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David W. Slayton,  
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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF LOS ANGELES

9  
10 NICHOLAS GUTIERREZ,

11 Plaintiff,

12 vs.

13 CITY OF BURBANK, and DOES 1 through 100  
14 inclusive,

15 Defendants.

) Case No.: 23 ST CV 25587

)  
) PLAINTIFF NICHOLAS GUTIERREZ'S  
) OPPOSITION TO DEMURRER TO SECOND  
) AMENDED COMPLAINT

) DATE: August 26, 2024

) TIME: 8:30 a.m.

) DEPT: 30

) JUDGE: Hon. Barbara M. Scheper  
)  
)

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17  
18 Plaintiff Nicholas Gutierrez, through undersigned counsel, hereby submits this opposition to the  
19 demurrer to the Second Amended Complaint filed by Defendant City of Burbank. The demurrer lacks  
20 merit as it fails to acknowledge the quantitatively and qualitatively substantial factual allegations raised  
21 in the Complaint which, when proven true at trial, will entitle Mr. Gutierrez to relief under the California  
22 Voting Rights Act (CVRA) and the Equal Protection Clause of the California Constitution.

23 **I. INTRODUCTION**

24 The California Voting Rights Act supports the rights of voters in California who would  
25 otherwise have their vote diluted when racially polarized voting occurs. The Equal Protection clause of  
26 the California Constitution prohibits cities from setting up a voting scheme that disparately impacts  
27 racial minorities. At this stage, Plaintiff needs only to put Defendant on notice of these causes of action  
28

1 and allege the facts that support these causes. This low threshold was easily met in this case by the  
2 Complaint. Although these causes of action will come down to a battle of the experts, who will analyze  
3 voter data and make conclusions related to dilution and polarization, the Plaintiff inserted several new  
4 paragraphs, ¶¶ 52-65. This includes two on-point case examples of racialized polarized voting and voter  
5 dilution. It bears pointing out here and repeating in the body of arguments below, the Defendant  
6 extensively cites *Pico Neighborhood Assn v. City of Santa Monica* (2023) 15 Cal.5th 292. *Pico* is a  
7 California Supreme Court opinion that rules on trial issues. It is largely inapplicable at the pleadings  
8 stage because it focused on the remedies after the trial court found a CVRA violation. Further, the  
9 takeaway from *Pico* was that there is no requirement for a protected class to constitute a majority or  
10 near-majority in a hypothetical district, which overruled the appellate decision to the contrary. The Court  
11 broadened the CVRA’s application.

12 The Burbank Unified School District, in acknowledgment of the legal implications under the  
13 California Voting Rights Act and the resulting concerns over voter dilution, has transitioned to district  
14 elections starting this year, ensuring that each board member is elected by voters from a specific  
15 geographic area. This shift contrasts with the City Council's continued use of at-large elections, thereby  
16 creating confusion and potential inequities as different electoral systems are applied within the same  
17 community.

18  
19 **II. PLAINTIFF STATES A CLAIM FOR VIOLATION OF THE CVRA**

20 The CVRA prohibits racially polarized voting and vote dilution in local elections. We allege  
21 both and provide ample examples. The State’s protections are greater than Federal Law in some  
22 respects. “In an effort to provide greater protections to California voters than those provided by the  
23 VRA, the Legislature subsequently enacted the California Voting Rights Act of 2001 (Elec. Code, §  
24 14025 et seq.; CVRA).” (*Pico Neighborhood Assn. v. City of Santa Monica* (2023), 15 Cal. 5th 292, 306  
25 (“*Pico*”).) The Plaintiff alleges facts in his Complaint that there are at least 30 examples of voter dilution  
26 under the current at-large voting scheme. (Compl. ¶¶ 5, 6, 41, 65, 70, 77, 82). In section B of the  
27 Complaint, Plaintiff alleges facts supporting the cause of action elections for racially polarized voting  
28

1 and voter dilution. (Compl. ¶¶ 39-65.) These paragraphs are more than sufficient to state a claim under  
2 the CVRA, and the demurrer should be overruled.

3 The Second Amended Complaint newly examines two elections in the City of Burbank. In both  
4 elections (Compl. ¶¶ 52-65) racial polarization and voter dilution is clear and the demurrer must fail.  
5 Defendants do not and cannot proffer evidence that polarization and dilution is not present.

### 6 7 **Voter Dilution is Clearly Present**

8 According to *Pico*, “A court presented with a dilution claim should undertake a searching  
9 evaluation of the totality of circumstances (see, e.g., Elec. Code, § 14028, subd. (e)), including the  
10 characteristics of the specific locality, its electoral history, and the design and impact of the at-large  
11 system as well as the potential impact of lawful alternative electoral systems.” (*Pico* at 320.) Plaintiff  
12 has alleged these facts repeatedly throughout the Complaint. The opposite of voter dilution is voter  
13 concentration. In the Complaint, we showed how Latino candidates did better in Latino precincts and  
14 worse in white precincts. (Compl. ¶¶ 52-65.) Concentrating those precincts that the Latino protected  
15 class candidates did well in into electoral districts will allow greater influence in elections and increase  
16 their chances of winning, just as diluting their votes in an at-large election makes it harder to win. This  
17 is a classic voting rights remedy that takes place regularly around the country under various state and  
18 federal voting rights schemes (and made easier in California by the CVRA).

19 Plaintiff argues that Plaintiff fails “to Allege Facts Demonstrating Dilution of the Ability of  
20 Latino Voters to Elect Chosen Candidates.” (Demurrer 12). As discussed above, in the Complaint, we  
21 have asserted and proved that dilution harms the protected class’s ability to elect representatives of its  
22 choice and harms the protected class’s ability to influence elections. (Just to be clear, we mean the  
23 Latino protected class but wanted to demonstrate that readers would understand that without the  
24 modifier.)

25 Its next argument is that paragraphs 124 and 133 mention “protected class members” and not  
26 specifically Latino protected class members. (Demurrer 13). The author of the Second Amended  
27 Complaint believed that the context makes the terms clear because the Plaintiff is a member of the  
28 Latino protected class, as required by the CVRA (Com. ¶¶ 70-71) and the entire racially polarized

1 voting and voter dilution analysis identifies and focuses on Latino protected class members. If that is a  
2 defect, the plaintiff can cure it by changing these two instances of “protected class member” to “Latino  
3 protected class member” in an amended complaint or changing it in the present Complaint by  
4 interlineation by leave of the Court.

5 The Defendant states that “Plaintiff does not allege any such facts demonstrating Latinos would  
6 be able to elect their preferred candidate in a single-member district.” (Demurrer 15.) That is untrue, and  
7 not actually a requirement of the law. In paragraph 65, for example, Plaintiff states: “There is  
8 impairment of the protected class's ability to influence the outcome of the election and to elect  
9 candidates of its choice.” Obviously, electing a candidate of your choice in a city using district elections  
10 would result in electing a candidate of your choice in a “single-member district.” There are no at-large  
11 candidates, by law.

12 This alleged defect is not a requirement of the law. The law only requires the ability to influence  
13 the outcome of the election (*Pico* at 314-315), not to elect a candidate of your choice, a much higher bar.  
14 This simply recognizes electoral reality. The Plaintiff goes on to argue that because a Latino candidate  
15 has been elected, the Latino protected class magically has enough voting power. (Demurrer 16.) There is  
16 no law to back that up, and *Pico* specifically says “the CVRA allows the plaintiff to prevail by  
17 demonstrating, in the alternative, that the at-large method impairs the class’s ability “to influence the  
18 outcome of an election.” (Elec. Code, § 14027, italics added; cf. *League of United Latin American*  
19 *Citizens v. Perry* (2006) 548 U.S. 399, 446 (LULAC) (plur. opn. of Kennedy, J.) [“The failure to create  
20 an influence district . . . does not run afoul of § 2 of the [VRA]”].) (*Pico* at 295.) To eliminate redress  
21 where a protected class has any amount of influence would render the entire Act surplusage since even a  
22 single voter has influence. III. Plaintiff States a Claim for Violation of Equal Protection under the  
23 California Constitution

24 Defendant provides three actions by the Defendant that shows intent to discriminate against the  
25 Latino protected class. (Compl. ¶¶ 137-148). The City Council voted against district elections, despite  
26 being on notice of racially polarized voting and voter dilution. (Compl. ¶ 138.) Even if they did not find  
27 the Plaintiff’s notice letter compelling, the fact that they did nothing to refute the charges, either to clear  
28

1 their own consciences, or to build public trust, is bewildering. The only reasonable inference is they  
2 knew there was compelling evidence.

3         Between the time it had received the demand letter with evidence on August 23, 2022, (Compl.  
4 ¶19) and voting not to move forward on October 3, 2023 (Compl. ¶¶ 73, 100), Defendant had 406 days  
5 (about 13.5 months) to discuss with a consultant the existence of or lack of evidence of racially  
6 polarized voting and voting dilution and present that to the Plaintiff or the community. It strains  
7 credulity that the City of Burbank denied racially polarized voting and voter dilution and sat idly for  
8 over a year. Is it cheaper to engage a law firm to fight a protracted court battle than to ask a consultant to  
9 provide evidence that the city did not engage in racially polarized voting and voter dilution? You are  
10 going to need the latter eventually. It makes more sense that they knew that at-large voting was violating  
11 the CVRA and made the determination to go to court and hope to outlast the plaintiff in complex  
12 litigation.

13         You could argue that fighting this lawsuit is the defendant’s attempt to clear its name, but it’s a  
14 very roundabout and costly way to achieve the goal. Paired with spending taxpayer funds for a year on a  
15 consultant, posting up hundreds of community signs (Exhibit A), holding multiple public hearings,  
16 creating a website, it seems more likely than not that the City knew it was in violation, and its decision  
17 had the knowledge, purpose and intent to discriminate against the affected protected class.

18         The Burbank Unified School District studied the issue and immediately moved to district  
19 elections. (Compl. ¶¶ 8-9). It had the same voting area and structure as Defendant. Evidence of racial  
20 polarization and voter dilution in that jurisdiction is valid when analyzing behavior of voters of the City  
21 of Burbank, since they are the very same voters. Therefore, this is further evidence of the City of  
22 Burbank’s knowledge of the violation of the CVRA. The City of Burbank is welcome to refute this  
23 evidence at trial.

24         Defendants argue that the “SAC does not allege facts supporting a racially discriminatory  
25 purpose in the establishment and maintenance of an at-large voting system.” (Demurrer 19.) However,  
26 where the Defendants were on notice of the past and ongoing discriminatory behavior (racially polarized  
27 voting and voter dilution) and did not refute the evidence, rather denied it a conclusory manner and  
28 spent significant City time and public funds and resources curing the problem (hiring a consultant,

1 holding public hearings) the obvious inference is they were aware of the wrongdoings. If they were  
2 aware of the wrongdoings, not only are the incidents in the SAC valid examples of intentional  
3 discrimination, but every council meeting where they met and failed to cure the ongoing CVRA is an  
4 instance of equal protection deprivation. As a hypothetical, if you are on the board of directors of a non-  
5 profit, and the executive director says he hires staff based on gender, he is guilty of sexual  
6 discrimination and the board is liable for knowing it and failing to cure. The city council was presented  
7 with evidence of unequal treatment of its voters and failed to direct the city manager to act to cure the  
8 racial polarized voting and voter dilution. The inference from this failure to cure, where there are ample  
9 opportunities, is the intent to maintain the racially polarized system. A demurrer should only be granted  
10 here if the Council was not aware of the unlawful voting in Burbank or had evidence that it was not  
11 taking place. Neither of those situations exist here and the plaintiff has asserted strong evidence that the  
12 council was on notice, failed to investigate or refute, and failed to cure the illegal election scheme.

13 In 2018, the Burbank Council had the opportunity to amend the election scheme. (Compl. ¶¶ 7-  
14 9, 139.) Their failure to act in light of evidence around the state of the discriminatory effects of at-large  
15 districts is a violation of the equal protection clause. The 2018, 2023, and ongoing failure to act by the  
16 City Council is a part of a broader pattern of discrimination and violates the duty imposed by the CVRA  
17 and modern voting rights laws.

18 The Defendant argues that because district elections “could mean the end of the line for some of  
19 the councilmembers” a self-preservation motive is inconsistent with a purpose to discriminate.  
20 (Demurrer 21). However, both intentions can exist simultaneously. When a significant majority of  
21 current and past council members are white and they do not want to share power with non-white  
22 candidates, that is intentional discrimination. Council members know generally where the Latinos live in  
23 Burbank (Compl. ¶¶ 52-65) and know that candidates from those areas are not traditionally successful in  
24 Burbank elections (Compl. ¶¶ 31-38). Changing the status quo to help Latinos has not occurred. As the  
25 complaint points out, the Council was made aware of racial polarization by a letter asserting racially  
26 polarized voting and voter dilution (Compl. ¶ 19) and hired a consultant to draw maps. (Compl. ¶ 138).  
27 The Council selected one of the district maps, but it ultimately took action not to pass the ordinance  
28 making the map official. There is a strong inference that the council voted to move to district elections,

1 at great expense, after receiving the demand letter detailing the evidence of racially polarized voting and  
2 voter dilution, because it wanted to cure the racially polarized voting and voter dilution. Defendant  
3 offers as evidence that the resolution it adopted in January 2023 “states that the Council does not believe  
4 the City is in violation of CVRA...”. (Demurrer 20.) That self-serving resolution hardly compels as  
5 evidence. Finally, why would the Defendant decide to fight the allegations after *Pico* came out, which  
6 helps CVRA plaintiffs? ([California Supreme Court Interprets State Act to Expand Reach of Vote Dilution Protection](#),  
7 137 Harv. L. Rev. 1781 (2024).) This undercuts the argument that it was a financial decision, rather than  
8 an admission of CVRA wrongdoing. They would have saved money by denying the allegations from the  
9 start, rather than waiting for an adverse decision. If there are valid culpable and exculpable reasons for  
10 the decision, the correct legal posture is to move to trial. Evidence will be gleaned from discovery,  
11 experts, etc., which can meet the burden of the plaintiff or allow the defendant to argue its theory.

### 12 13 **Discriminatory Inaction is Tantamount to Discriminatory Action**

14 In a landmark case, discriminatory inaction in the failure to grant permits was considered as part  
15 of the equal protection violation. (*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). This case involved a San  
16 Francisco ordinance requiring laundries to be in brick buildings unless an exception was granted by the  
17 Board of Supervisors. The Board systematically denied permits to Chinese applicants while granting  
18 them to non-Chinese applicants. The Supreme Court found that the ordinance’s discriminatory  
19 application by the Supervisors violated the Equal Protection Clause. Though the case focused on  
20 discriminatory action, it illustrates how discriminatory inaction (failure to grant permits) was considered  
21 as part of the equal protection violation. The City Council was made aware of the violations, did not  
22 investigate or cure them, despite reasonable opportunities to do so, showing knowledge and purpose to  
23 maintain the unlawful status quo.


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1 **III. Conclusion**

2 The Plaintiff asks the Court to overrule the demurrer as there are sufficient facts alleged  
3 supporting the cause of action. Should the Court be inclined to sustain the Demurrer, the Plaintiff seeks  
4 leave to amend to cure defects in the Complaint.

5  
6 Respectfully submitted.

7  
8 DATED: August 9, 2024

9   
10 \_\_\_\_\_  
11 Jason Dominguez  
12 Attorney for  
13 Plaintiff Nicholas Gutierrez  
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# Exhibit A

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ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: 186768 NAME: Jason Dominguez, Esq. FIRM NAME: Law Offices of Jason Dominguez, Esq. STREET ADDRESS: Post Office Box 20040 CITY: Santa Barbara STATE: CA ZIP CODE: 93120 TELEPHONE NO.: (805) 421-0946 FAX NO.: E-MAIL ADDRESS: jdominguez@druven.law ATTORNEY FOR (name): Plaintiff Nicholas Gutierrez	FOR COURT USE ONLY
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES</b> STREET ADDRESS: 111 North Hill Street MAILING ADDRESS: 111 North Hill Street CITY AND ZIP CODE: Los Angeles, California 90012 BRANCH NAME: Stanley Mosk Courthouse	CASE NUMBER: 23STCV25587
PLAINTIFF/PETITIONER: Nicholas Gutierrez DEFENDANT/RESPONDENT: City of Burbank	JUDICIAL OFFICER: Hon. Barbara M. Scheper
<b>PROOF OF ELECTRONIC SERVICE</b>	DEPARTMENT: 30

1. I am at least 18 years old.

- a. My residence or business address is (specify):  
 Post Office Box 10631, Burbank, California 91510
  
- b. My electronic service address is (specify):  
 job20100610@gmail.com

2. I electronically served the following documents (exact titles):

PLAINTIFF NICHOLAS GUTIERREZ'S OPPOSITION TO DEMURRER TO SECOND AMENDED COMPLAINT

The documents served are listed in an attachment. (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:

- a. Name of person served: Jill VanderBorgh; Marguerite Mary Leoni; David Lazarus  
 On behalf of (name or names of parties represented, if person served is an attorney):  
 City of Burbank
- b. Electronic service address of person served :  
 jvanderborgh@burbankca.gov; mleoni@nmgovlaw.com; dlazarus@nmgovlaw.com
- c. On (date): August 9, 2024

The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment.  
 (Form POS-050(P)/EFS-050(P) may be used for this purpose.)

Date: August 9, 2024

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Helen Wong  
 \_\_\_\_\_  
 (TYPE OR PRINT NAME OF DECLARANT)

  
 \_\_\_\_\_  
 (SIGNATURE OF DECLARANT)