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5 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
6 IN AND FOR THE COUNTY OF LOS ANGELES

7 NICHOLAS GUTIERREZ,  
8 *Plaintiff,*

9 vs.

10 CITY OF BURBANK, AND DOES 1 through 100,  
11 inclusive,  
12 *Defendants.*

CASE NO.: 23 ST CV 25587

**AMICUS DAVID A. HOLTZMAN'S  
SUBMISSION RE AND SUPPORTING  
DEMURRER TO FIRST  
AMENDED COMPLAINT**

(Reservation No. 247941171087)

HEARING DATE: May 30, 2024  
TIME: 8:30 AM  
DEPT: 30  
JUDGE: Hon. Barbara M. Scheper

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22 I write as a friend of the court, after reading that in California “no law  
23 prevents amicus support at [the Superior Court] level, and trial courts usually will accept  
24 such briefs for filing.” (Reporters Committee for Freedom of the Press, “Amicus briefs,”  
25 <https://www.rcfp.org/privilege-sections/6-amicus-briefs/>, accessed May 23, 2024.)

26  
27 I am a Burbank resident, taxpayer, and voter. I am an attorney and member  
28 in good standing of the California State Bar, but I am not representing a client here. I am

1 a member of the County of Los Angeles Citizens Redistricting Commission, a former  
2 president of the League of Women Voters of Los Angeles, the founder and executive  
3 director of Los Angeles Voters For Instant Runoff Elections, and the founder and  
4 administrator of One Burbank, a group dedicated to keeping Burbank whole. Please note  
5 that I am not writing on behalf of any of those organizations.

6  
7 The City of Burbank’s memorandum of points and authorities  
8 accompanying its demurrer to the first amended complaint in this case admirably lays out  
9 reasons the demurrer should succeed. For each cause of action, each reason given in  
10 Burbank’s brief is sufficient in and of itself.

11  
12 I write to offer an additional reason for sustaining the demurrer as to the  
13 first cause of action in the First Amended Complaint: **The primary relief the plaintiff**  
14 **seeks is not available in this case, and he has failed to specify a lawful alternative.**

15 The City of Burbank may not use a district-based election method to elect  
16 its city council. Its city council may not adopt a district-based method for the election of  
17 its members. Within the city’s charter is language that forbids it, put there pursuant to a  
18 grant of plenary authority given by the voters of California via the California  
19 Constitution. The State Legislature may not take that away. A court order directing  
20 Burbank to elect its city council members by district would be an illegal court order.

21 As we know, the California Supreme Court recently held that, to succeed, a  
22 “California Voting Rights Act” (CVRA) plaintiff must offer a **lawful** alternative electoral  
23 method and show that the alternative would remedy the alleged CVRA violation. (Pico  
24 Neighborhood Association v. City of Santa Monica (2023) [*Pico*], as modified,  
25 S263972M, pp. 7, 24, 27-28. See [https://law.justia.com/cases/california/supreme-](https://law.justia.com/cases/california/supreme-court/2023/s263972m.html)  
26 [court/2023/s263972m.html](https://law.justia.com/cases/california/supreme-court/2023/s263972m.html).)

27 Among the alternatives the Court mentioned as acceptable are two methods  
28 that are at-large and would be lawful under Burbank’s city charter: cumulative voting and

1 ranked-choice voting. (See *id.* at pp. 19-20, 24-25, and Order Modifying Opinion, filed  
2 9/20/23.) [Using ranked-choice voting for proportional representation of voters is not a  
3 new idea in Burbank. A charter review committee chaired by a woman who went on to  
4 become the president of the League of Women Voters of the United States considered the  
5 idea decades ago.]

6 Here, the plaintiff has offered only “district-based elections” as the  
7 alternative. Since the sole proffered alternative is impermissible (unlawful) in Burbank,  
8 it does not satisfy the requirement to identify a lawful alternative, and a court may not  
9 impose it.

10  
11 The California Constitution includes a recipe for a city like Burbank to use  
12 if it wants to choose its own city council election method and have its choice be  
13 completely shielded from being overruled by the state legislature. The recipe? Step one:  
14 enact a charter. Step two: provide the election method “therein” (in the charter). (Cal.  
15 Const. Art. XI, section 5, subdivision (b)(4).) A city that follows the recipe has “plenary  
16 authority” to make the choice. (*Id.*)

17 Burbank, by its electorate, has followed the recipe and chosen to have  
18 “at large” elections, not district-based elections, for its city council. (Burbank City  
19 Charter, Article 3, Sections 300 and 305.)

20 Constitutional hierarchies like ours in California require courts to treat what  
21 constitutions say as constraints on what legislatures may do. When, as here, a  
22 constitution gives localities plenary authority to do something by following a recipe, the  
23 legislature must respect that. Even if the legislature finds something to be a matter of  
24 statewide concern, courts must not allow the legislature to disrespect the Constitution,  
25 even regarding that something. (In California, the Legislature may of course ask the  
26 people of the state to amend the State Constitution by putting an amendment on a  
27 statewide election ballot for popular approval.)

1                   **For failing to identify a lawful alternative electoral method as required**  
2 **by *Pico*, the First Amended Complaint fails to state a viable claim under the CVRA.**

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4                   I have compiled a table of cases, sorted by year, that some might say  
5 address this issue, and have included some comments on each. Please see Attachment 1.

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7                   Respectfully Submitted,

8                   

9                   David A. Holtzman, M.P.H., J.D.

10                  May 24, 2024

ATTACHMENT 1

Case Name & Citation(s)	Year	Court	Statute	Remarks
<p>Yumori-Kaku v. City of Santa Clara, 59 Cal.App.5th 385; 273 Cal.Rptr.3d 437 <b>(Santa Clara)</b></p>	<p>2020</p>	<p>Cal. Ct. App. 6th dist</p>		<p>The Court of Appeal here upheld the CVRA against Santa Clara’s charter-mandated method of electing its city council: by six separate city-wide elections to six numbered seats. The trial court here had “relied on Jauregui [the 2014 <b>Palmdale</b> case; see below] ... for the proposition that the [CVRA] preempts city charter provisions that establish at-large election of city council members.” But, as discussed below, the <b>Palmdale</b> case should not be used for that proposition, because <i>in Palmdale there were no such provisions</i> – there were no provisions in the Palmdale city charter that established at-large election of city council members.</p> <p><u>The key word where the California Constitution provides charter cities the right to decide their own city council election methods is “<b>therein.</b>”</u> A city only enjoys that right if it places the election method in the city charter, which it can only do through a ballot measure approved by the city’s voters. <u>The court of appeal opinion here contains no consideration of the California Constitution’s use of the word “<b>therein</b>” or the overbroad nature of the <b>Palmdale</b> opinion.</u></p> <p>The court of appeal declined an “invitation to depart from the Jauregui [<b>Palmdale</b>] court’s reasoning and holding,” although the <b>Palmdale</b> court did not rule on an election method specified in the city’s charter, so the constitutional provision that court purported to interpret did not apply there.</p>
<p>City of Redondo Beach v. Padilla; 46 Cal.App.5th 902 (. 2020) • 260 Cal. Rptr. 3d 263 (<b>Redondo Beach</b>, court of appeal)</p>	<p>2020</p>	<p>Cal. Ct. App. 2nd dist, div 7</p>	<p>CVPRA</p>	<p>Upheld the <b>Redondo Beach</b> trial court decision (see below). [The legislature should have specified “charter” cities, not simply cities, if it wanted the act at issue to apply to charter cities.]</p>

Case Name & Citation(s)	Year	Court	Statute	Remarks
City of Redondo Beach v. State of California, Alex Padilla, et al., Case No. BS 172218 ( <b>Redondo Beach</b> , trial court)	2018	State Superior Ct, L.A. County	CVPRA	The trial court here blocked the state from enforcing the California Voter Participation Rights Act (CVPRA) against Redondo Beach, a charter city. The CVPRA would have forced Redondo Beach to change its city council election days to coincide with statewide election days. In its judgment, the court decreed that “The California Voter Participation Rights Act (Elec. Code §§14050 - 14057) is unconstitutional as applied to charter cities.”
Op AG No. 16-603 (Opinion of Attorney General Xavier Becerra, answering a question presented by Assemblymember Chris Holden) ( <i>AG’s op on CVPRA</i> )	2017	Calif. AG’s office	CVPRA	Question: “Does the California Voter Participation Rights Act apply to charter cities, and to local school districts whose elections are governed by city charters?” Answer given: Yes. <b>FLAWS:</b> <u>No consideration of the California Constitution’s use of the word “therein.”</u> <u>Relies on the [inapplicable in the Burbank case] “4-part test” from <i>Cal. Fed., Vista, and Palmdale.</i></u> [Also, uses the word “integrity” in a way that is not ordinarily applied to elections (and would support protecting cities from being split into districts).]

<p>Jauregui v. City of Palmdale 226 Cal.App.4th 781 172 Cal. Rptr. 3d 333 (Jauregui) (the <b>Palmdale</b> case)</p>	<p>2014</p>	<p>Cal. Ct. App. 2nd dist, div 5</p>	<p>CVRA</p>	<p>No consideration of the California Constitution’s use of the word <b>“therein.”</b> <u>Palmdale did not specify “at large” in its charter. Burbank does.</u> The court’s consideration of Cal. Const. Art. XI Sec. 5(b)(4) “plenary authority” was inapposite to the facts of the case before it, because that authority is only for charter cities to specify certain things (such as election methods) <b>in their charters</b> – “to provide <b>therein.</b>” The majority opinion here wrongly states that the California Supreme Court had included the word “therein” in <i>Seal Beach</i> where it quoted from and discussed Art. XI Sec. 5(b). The court here did quote, but did not discuss, the constitution’s use of the word “therein.”</p> <p>Although the court here held that “in the municipal election context,” “[t]he “plenary authority ... can be preempted by a statewide law after engaging in [a] <i>four-step evaluation process</i>” (citing <i>Cal. Fed.</i> and <i>Vista</i>), the issue could not have been fairly litigated. <u>The <i>four-step test</i> was designed for sorting out conflicts between statewide statutes and ordinary charter city laws (what the Cal. Supreme Ct., in <i>Professional Fire Fighters</i>, called “local enactments”). Those conflicts stem from Const. Art. XI Sec. 5(a)’s grant to charter cities of authority over so-called “municipal affairs.”</u> There was such a conflict here in Palmdale, but <u>the court went too far in saying the <i>test</i> could be used to override the separate “plenary authority” granted by Sec. 5(b)(4) for certain types of charter provisions. No such charter provision was at issue here. The court should have simply found that Cal. Const. Art. XI Sec. 5(b)(4) was not relevant to the case.</u> The court would have thereby limited the purported applicability of its analysis and conclusions to charter cities (like Palmdale) without election methods provided in their charters. <u>Its use of Sec. 5(b)(4) made its ruling overbroad.</u></p> <p>And it was wrong. We have a constitutional order in this country. Constitutions govern legislatures. Legislatures do not preempt constitutions.</p> <p><b>Nobody should apply this court’s inapposite holding to Burbank’s charter.</b></p>
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Case Name & Citation(s)	Year	Court	Statute	Remarks
State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista; 54 Cal.4th 547, 552, 555-556 ( <b>Vista</b> )	2012	Cal. S.Ct.	Calif. prevailing wage law	<p><u>No consideration of the California Constitution’s use of the word “<b>therein.</b>” <b>Relies on</b> the first three parts of the [inapplicable in the Burbank case] (3 or) 4-part test laid out in <b>Cal. Fed.</b></u> Vista became a charter city largely to “give the city the option of not paying prevailing wages on its planned public works projects.” The ballot argument in favor of the charter adoption measure gave that as a reason. Once a charter city, Vista exercised its authority under Cal. Const. Art. XI Sec. 5(a), <b>not (b)(4)</b>, to contract for two new fire stations without requiring payment of prevailing wages. In a 5-2 decision, the Court said that was OK</p>
Cal. Fed. Savings & Loan Assn. v. City of Los Angeles; 54 Cal.3d 1, 16-17 ( <b>Cal. Fed.</b> )	1991	Cal. S.Ct	1979 amdt of Rev & Tax Code §23182	<p><u>No consideration of the California Constitution’s use of the word “<b>therein.</b>” <b>Considered only</b> Cal. Const. Art. XI Sec. 5(a), <b>not (b)(4)</b>.</u> Per the Court, state law designed to achieve tax rate parity between types of financial institutions preempted L.A.’s attempt to make S&amp;Ls pay biz tax. <i>The Court set forth and relied on a 4-part test (1-municipal affair?; 2-conflict?; 3-statewide concern?; 4- is state law reasonably related and tailored to that concern?)</i> [and buried the description of 4<sup>th</sup> part in the fourth-to-last paragraph of the discussion of the 3<sup>rd</sup>.] The Court also noted historical use of “ad hoc intuition,” the law’s conceptual uncertainty, and lack of reason to “expect doctrinal tidiness” in this area.</p>

Case Name & Citation(s)	Year	Court	Statute	Remarks
People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach 36 Cal.3d 591, 600, 205; Cal.Rptr. 794; 685 P.2d1145 ( <i>Seal Beach</i> )	1984	Cal. S.Ct	Meyers-Milias-Brown Act (MMBA)	<p>Selectively quoted from Cal. Const. Art. XI Sec. 5(b), and thus avoided considering or applying the word “therein.” The City of Seal Beach was sued for not complying with the MMBA’s “meet-and-confer” requirement before it proposed a charter amendment to its voters. <u>The case was about a charter city’s right to propose a charter amendment (specifically, the rules to be followed by city councils in putting labor-relations-related charter amendments on the ballot), not about anything it the city’s charter.</u> The Court concluded that the city council was required (under the MMBA) to meet and confer with labor representatives of its police officers before it proposed charter amendments that would affect matters relating to their labor representation.</p> <p>The constitutional provision at issue was Cal. Const. Art. XI Sec. 3(b), but the Court found Art XI Sec. 5 cases about municipal home rule to be “instructive.” After quoting parts of Sec 5(b), while leaving out the word “therein” (again, this case was only about what happens before something gets in a charter [therein]), the court quoted the <i>Professional Fire Fighters</i> case holding that <u>a “general law prevails over local enactments of a chartered city” [ordinances and regulations, not charter provisions authorized by Cal. Const. Art. XI Sec. 5(b)(4)],</u> “even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.”</p>

Case Name & Citation(s)	Year	Court	Statute	Remarks
<p>Baggett v. Gates 32 Cal.3d 128, 135, 140; 185 Cal.Rptr. 232; 649 P.2d 874 (<i>Bagget</i>)</p>	<p>1982</p>	<p>Cal. S.Ct</p>	<p>Public Safety Officers' Procedural Bill of Rights Act ("the Act")</p>	<p>The primary issue was “whether the Public Safety Officers' Procedural Bill of Rights Act (Bill of Rights Act) applies to chartered cities.” <u>The opinion quotes but does not discuss “therein” or limit its analysis to cities with directly conflicting provisions (here, conflicting with the Act) in their charters. In fact, the Court found no conflict at all between the Act and the authority provided to charter cities by Cal. Const., art. XI, § 5, subd. (b).</u> Instead, the Court found that the authority provided under subd. (a) did not preclude plaintiff police officers from being entitled to procedural protections under the Act. (The subject matter of the Act was “of sufficient statewide concern” to justify state “legislative intrusion into an area traditionally regarded as ‘strictly a municipal affair.’”) The intrusion overrode city personnel regulations not in the city charter.</p>
<p>Professional Fire Fighters, Inc. v. City of Los Angeles 60 Cal.2d 276, 294-295; 32 Cal.Rptr. 830; 384 P.2d 158. (<i>Professional Fire Fighters</i>)</p>	<p>1963</p>	<p>Cal. S.Ct</p>	<p>Labor C. secs. 1960-1963; Gov. C. secs. 3500-3509</p>	<p>The state laws for “firemen” at issue here were slightly different from general policies and general rights and obligations of labor and management set forth in the Labor Code. <u>Although the Court noted that the state law was in conflict with the city’s “charter provisions, ordinances and regulations,” the opinion here only addressed “ordinances and regulations enacted under the provisions of [L.A.’s] charter” (not the charter provisions themselves).</u> <u>This case did not address the word “therein,” which may not even have been in the state constitution at the time.</u> The Court noted that the state constitution failed to define “municipal affairs,” and found that the “the subject matter under discussion” was “of statewide concern,” not “exclusively” a municipal affair, so the state law prevailed.</p>