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15 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 IN AND FOR THE COUNTY OF LOS ANGELES
17

18 NICHOLAS GUTIERREZ,

19 *Plaintiff,*

20 vs.

21 CITY OF BURBANK, and DOES 1 through 100,
22 inclusive,

23 *Defendants.*

Case No.: 23 ST CV 25587

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

*[Request for Judicial Notice,
Declaration of Marguerite Mary Leoni]*

Reservation No. 995885231452

DATE: August 26, 2024

TIME: 8:30 AM

DEPT: 30

JUDGE: Hon. Barbara M. Scheper

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

2 **PLEASE TAKE NOTICE** that on August 26, 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 North Hill
4 Street, Los Angeles, California, 90012, defendant City of Burbank (“City”) will, and hereby does,
5 demur to the Second Amended Complaint (SAC) filed herein pursuant to Code of Civil Procedure
6 section 430.10, subdivision (e), on the following grounds:

7 **GROUND FOR DEMURRER TO FIRST AMENDED COMPLAINT**

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

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

10 The First Cause of Action of Plaintiff’s Second Amended Complaint fails to state facts
11 sufficient to constitute a cause of action. (Code Civ. 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 The Second Cause of Action of Plaintiff’s Second Amended Complaint fails to state facts
15 sufficient to constitute a cause of action. (Code Civ. P. § 430.10, subd. (e).)

16 Through counsel, the Defendant met and conferred with Plaintiff by letter and telephonically
17 on Tuesday, July 23, 2024, under Code of Civil Procedure section 430.41, subdivision (a), but
18 Plaintiff declined to amend the SAC. (Decl. of Leoni.)

19 This demurrer is based on (1) this notice of demurrer and demurrer; (2) the attached
20 memorandum of points and authorities; (3) the concurrently filed request for judicial notice and all
21 other matters of which this Court may take judicial notice under sections 451, 452, and 453 of the
22 California Evidence Code; (4) the Declaration of Marguerite Mary Leoni; (5) the Declaration of

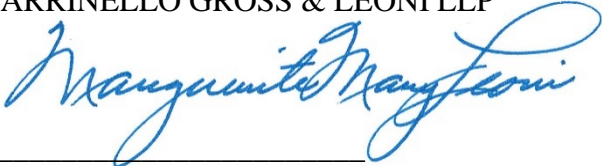
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1 Julia von Klan d'Amours; (6) the records and files in this matter including of the demurrer to the
2 Complaint and the First Amended Complaint; and (7) such other evidence and argument of counsel
3 as this Court may permit.

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Dated: July 30, 2024

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP



By: _____
Marguerite Mary Leoni
Christopher E. Skinnell
David J. Lazarus
Julia von Klan d'Amours
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Despite explicitly alleged electoral success, Plaintiff Nicholas Gutierrez (“Plaintiff”) claims
4 in the SAC that the City’s failure to change its longstanding system of at-large elections for City
5 Council dilutes the ability of Latino voters to elect chosen candidates and discriminates against them
6 based on their race and ethnicity.

7 Plaintiff filed the original complaint herein on October 19, 2023, alleging the same two causes
8 of action for violation of the California Voting Rights Act (“CVRA”) and of the Equal Protection
9 Clause of the California Constitution. Defendant generally demurred to both causes of action, and to
10 the entire complaint for uncertainty because it failed to allege whose voting rights were. The Court
11 sustained the demurrer for uncertainty with leave to amend, but did not rule on the general demurrers.

12 Plaintiff filed a First Amended Complaint (“FAC”) on February 14, 2024, alleging he is a
13 Latino voter of the City and “Latino American voters, a protected class, are harmed under
14 [Burbank’s] current at-large voting system.” (FAC ¶¶ 34 & 35.) Apparently conceding deficiencies
15 in the two causes of action alleged in the original Complaint, Plaintiff “tweaked” them to add some
16 factual—but still insufficient—allegations. In the First Cause of Action for violation of the CVRA,
17 Plaintiff alleged that 61 candidates ran for election to the City Council, including five successful
18 Latino candidates (who won over multiple election cycles), and four other Latino candidates were
19 unsuccessful in their electoral bids. (See FAC ¶¶ 25-29 & 47.) Regarding the Second Cause of
20 Action, for violation of California’s Equal Protection Clause, Plaintiff added the allegation that the
21 City’s electorate voted in 2018 to move City Council elections from odd-numbered years to
22 November of even-numbered years but the City Council did not place on that ballot a measure to
23 transition from at-large to by-district voting. (FAC ¶¶ 7, 8, & 9)

24 Defendant demurred to the FAC. On May 30, 2024, the court ruled that the allegations of the
25 FAC were “completely conclusory as to the essential elements of [Plaintiff’s] claims” but after oral
26 argument granted Plaintiff another opportunity to amend. (Decl. of Leoni, Ex. 4, Transc. at 4:12-14.)

27 Plaintiff filed his SAC on June 27, 2024. The SAC alleges that Latinos voted as a bloc for
28

1 candidates Dominguez and Gonzalez (2001¹), Espinoza (2003²), and Guillen (2013, 2015, and
2 2017³) but these candidates were defeated in the at-large election because the non-Hispanic white
3 majority voted as a bloc against them. (SAC ¶¶ 42, 43, 44, 45, 46.)

4 Plaintiff, however, did not add any allegations to establish the other necessary element of a
5 CVRA claim: dilution of the ability to elect chosen candidates. (*Pico Neighborhood Assn v. City of*
6 *Santa Monica* (2023) 15 Cal.5th 292, 315 (“*Pico*”) [a plaintiff cannot prevail [on a claim under the
7 CVRA] based “solely on proof of racially polarized voting,” dilution of the ability to elect chosen
8 candidates is “a separate element under the CVRA”].) Plaintiff does not allege facts demonstrating
9 that district-based elections would improve the Latino voters’ ability to elect preferred candidates.
10 (*Id.* at 315, 322.)

11 Finally, the SAC once again fails to allege facts constituting a violation of California’s Equal
12 Protection Clause. Plaintiff is required to allege facts showing that a substantial motivation of the
13 City Council in using at-large elections is to discriminate against Latino voters. (Cf. *Dem. Nat’l*
14 *Comm. v. Hobbs* (9th Cir. 2020) 948 F.3d 989, 1038 (“*Hobbs*”).) Plaintiff must also allege
15 impairment or abridgment of the right to vote. Plaintiff has not alleged facts to demonstrate either.

16 **II. FACTUAL BACKGROUND AND ALLEGATIONS OF THE SAC.**

17 ***a. City of Burbank Formation and Elections***

18 The City of Burbank was incorporated on July 8, 1911, and adopted a charter on January 13,
19 1927. (Cal. Uncod. Init. Measures & Stats Deer 1927-18 Burbank City Charter.) Elections for the
20 five members of the City Council are conducted at-large. (SAC ¶¶ 28 & 29.)

21 ***b. The City’s Diversity and Inclusivity***

22 Plaintiff alleges that the total population of the City is 44.2 percent races other than non-
23 Latino white. (SAC ¶ 6.) Plaintiff is Latino (SAC ¶ 70), and the Latino population of the City
24 according to the 2020 Census is approximately 24 percent. (RJN Ex.1.) Latinos who are eligible to
25 vote constitute approximately 22 percent of all eligible voters. (RJN Ex. 2.) The Urban Institute’s
26 recent nationwide survey of community levels of inclusivity, measured in terms of income
27

28 ¹ A different Latino candidate, Council Member Ramos, won that election. (SAC ¶ 33.)

² A different Latino candidate, Council Member Vander Borcht, won that election. (SAC ¶ 33.)

³ Two different Latino candidates, Council Members Talamantes and Frutos, won that election (SAC ¶ 33.)

1 segregation, rent burden, share of population who are not in school and have not graduated, and
2 working poor, concluded that the City ranked 8th out of 274 cities across the country in terms of
3 overall inclusion. (RJN Ex. 3.)

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

5 According to the SAC, the City is and historically has been led by a council of diverse
6 members. (See SAC ¶¶ 31-35 [alleging the election of a person of Hispanic origin to the City Council
7 in 2001, 2005, 2009, 2013, 2017, and 2022].) Of the current five members of the City Council, (1)
8 Council Member Nikki Perez is descended from immigrants from El Salvador and Guatemala, is an
9 indigenous and openly LGBTQIA+ elected official (she received a record breaking 17,958 votes in
10 the 2022 election), and she was the chosen candidate of Latino voters in the 2022 elections (SAC ¶¶
11 53-61; RJN Ex. 4 & 5); (2) Council Member Zizette Mullins was born in Cairo, Egypt, and emigrated
12 to the United States from Egypt at the age of 13, not speaking a word of English (RJN Ex. 6); and
13 (3) Council Member Konstantine Anthony is the first openly autistic elected official in the western
14 part of the United States (he received then a record breaking 17,529 votes in the 2020 election). (RJN
15 Ex. 7 & 8; see also SAC ¶ 34.)

16 In addition to current City Council member Perez, candidates from a wide range of diverse
17 backgrounds have experienced electoral success over the past twenty years, including Latino Jef
18 Vander Borcht (1999-2003 & 2003 – 2007) (RJN Exs. 9 & 21), Latina Marsha Ramos (2001 – 2005
19 & 2005 - 2009), Latino Jess Talamantes (who was elected to three terms in 2009, 2013, & 2017),
20 and Latino Robert Frutos (2013 – 2017 & 2017 - 2022). (SAC ¶¶ 31-37.)

21 ***d. Chosen Candidates of Latino Voters***

22 Plaintiff alleges City Council member Perez was the chosen candidate of Latino voters in the
23 2022 election. (SAC ¶¶ 53-61.) Of course, City Council member Perez won the election in the at-
24 large voting system, carrying 19 of 25 precincts.⁴ (RJN Ex. 5.)

25 Plaintiff alleges City Clerk candidate Garzon was the chosen candidate of Latino voters in
26 the 2022 election (SAC ¶ 62-64), but Latino support for candidate Garzon appears to be attenuated.

27 ⁴ In ¶ 120 Plaintiff asserts candidate Helligar was the chosen candidate of Latino voters. There are no facts
28 alleged to support this assertion. The assertion is also at odds with the allegation that City Council member Perez was
the chosen candidate of Latino voters in that election. In any case, candidate Helligar did not carry any precinct in the
election.

1 Candidate Garzon did not place first in any precinct, even in the most Latino parts of Burbank. (SAC
2 ¶¶ 62-42 ; RJN Ex. 5.)

3 Historically, Plaintiff alleges candidates Dominguez, Gonzalez, Espinoza, and Guillen were
4 the chosen candidates of Latino voters who were allegedly defeated because of non-Latino bloc
5 voting in the at-large voting system. (SAC ¶¶ 42-46.) The facts do not support the allegations. In the
6 2001 primary election, candidate Dominguez carried one precinct. Candidate Gonzalez carried none.
7 In the 2003 primary election candidate Espinoza carried no precinct. Candidate Guillen carried no
8 precinct in the 2013, 2015, and 2017 primary elections, or in the 2017 general election, and one
9 precinct in the 2015 general election, (RJN Exs.14-20.)

10 *e. The City’s Consideration of a Transition to District-Based Elections*

11 The SAC alleges that, when the City received correspondence from Plaintiff’s counsel in
12 August 2022 claiming voting rights violations, it acted quickly and seriously. It hired counsel, a
13 demographer, and outreach consultants at substantial expense; it adopted a Resolution of Intent
14 (“Resolution”) to make a transition from at-large to by-district systems; it created a new website and
15 mapping tools to enable the public to shape the process of map drawing; it engaged in extensive
16 public outreach, including convening six public hearings and eight community forums to consider a
17 transition to by-district elections; and it thoroughly debated the merits of a wide range of potential
18 maps most of which had been submitted by members of the public. (RJN Ex. 10.) The City Council
19 then paused to await the decision of the California Supreme Court in *Pico Neighborhood Association*
20 *v. City of Santa Monica*, which involved the interpretation of several key relevant provisions of the
21 CVRA, including the requirement of proving vote dilution. Following issuance of the decision, the
22 Council thoroughly debated the merits and voted not to adopt a district map at this time. Rather, the
23 Council voted to study an alternative reform, cumulative voting, while referring additional questions
24 about the structure of City government to the City’s Charter Review Committee. (SAC fn. 17 [Video
25 of 10-3-2023 City Council meeting commencing at 1:55:35].) The Council invited Plaintiff, who had
26 not participated in the process, to provide feedback “to ensure any potential outcome addresses the
27 concerns posed by the initial notice” of a voting rights violation. (*Id.*; SAC ¶¶ 88-105.) Instead,
28 Plaintiff filed his lawsuit.

1 **III. LEGAL STANDARD**

2 “[T]he party against whom a complaint . . . has been filed may object, by demurrer,” including
3 on the grounds that “[t]he pleading does not state facts sufficient to constitute a cause of action.”
4 (C.C.P. § 430.10, subd. (e).) “The reviewing court accepts as true all facts properly pleaded in the
5 complaint in order to determine whether the demurrer should be overruled.” (*Guardian N. Bay, Inc.*
6 *v. Superior Court* (2001) 94 Cal.App.4th 963, 971.) However, courts do not assume the truth of
7 “contentions, deductions or conclusions of fact or law.” (*Cansino v. Bank of Am.* (2014) 224
8 Cal.App.4th 1462, 1468; *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537
9 [“It is settled law that a pleading must allege facts and not conclusions, and that material facts must
10 be alleged directly and not by way of recital.”].) In addition, only “reasonable inferences” may be
11 drawn from factual allegations (*Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th
12 935, 952) and a court ignores allegations in the body of the complaint that are contrary to documents
13 incorporated by reference⁵ and treats the documents as controlling over their characterization in the
14 pleading. (*Exec. Landscape Corp. v. San Vicente Country Villas IV Ass’n* (1983) 145 Cal.App.3d
15 496, 499.) Finally, the CVRA is a statutory cause of action which must be pleaded with particularity.
16 (See *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790; *Lopez v. So. Cal. Rapid*
17 *Transit Dist.* (1985) 40 Cal.3d 780, 795.) A plaintiff must allege the who, where, when, what, and
18 how. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645).

19 **IV. ARGUMENT**

20 **A. The First Cause of Action for Violation of the CVRA Should Be Dismissed For**
21 **Failure to Allege Facts Demonstrating Dilution of the Ability of Latino Voters to**
22 **Elect Chosen Candidates**

23 Plaintiffs have alleged racially polarized voting in elections in the City of Burbank. (SAC ¶¶
24 42-46 & 53-64.) “[D]ilution is a separate element under the CVRA. To establish the dilution element,
25 a plaintiff in a CVRA action must identify ‘a reasonable alternative voting practice’ to the existing
26 at-large electoral system that will ‘serve as the benchmark “undilute” voting practice.’ (*Citation*
27 *omitted.*)” (*Pico, supra*, 15 Cal. 5th at 315.) Successful claims for vote dilution under the CVRA

28 _____
⁵ The SAC includes 19 footnotes incorporating links to electronic versions of official documents of the City of Burbank. For the Court’s convenience, copies of relevant documents are filed with this demurrer.

1 “require the plaintiff to show that the protected class would, under some lawful alternative, have a
2 ‘real electoral opportunity’ to elect its candidate of choice, either on its own or with the aid of
3 crossover voters.” (*Id.* at 321-22.) “To replace at-large with district elections under a dilution theory,
4 a successful plaintiff must show not merely that the protected class would have a real electoral
5 opportunity in one or more hypothetical districts, but also that the incremental gain in the class’s
6 ability to elect its candidate of choice in such districts would not be offset by a loss of the class’s
7 potential to elect its candidates of choice elsewhere in the locality.” (*Id.* at 322.) Finally,
8 “[d]etermining whether the protected class has the potential to elect its preferred candidate under
9 some alternative system requires a “‘functional’ analysis of the political process’ in that locality and
10 a “‘searching practical evaluation of the ‘past and present reality.’” (Citation omitted.) Courts should
11 consider the totality of the facts and circumstances of the particular case (see, e.g., Elec. Code, §
12 14028, subd. (e)), including the characteristics of the specific locality, its electoral history, and “‘an
13 intensely local appraisal of the design and impact” of the contested electoral mechanisms’ as well as
14 the design and impact of the potential alternative system.” (*Id.* at 320.) The SAC any of these
15 essential allegations.

16 The SAC does allege in paragraphs 124 and 133, “An alternative method of election exists
17 — district-based elections — that will provide an opportunity for *the members of protected classes*
18 as defined by the CVRA to elect candidates of their choice in City of Burbank elections.” (Emphasis
19 added.) But *all* voters are members of a protected class (see *Sanchez v. City of Modesto* (2006) 145
20 Cal.App.4th 660, 684-685), and this conclusory allegation says nothing about *Latino* voters. (Decl.
21 of Leoni, Ex. 3, 1-12-24 Tent. Ruling at p. 2 [“The Court finds that Plaintiff’s CVRA cause of action
22 has not been adequately pled because Plaintiff fails to allege which protected class is the subject of
23 his claim.]])

24 Plaintiff does not allege that Latino voters will have an opportunity to elect candidates of
25 their choice in district-based elections. Nor could he. The allegations of SAC demonstrate just the
26 opposite. Of the five unsuccessful candidates Plaintiff alleges were the chosen candidates of Latino
27 voters – Dominguez (2001), Gonzalez (2001), Espinosa (2003), Guillen (2013, 2015, & 2017),
28 Helligar (2022) – none carried even one precinct in the election, except Dominguez in the 2001

1 primary and Guillen in the 2015 general in which they each carried just one.⁶ The same goes for City
2 Clerk candidate Garzon, allegedly the candidate of choice for Latino voters. According to the SAC,
3 she did not place first in a single precinct, not even those alleged to have high Latino concentration
4 and turnout. (Compare *Pico, supra*, at 309 [“The trial court further found that the City’s at-large
5 voting system unlawfully diluted the electoral strength of its Latino residents ...in that several
6 alternative voting systems—e.g., district-based elections, cumulative voting, limited voting, and
7 ranked choice voting—would better enable Latino voters ‘to elect candidates of their choice or
8 influence the outcomes of elections.’”].) If a candidate does not win in any precinct, the candidate
9 cannot win the election either at-large or in single-member districts.

10 Of course, City Council member Perez, also a chosen candidate of Latino voters, won the
11 2022 election at-large. District-based elections were not necessary for Latino voters to elect the
12 candidate of their choice with all other voters. The SAC provides no facts to satisfy Plaintiff’s burden
13 to “demonstrate that some lawful alternative method of election would improve the protected class’s
14 overall ability to elect its preferred candidates.” (*Pico*, at 322.) The electoral results do not support
15 that allegation. Courts “will not close their eyes to situations where a complaint contains allegations
16 of fact inconsistent with attached documents, or allegations contrary to facts which are judicially
17 noticed. [Citation.] Thus, a pleading valid on its face may nevertheless be subject to demurrer when
18 matters judicially noticed by the court render the complaint meritless.” (*Del E. Webb Corp. v.*
19 *Structural Materials Co.* (1981) 123 Cal. App. 3d 593, 604.)

20 The SAC does not set forth any facts showing a comparison between anticipated Latino
21 electoral success under district-based elections and success under the current at-large elections. (Cf.
22 *Pico, supra*, 15 Cal.5th at 318 [the plaintiff must show that, “assuming the same degree of racial
23 polarization, the greater concentration of protected class voters in the hypothetical district would
24 nonetheless be sufficient to enable them to elect their preferred candidate when combined with the
25 available crossover votes” or “demonstrate sufficient voting strength where racially polarized voting

26
27 ⁶ In the 2001 primary, Latino candidate Ramos garnered more votes than either candidate Dominguez or
28 Gonzalez in every precinct except the one that Dominguez won. In the 2003 primary election, a different Latino
candidate, Vander Borgh, carried every precinct except one. In the 2013 primary election, two other Latino candidates,
Talamantes and Frutos, came in first in every precinct except seven of 42. No Latino candidate ran in 2015 except
Guillen. In 2017, Latino candidates Talamantes and Frutos carried every precinct except three of 29 in the Primary, and
candidate Frutos carried 18 of 29 precincts in the general election.

1 by other voters in the hypothetical district is lower than in the community as a whole”]; *Sanchez v.*
2 *City of Modesto, supra*, 145 Cal.App.4th, at 670 [discussing cross-over and coalitional districts].)
3 Plaintiff does not allege any such facts demonstrating Latinos would be able to elect their preferred
4 candidate in a single-member district.

5 Furthermore, the facts alleged in the SAC and the City’s historic Latino representation on the
6 Council undercut any notion of Latino vote dilution. Of the twenty-seven open seats on the Council
7 since 2001 (see SAC ¶¶ 34 - 37), at least nine were won by persons of Latino origin, a 33-percent
8 success rate that exceeds proportional representation for the 22 percent of the City’s eligible voter
9 population that is Latino. Persistent proportional representation undermines the allegation that the
10 ability of Latino voters to elect their preferred representatives is not equal to that enjoyed by other
11 voters. (See *Thornburg v. Gingles* (1986) 478 U.S. 30, 77; see Elec. Code § 14028(b) ; cf. *Montes v.*
12 *City of Yakima* (2014) 40 F.Supp.3d 1377, 1405 [fact that no Latino candidate had ever been elected
13 to Yakima City Council, despite Latinos representing one-third of voting age population and one-
14 quarter of CVAP is “powerful evidence” that majority will usually defeat Latino minority’s preferred
15 candidate].)

16 None of the above is new. Defendant has briefed these deficiencies in Plaintiff’s allegations
17 in both its demurrers to the Complaint and to the FAC. For the first time, however, a phrase in a
18 sentence of a new allegation⁷ in the SAC hints that Plaintiff may argue the issue is dilution of the
19 ability of Latino voters *to influence the outcome of elections*.

20 Plaintiff has alleged no facts demonstrating impairment of the ability to influence the
21 outcome of elections. Importantly, Plaintiff does not state a cause of action asserting impairment of
22 the ability of Latino voters to “influence the outcome of elections.” The First Cause of Action
23 concerns only impairment of the ability to elect chosen candidates. (SAC ¶¶ 132-133.) The
24 allegations of racially polarized voting are not sufficient to state a dilution of influence cause of
25 action. “[D]ilution requires not only a showing that racially polarized voting exists, but also that the

26
27 ⁷ New paragraph 65 alleges in conclusory terms: “These two case studies [2022 elections for
28 City Council and City Clerk] show racially polarized voting. This dilutes the voting rights of the
protected class, harming them by making electoral success elusive. There is impairment of the
protected class’s ability to influence the outcome of the election and to elect candidates of its choice.”
(Emphasis added.)

1 protected class thereby has less ability to elect its preferred candidate or *influence the election's*
2 *outcome* than it would have if the at-large system had not been adopted.” (*Pico, supra*, 15 Cal. 5th,
3 at 314-15, emphasis added.) In the CVRA, “influence” is inextricably tied to the “outcome of an
4 election.” (Elec. Code § 14027; *Pico, supra*, 15 Cal. 5th, at 323-24 and cases cited therein.) As stated
5 in *Pico*, “a protected class’s ability to influence the outcome of an election could include, for
6 example, ‘forming a coalition with another group to elect a candidate acceptable to each’ or ‘blocking
7 an unacceptable candidate.’” (*Id. at* 324.) The SAC contains no such allegations.

8 Moreover, the allegations in the SAC demonstrate that Latino voters already have the ability
9 to “influence” the outcome of elections as demonstrated by the election of their chosen candidate,
10 City Council Member Perez, in the at-large electoral system. (See, e.g., ¶ 53.) In addition, “[t]he
11 dilution element also ensures the protected class is not made worse off” which requires an allegation
12 that the incremental gain in the class’s ability to influence the outcome of elections in single-member
13 districts is not offset by a loss of the class’s potential to elect its candidates of choice elsewhere in
14 the locality or influence the outcome of elections citywide. (*Pico, supra*, 15 Cal. 5th, at 322.) There
15 is not a single allegation in the SAC that establishes Latino voters would have more “influence” over
16 the outcome of elections in a single-member district electoral system. The court cannot infer that
17 Latino voters lacked “influence” on the outcome of elections just because their first choice candidate
18 did not prevail. Latinos could influence the election of the numerous Latino candidates who were
19 elected in citywide elections by voting for them, even if not the first choice of these voters. (*League*
20 *of United Latin American Citizens v. Perry* (2006) 548 U.S. 399, 469-470 [“[T]he Court has
21 recognized that ‘the power to influence the political process is not limited to winning elections.’”].)

22 **B. Plaintiff Fails to Allege any Facts That Plausibly Support the Second Cause of**
23 **Action for Violation of California’s Equal Protection Clause.**

24 A plaintiff bringing a racial discrimination claim under the Equal Protection Clause must
25 allege facts showing purposeful discrimination and discriminatory effects. (*Washington v. Davis*
26 (1976) 426 U.S. 229, 239; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* (1985) 429 U.S.
27 252, 265; *Kim v. Workers’ Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361-1362.) This
28 standard applies to voting rights claims under both the U.S. and California Constitutions. (*Jauregui*
v. City of Palmdale (2014) 226 Cal.App.4th 781, 800 [both constitutions provide “comparable

1 protections in voting rights cases”].) Such claims “require a showing of intentional discrimination,”
2 which is “notoriously difficult” to make “absent direct evidence of a discriminatory rationale.” (*Smith*
3 *v. Henderson* (D.D.C. 2013) 982 F.Supp.2d 32, 49.) Plaintiff has not cleared the hurdle.

4 Plaintiff alleges that three actions that *did not happen* support his cause of action for
5 intentional discrimination: 1) the City *did not change* to by-district elections in 2023 when Plaintiff
6 demanded it do so, 2) the City *did not change* to by-district elections when it changed its general
7 election date, and 3) the City *did not perform* its purported “duty” to change to by-district elections
8 when other cities were doing so. (SAC ¶¶ 138-140.) An inference of racial discrimination does not
9 arise from bare allegations of actions the City did not take. Indeed, the SAC’s substantive factual
10 allegations of two decades of Latino electoral success in City Council elections, most recently with
11 the election of City Council member Perez, are inconsistent with a racially discriminatory electoral
12 system. Plaintiff adds a conclusory allegation to the SAC that amending the City Charter in 2007 to
13 change the way vacancies on the City Council were filled is evidence of racial discrimination.
14 Plaintiff alleges no facts to support his conjecture. (SAC ¶ 141.)

15 ***I. Plaintiff must allege facts demonstrating that a discriminatory purpose was***
16 ***a motivating factor in using at-large elections.***

17 The plaintiff bears the burden of pleading facts demonstrating that a discriminatory purpose
18 was a “substantial or motivating factor” behind the allegedly violative law. (*Hobbs, supra*, 948 F.3d
19 989, 1038; *N.C. State Conf. of the NAACP v. McCrory* (4th Cir. 2016) 831 F.3d 204, 233
20 [“discriminatory racial intent [must] motivate[] the enactment” of challenged provision]
21 (“*McCrory*”).) Such facts could include (1) a historical pattern of laws producing discriminatory
22 results; (2) departures from the normal legislative process that shed light on the decisionmaker’s
23 purposes; (3) the legislative history, specifically statements by legislators evincing a racial or
24 pretextual motivation; and (4) whether the law has a disparate impact on a particular racial group.
(*Hobbs, supra*, 948 F.3d at 1038, citing *Arlington Heights, supra*, 429 U.S. 252.)

25 Conclusory allegations of discriminatory purpose, without supporting facts, are insufficient
26 to state a claim for purposeful discrimination. (See *Moss v. United States Secret Serv.* (9th Cir. 2009)
27 572 F.3d 962, 970-971 [dismissing discrimination claim that was unsupported by actual facts].) In
28 *McCrory*, plaintiffs made a thorough showing of purposeful race-based discrimination when the

1 North Carolina Legislature adopted a sweeping omnibus elections bill that passed along party lines
2 and without the vote of a single African-American legislator, and which created a strict photo
3 identification requirement, shortened the early voting period, eliminated same-day voter registration,
4 and eliminated pre-registration for 16- and 17-year-olds, among other restrictive changes. The State
5 itself conceded that voting restrictions were targeted for counties that “were disproportionately
6 black.” (831 F.3d at 218-224.) Specific facts in that case established that “North Carolina has a long
7 history of race discrimination generally and race-based vote suppression,” among other forms of
8 official discrimination, federal courts and the DOJ had determined repeatedly that the General
9 Assembly “acted with discriminatory intent,” and the legislation had been rushed through the
10 process.” (*Id.* at 223-224.)

11 Similarly, in *Hobbs*, plaintiffs challenged Arizona’s policy of discarding ballots cast in the
12 wrong precinct and criminalizing the collection and delivery of another person’s ballot. The court
13 found that the “Arizona legislature has a long history of race-based discrimination,
14 disenfranchisement, and voter suppression,” that the measure’s adoption was preceded by a racially-
15 tinged advocacy video, and that DOJ had previously rejected legislation to criminalize the collection
16 of another person’s ballot because the drafter himself had admitted the provision was “targeted at
17 voting practices in [] Hispanic areas.” (948 F.3d at 1007-1008, 1039; see also *Williams v. Dallas*
18 (N.D. Tex. 1990) 734 F. Supp. 1317, 1408-1410 [discrimination found when configuration of single-
19 member districts packed and cracked African-American population to maintain “political power of
20 whites,” and where there was a history of racial appeals in elections, a previous judicial finding of
21 intentional discrimination, and other indicia of invidious discrimination]; *Political Civil Voters*
22 *Organization v. Terrell* (N.D. Tex. 1983) 565 F. Supp. 338, 340-342 [candidates in at-large system
23 required to own real property, a “direct governmentally sanctioned exclusion similar to the poll tax,”
24 and City discarded popular vote result to hold by-district elections].)

25 A plaintiff cannot meet its burden of alleging purposeful racial discrimination by simply
26 alleging, as Plaintiff does here, that a city uses at-large elections and did not change its electoral
27 system after enactment of the CVRA. Using an “at-large electoral system” is not unconstitutional on
28 its face. (See *Rodgers v. Lodge* (1982) 458 U.S. 613, 617 [at-large elections are not unconstitutional

1 *per se*; rather, to violate Equal Protection, at-large elections must be conceived and operated as
2 purposeful devices to further racial discrimination].)

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

5 The SAC does not offer any facts constituting direct evidence of a discriminatory purpose.
6 Rather, Plaintiff relies entirely on outlandish inference. (See Evid. Code § 600 [“An inference is a
7 deduction of fact that may *logically and reasonably* be drawn from another fact or group of facts
8 found or otherwise established in the action”].) Plaintiff does not set forth a shred of historical
9 background or legislative history showing that the City initially adopted its system of at-large
10 elections for the purpose of discriminating against racial minorities.⁸ Nor does he set forth any
11 historical background showing that the City maintained its current election system for an
12 impermissible purpose or departures from the normal process or sequence demonstrating an
13 invidious purpose. Plaintiff offers no official discriminatory actions or statements. The fact that the
14 Council adopted a resolution in 2020 acknowledging past *private* discrimination in the City during
15 parts of the 20th Century and committing to “review and assess City policies, procedures, ordinances,
16 values, goals, and missions through an anti-racism lens to foster an unbiased and inclusive
17 environment that is free of discrimination”— cuts deeply *against* Plaintiff’s allegation of racial
18 discrimination. Such an inference cannot “reasonably” be drawn. The resolution states that “no
19 official ordinance or law of the City of Burbank has been found imposing sundown restrictions.”
20 (SAC ¶¶ 79-80 & fn. 9; RJN Ex. 11.)

21 Plaintiff notes in paragraphs 7 - 9 of the SAC that the City changed the date of its general
22 municipal election in 2018, lamenting that the City did not adopt by-district elections at the same
23 time. Placing a measure on the ballot to change the date of the general municipal election does not

24 ⁸ Plaintiff alleges that at the time Defendant adopted its Charter, “at-large elections were known to dilute the
25 minority vote.” (SAC ¶ 144.) Plaintiff does not allege that *Defendant* knew at-large voting was racially discriminatory
26 and adopted at-large voting for that purpose. “Discriminatory purpose” . . . implies more than intent as volition or intent
27 as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of
28 action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (*Personnel*
Administrator of Mass. v. Feeney (1971) 442 U.S. 256, 279 (footnotes omitted); see, *Mobile v. Bolden* (1980) 446 U.S.
55, 70 n.15 [“It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters
of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of
corrupt municipal government.”].)

1 plausibly infer a discriminatory motive in *not placing* a district elections measure on the same ballot.
2 Plaintiff does not allege that anybody demanded that the City change to by-district elections or that
3 it had before it any evidence of racially polarized voting or vote dilution.

4 Plaintiff suggests that the City Attorney’s recommendation to adopt a districting plan
5 supports the conclusion that the failure to adopt a plan was purposefully discriminatory. This is at
6 odds with the facts set forth in the SAC. (See SAC ¶ 20 & fn. 4; RJN Ex. 10.) The City Attorney’s
7 staff report does not raise any concerns about discrimination. In fact, the Resolution of Intent, passed
8 by the City Council on January 24, 2023, expressly states that the Council does not believe the City
9 is in violation of the CVRA or any law and that it is considering by-district elections to avoid
10 expensive litigation under the CVRA. (SAC ¶ 88 & fn. 12; RJN. Ex. 12.)

11 The SAC’s factual allegations show that the City followed standard procedures following
12 receipt of Plaintiff’s demand letter. (SAC ¶¶ 11 & 88-105.) The City’s process was consistent with
13 the statutory procedures governing transitions to district-based elections. (Elec. Code § 10010.) That
14 the City’s process was more extensive than the statutory requirements or the process pursued by the
15 local school district (SAC ¶ 19 & fn. 2-3; *id.* ¶ 107 & fn. 19, 20, & 21) does not support a cause of
16 action for intentional discrimination.⁹

17 While the SAC alleges that the Council deferred adopting an ordinance transitioning to by-
18 district elections, it fails to set forth facts showing that the deferral was racially motivated. To the
19 contrary, the SAC alleges that the City first delayed a decision to await the California Supreme
20 Court’s seminal decision in *Pico* construing the CVRA (SAC ¶ 99 & fn. 16), 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 district
23 elections, the trial court found that, in addition to district elections, several alternative at-large
24 election methods—cumulative voting, limited voting, and ranked choice voting—would each
25 enhance Latino voting power and their ability to elect candidates of their choice.”]); (2) refer certain
26

27 ⁹ Plaintiff misstates the law in asserting the City was required to adopt a districting plan within 90 days of
28 adopting its Resolution and failed to meet that deadline. (SAC ¶ 15.) 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. (Elec. Code § 10010(e)(3)(B).)

1 questions to the Charter Review Committee; and (3) reach out to Plaintiff about his concerns. (SAC
2 ¶¶ 100 & 101 & fn. 16 & 17; RJN Ex. 10.) Each of these alternatives is race-neutral; none plausibly
3 supports an inference that council’s deferral had a racially discriminatory purpose.

4 The SAC also lacks a single fact showing that the City has engaged in a pattern of official
5 discrimination, such as would be established through past judicial or administrative fact-finding. (Cf.
6 *Williams v. Dallas*, 734 F. Supp. at 1408-1410.) That a Charter Review Committee of diverse citizen
7 leaders at first proposed to study by-district elections for City Council, along with other structural
8 changes, then decided not to do so, does not “acknowledge[] the existence of discrimination within
9 Burbank”. (SAC ¶¶ 85-87 & fn. 10, 11; RJN Ex 13.) These facts do not reasonably suggest that the
10 Committee viewed the City’s at-large election system as a form of race-based discrimination. A more
11 reasonable inference is that the Committee did not consider changing to district-based elections to
12 be a pressing issue. Finally, true to the adage “no good deed goes unpunished,” the Committee’s
13 recommendation to insert a social equity and anti-discrimination clause into the Charter (SAC ¶ 87)
14 does not support a conclusion the City maintained *its election system* for the purpose of
15 discriminating on the basis of race. Rather, the recommendation demonstrates the Committee’s
16 dedication to equity.

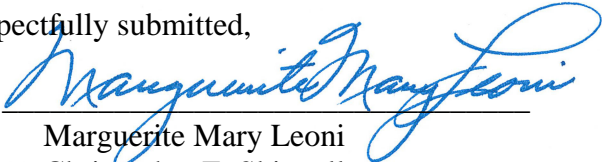
17 Finally, Plaintiff himself alleges in the complaint that a race-neutral and non-discriminatory
18 purpose animated the City Council’s decision to defer adopting districts. The SAC alleges the
19 decision was “politically motivated.” (SAC ¶ 144.) Plaintiff further pleads on information and belief
20 that the Council postponed adopting a districting map because certain members of the Council are
21 worried that district elections “could mean the end of the line for some of the councilmembers.”
22 (SAC ¶ 101.) Such allegations, even if true, do not support the second cause of action. (See *League*
23 *of Women Voters of Chi. v. Wolf* (N.D. Ill. 2013) 965 F. Supp. 2d 1007, 1017 [“The political
24 motivation alleged, to favor certain incumbent alderman and to disadvantage certain ‘independent’
25 aldermen, does not by itself implicate the Equal Protection Clause.”]; cf *Garza v. County of Los*
26 *Angeles* (1990) 918 F.2d 763, 771 [30-year history of redistricting the Latino voting bloc to prevent
27 the evolution of a Latino majority supervisorial district demonstrated intent to create the very
28 discriminatory result that occurred].)

1 **V. CONCLUSION**

2 Defendant’s demurrer should be sustained without leave to amend. Defendant has seven
3 times (four detailed meet & confer letters and three demurrers) described in specific detail the factual
4 allegations required to allege vote dilution under the CVRA based on the law in *Pico*, and a violation
5 of the Equal Protection Clause. In ruling on the demurrer to the FAC, the Court told Plaintiff that
6 “your allegations are completely conclusory as to the essential elements of your claims.” Despite
7 that admonition, Plaintiff persists in putting forth nearly the identical conclusory allegations
8 generalized to “protected classes” and devoid of fact. After three attempts and the Court’s patient
9 guidance, it is clear Plaintiff has no factual basis for alleging a violation of the CVRA or Equal
10 Protection Clause against the City of Burbank. The factual allegations in the complaint regarding
11 racially polarized voting are inconsistent with vote dilution (Council Member Perez, the chosen
12 candidate of Latino voters, was handily elected at-large; the other alleged chosen candidates of
13 Latino voters fared so poorly that they would not have been elected even in single-member districts)
14 and the expressly repeated allegations that the City established and maintains at-large elections for
15 partisan reasons, not racially discriminatory purposes. At this point in this pleading marathon,
16 plaintiff cannot contradict the facts he does allege. (*Ochs v. PacifiCare of Cal.* (2004), 115 Cal. App.
17 4th 782, 797 [“A plaintiff may not avoid a demurrer by pleading facts or positions in an amended
18 complaint that contradict the facts pleaded in the original complaint.”].) Also, persistent failure to
19 articulate facts to support a cause of action is grounds for sustaining a demurrer without leave to
20 amend. (*York v. City of L.A.* (2019) 33 Cal. App. 5th 1178, 1197. Throughout his opposition to the
21 multiple demurrers in this case, Plaintiff has not cited even one case that supports pleading a voting
22 rights violation by copying the language of the statute or a claim for intentional discrimination based
23 on allegations as flimsy as those in the SAC. Defendant requests that the Court put an end to this
24 pleading game of hide and seek and sustain the demurrer without leave to amend.

25 Dated: July 30, 2024

Respectfully submitted,

26 By: 

27 Marguerite Mary Leoni
28 Christopher E. Skinnell
David J. Lazarus
Julia von Klan d’Amours
Attorneys for Defendant



Court Reservation Receipt

Reservation	
Reservation ID: 995885231452	Status: RESERVED
Reservation Type: Demurrer - without Motion to Strike	Number of Motions: 1
Case Number: 23STCV25587	Case Title: NICHOLAS GUTIERREZ vs CITY OF BURBANK
Filing Party: City of Burbank (Defendant)	Location: Stanley Mosk Courthouse - Department 30
Date/Time: August 26th 2024, 8:30AM	Confirmation Code: CR-C8Z7FGRATEFRDU6KL

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

Payment	
Amount: \$0.00	Type: GOVT_EXEMPT

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