthetical that he came from Peru, is enough to convert that person into a preferred candidate of the  
2 Latino voting bloc, despite an Anglo-Saxon last name (Jef Vander Borcht). This article was published in  
3 2005, more than a year after he was elected, which means only Latino Burbank voters who mastered  
4 time travel would have known that Jef Vander Borcht had a Latin American connection when they voted  
5 for him (his elections were in 1999 and 2003).

6 Similarly, the Defendant tries to diminish the weight of the Latino candidates who lost city  
7 council elections. (Defs' Memo 14:7.) It says Latino candidates having electoral success is inconsistent  
8 with an inference of racially polarized voting. However, this factual dispute suggests that a demurrer is  
9 not sustainable as it shows there are facts in favor of polarized voting.

10 The Finder of Fact will have the difficult job of weighing evidence, such as what evidentiary  
11 value one election may have relative to another. (*Yumori-Kaku v. City of Santa Clara* (2020) 59  
12 Cal.App.5th 385, 416.) The court spends several pages reviewing the complex statistical arguments from  
13 two prominent statistics experts. Plaintiff's expert was Dr. Morgan Kousser, a professor of history and  
14 social science at the California Institute of Technology. Defendants relied on Dr. Jeffrey B. Lewis, a  
15 professor of political science at the University of California Los Angeles. The trial court also heard  
16 testimony from Dr. S. Karthick Ramakrishnan, plaintiffs' expert on Asian American political and civic  
17 participation. (*Id.* at 398.) The experts submitted testimony on political cohesion, sometimes challenging  
18 each other's opinions. (*Id.* At 400-404.) The court relied on the expert's ecological inference model to  
19 provide a valid tool to assess political cohesion. Political cohesion is synonymous with racially polarized  
20 voting and alleged in the FAC at paragraph 40 and as racially polarized voting, the statutory term<sup>1</sup>,  
21 numerous times in the FAC. It will be appropriately argued by experts at trial, as it was in *Yumori-Kaku*.

22 This is not the domain of counsel. It is not possible, much less fruitful, for non-experts lawyer to  
23 wage a battle at the demurrer about how many elections need to be won, lost or cited by whom and  
24 when in a complaint to prove racially polarized voting or what social history counts and what does not.  
25 Nor is it productive to make preliminary evaluations of the power of exogenous elections versus  
26 endogenous elections. No court has taken up the suggestion of Defendants in this regard and sustained a

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27  
28 <sup>1</sup> The existence of racially-polarized voting can be seen as protected class members voting as a politically cohesive unit while the majority votes sufficiently as a bloc to defeat the protected class's candidate. (*Pico, supra*, 15 Cal.5th at 330.)

1 demurrer. Racially polarized voting (political cohesion) was designated in paragraph 47 of the FAC as a  
2 Cal. Code Civ. Proc. § 128.7 area of reasonable further investigation and discovery.

3 Defendant’s arguments, if relevant, may go to the strength of Plaintiff’s evidence, a trial concern,  
4 not to the strength of the pleadings. Voting rights cases rely on exhaustive statistical methodologies,  
5 such as homogeneous precinct analysis, ecological regression, and ecological inference. (*Luna v. Cnty.*  
6 *of Kern* (E.D. Cal. 2018) 291 F. Supp. 3d 1088, 1118.) Defendant cites to Chris Elmendorf, *Racially-*  
7 *Polarized Voting*, *U. Chi. L. Rev.* (2016) 587, 589 (Def.’s Mem. 13:7.) Elmdorf states, “...the lower  
8 courts have not developed a crisp, objective test for racially polarized voting,....” (Elmendorf at 604.)  
9 The article spends much time describing the variance in court reasoning and decision. He concludes by  
10 saying:

11 *Now and then, judges have tried to make the polarization inquiry more*  
12 *rule-like, but these efforts have been largely unavailing. The discretionary*  
13 *nature of the threshold test is to a large extent the ironic by-product of the*  
14 *courts’ decision to make candidates’ vote shares by racial group the*  
15 *central factor in screening vote dilution claims. This was supposed to*  
16 *make the test objective and constraining; but because candidate attributes*  
17 *mediate the relationship between racial polarization in political*  
18 *preferences and polarization in vote shares, and because observed*  
19 *candidate attributes reflect strategic choices by candidates and other*  
20 *actors, the screening test cannot be made constraining without also*  
21 *becoming absurd—that is, unless it is rebuilt on new evidentiary*  
22 *foundations. (*Id.* at 681.)*

18 Defendant’s source admits widespread confusion as to which facts prove dilution and  
19 polarization – and particularly the observation that constraining the test makes it absurd applies equally  
20 to the demurrer. The facts in the FAC state a cause of action and allow the parties to start discovery for  
21 this totality of the circumstances test.

### 23 **III. PLAINTIFF STATES A CLAIM FOR VIOLATION OF EQUAL PROTECTION**

#### 24 **A. The First Amended Complaint (“FAC”) states facts sufficient to constitute the second cause** 25 **of action, a violation of California Constitution’s Equal Protection Clause.**

26 The FAC sets out a history of the Defendants acts and omissions that lay a factual basis for the  
27 allegation of an equal protection violation. (FAC ¶¶ 37, 48-49, 61, 87-95.) Burbank was a sundown town  
28 during or around the time the original charter came into effect and at that time, at-large elections were

1 known to dilute the minority vote. (FAC ¶ 93.) Many real estate subdivisions in Burbank adopted and  
2 enforced racially restrictive covenants and deed restrictions that kept Black people and people of color  
3 from purchasing property and living in those subdivisions for several decades in the 20th century. (FAC  
4 ¶ 43.) Oral and written history, public accounts, and newspaper articles demonstrate the prevalence of  
5 sundown practices in Burbank for a significant part of the 20th century. (FAC ¶ 43.) The risks and harms  
6 of racial polarization were recognized by the California legislature when it passed the CVRA. Discovery  
7 is the way to find out Defendant’s intent.

8         The three specific moments that Plaintiff asserts demonstrates Defendants intent to discriminate  
9 have the common thread of maintaining at-large voting in the face of evidence that it is racially-  
10 polarizing. The First was failing to convert to district elections after receiving a report from Plaintiff  
11 alleging CVRA violation, hiring a demographer, and holding several public hearings to select district  
12 maps. (FAC ¶ 88.) The second was the Defendant’s failure to put district elections on the ballot in 2018.  
13 (FAC ¶ 8.) The Third was Defendant’s duty to convert to district elections continually for years, since  
14 the CVRA passed a decade earlier. (FAC ¶ 90.)

15         The Defendant was on notice of racial polarization and dilution when the CVRA was passed in  
16 2001. City Attorneys, City Managers, and City Council read bulletins from listservs, California League  
17 of Cities, and the like, as well as keeping informed from newspapers and media outlets. This is  
18 manifested, for example, by the appearance of district elections on the Charter Citizen Committee in  
19 2017. (FAC ¶ 9.) The Charter Committee had district elections on a list of topics to consider per an  
20 August 9, 2022, letter from the Chair. (Def.’s Mem. Ex. 13 at 1.) The Assistant City Manager and City  
21 Attorney staffed the meetings and “provided information and a historical framework” to the committee.  
22 (*Ibid.*) The Defendant provided this letter but did not produce the agenda and minutes for the meetings  
23 that the letter said existed, implying that the details are damaging to their case.

24         Intentional discrimination was again manifested when counsel for Plaintiff served Defendant  
25 with a certified letter August 23, 2022, notifying Defendant of a CVRA violation. (Def.’s Mem. Ex. 12.,  
26 ¶ 5.) Attached to the letter was a report alleging evidence of racially polarized voting. (Def.’s Mem. Ex.  
27 10, at 1.) As of May 14, 2024, 630 days (about 1 year 8 and a half months) have passed since that letter  
28 was received. Burbank Unified School District, by contrast, voted to approve its district map and

1 elections sequence after receiving its letter and report in 170 days (about 5 and a half months). (FAC ¶  
2 12).

3 On January 24<sup>th</sup>, 2023, Defendant retained a demographer, National Demographics Company  
4 (Def.'s Mem. Exh. 10., at 2.) and appropriated \$100,000 (Def.'s Mem. Ex. 12 at 3). In the 476 days  
5 (about 1 and a half years) that have passed since then, Defendant and their demographer have not  
6 produced a report in response to Plaintiff's August 2022 report denying racial polarization and dilution.  
7 It is reasonable to infer that Defendant and its consultant conceded the issues. Core statistical concepts  
8 and election data do not change.

9 Defendant held several public hearings and outreach workshops to explain the map drawing  
10 process and to draw and select the maps. (Def.'s Mem. Ex. 12 at 5.) No credible explanation has been  
11 proffered as to why a year of public process and hundreds of thousands of taxpayer dollars have been  
12 abandoned. The allegations of a complaint must be construed liberally by drawing reasonable inferences  
13 from the facts pleaded. (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4<sup>th</sup> 952, 958.)

14 Defendants have the right to claim that the evidence is not compelling, and they may have the  
15 chance to prove that at trial. However, it is the right of the Plaintiff to have his day in court after  
16 properly alleging instances of acts and omissions that collectively prove intentional discrimination  
17 against a protected class of voters.

18 Defendant may misstate the law regarding motivation. It states that, "Plaintiff is required to  
19 allege facts showing that a substantial motivation of the City Council in using at-large elections was to  
20 discriminate against protected class voters. (Cf. *Dem. Nat'l Comm. v. Hobbs* (9th Cir. 2020) 948 F.3d  
21 989, 1038 ("Hobbs").)" (Def.'s Mem. 10:3.) However, *Hobbs* states clearly that "Rather, Plaintiffs need  
22 only show that discriminatory purpose was "a motivating factor." *Id.* at 265–66, 97 S.Ct. 555 (emphasis  
23 added)." (*Dem. Nat'l Comm. v. Hobbs* (9th Cir. 2020) 948 F.3d 989, 1038.) A substantial motivation  
24 would meet the test but is not required. The 9<sup>th</sup> Circuit en banc panel majority in *Hobbs* ruled in favor of  
25 the voting rights plaintiff and against the government.

26 Similar to the CVRA allegations, the Defendants attacks on this evidence may go the strength of  
27 the evidence, which may or may not meet its burden at trial, but it is not appropriate to defeat a pleading  
28 at this stage. A demurrer is not the appropriate procedure for determining the truth of disputed facts or

1 what inferences should be drawn where competing inferences are possible. (*Crosstalk Productions, Inc.*  
2 *v. Jacobson* (1998) 65 Cal.App.4th 631, 635.)

#### 3 4 **IV. LEGAL STANDARD**

5 A pleading allegation must be liberally construed, with a view to substantial justice between the parties.  
6 (Cal. Civ. Proc. Code § 452). A complaint will be upheld against a demurrer if it pleads facts sufficient  
7 to place the defendant on notice of the issues to allow the defendant to prepare a defense. (*Doe v. City of*  
8 *Los Angeles* (2007) 42 Cal. 4<sup>th</sup> 531, 549-50.) Pleading ultimate facts, as compared to evidentiary facts, is  
9 ordinarily sufficient. (*Id.* at 550.) This rule is particularly applicable to declaratory relief. (*Foster v.*  
10 *Masters Pontiac Co.* (1958) 158 Cal.App.2d 481, 486.) Causes of action may be alleged in general  
11 terms. “[T]here is no requirement that [the plaintiff] identify and allege the precise moment of the  
12 injury, or the exact nature of the wrongful act.” (*Hahn v Mirda* (2007) 147 Cal.App. 4<sup>th</sup> 740, 747, citing  
13 *Guilliams v. Hollywood Hospital* (1941) 18 Cal.2d 97, 102.) A demurrer tests whether a complaint states  
14 a cause of action. (*Ibid.*) On demurrer, questions of fact can only be resolved when the allegations of the  
15 complaint allow for only one legitimate inference. (*TracFone Wireless, Inc. v. County of Los Angeles*  
16 (2008) 163 Cal.App.4th 1359, 1368.)

#### 17 **V. MISUSE AND IRRELEVANCY OF “JUDICIAL NOTICE” EVIDENCE**

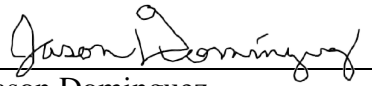
18 Defendants attempt to use “judicial notice” to declare that racial polarization, dilution or  
19 impairment did not take place in Burbank. These complex legal-factual determinations are not subject to  
20 easy analysis; to wit, in a recent major CVRA case, the trial court decision on the matter was reversed  
21 by the appellate court, which was in turn reversed by the California Supreme Court. (*Pico Neighborhood*  
22 *Assn v. City of Santa Monica* (2023) 15 Cal.5th 292, 307). These factual determinations require  
23 significant time for investigation and discovery and will not be resolved by turning to, for example,  
24 parties’ self-promoting websites. The RJN documents are irrelevant, subject to reasonable dispute, not  
25 capable of immediate determination by sources of reasonably indisputable accuracy, and do not support  
26 the inferences the Defendant attempts to draw from them.

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**VI. CONCLUSION**

The Plaintiff asks the court to overrule the demurrer as Plaintiff has stated sufficient facts to constitute the causes of action. Should the Court be inclined to sustain the demurrer, the Plaintiff seeks leave to amend the FAC.

DATED: May 14, 2024



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Jason Dominguez  
Attorney for  
Plaintiff Nicholas Gutierrez