Information About The California Voting Rights Act

On November 28, 2018, the Town Council will hold a special meeting study session in Council chambers to discuss and hear public comment on a proposed challenge to the Town's at-large election system. No action will be taken at that meeting.

On October 22, 2018 the Town received a letter (attached) from the law firm of Shenkman & Hughes alleging a violation of the California Voting Rights Act ("CVRA"). The letter claims that the Town's current at-large election system dilutes the ability of Latino voters to elect candidates of their choice or otherwise influence the outcome of Town Council elections. Specifically, the letter states that (1) Rosa Reynoza ran for Town Council in 2016 and lost despite receiving the support of Latino voters in the Town; and (2) Latinos comprise approximately 31.8% of the Town's population but no Latino has served on the Town Council. The letter threatens litigation if the Town declines to voluntarily change to a district-based election system.

The Town currently has an at-large election system whereby the voters throughout the entire Town choose each of the five Councilmembers. In district elections, the Town is physically divided into separate districts, with and each district represented by one Councilmember who must reside in that district. There are two types of "district" elections – "from district" and "by district." In "from district" elections, the election is held Town-wide but the candidate must live in the specified district (that is, all voters may vote for a candidate representing each listed district.) In "by district" elections, each Councilmember is chosen only by the voters residing in the same district as the Councilmember. Because the term of office for a Councilmember remains four years, a district election system means residents of a certain district vote once every four years.

The CVRA was signed into law in 2002. In a CVRA challenge, a plaintiff need only prove the existence of "racially polarized voting" to establish liability. A plaintiff is not required to prove an intent to discriminate against a protected class on the part of either voters or elected officials. Under the CVRA, "racially polarized voting" means voting in which there is a difference in the choice of candidates or ballot measures preferred by voters in a protected class, and in the choice of candidates and ballot measures preferred by other voters in the rest of the Town. To establish racially polarized voting, plaintiffs typically use experts to conduct statistical analyses to estimate group voting behavior in previous elections in which at least one candidate is a member of a protected class or ballot measures affect the rights and privileges of members of a protected class.

To date Mr. Shenkman's firm has challenged cities throughout the state. Over 80 cities have switched to district elections as a result of CVRA challenges, including the following northern California cities in 2018: Antioch, Concord, Fremont, Half Moon Bay, Martinez, Menlo Park, Redwood City, Santa Rosa, and South San Francisco.

In responding to a CRVA challenge, cities typically hire a demographer to conduct a statistical analysis of whether racially polarized voting has occurred in previous municipal elections, based on data from the County Registrar of Voters. Experienced demographer Dr. Karin MacDonald will conduct an analysis for the Town and assist with determining district boundaries if the Council determines to move to district elections.

The CRVA provides cities with a "safe harbor" from litigation and its associated costs, by "capping" a city's lifetime costs at $30,000 if: (1) within 45 days of receiving a CVRA challenge, a council adopts a resolution of intent to proceed with district elections, and (2) within 90 days of the resolution's adoption (with a possible additional 90-day extension if agreed to by the challenger), it enacts an ordinance establishing districts. For Windsor, the 45-day period in which to adopt a resolution of intent expires on December 6 – the day after the Council's next regular meeting. Following adoption of a resolution, a city must hold at least two public hearings to provide input on the composition of the district maps before draft district maps are drawn. The first and second public hearings must occur within a period of 30 days. The Town must then hold at least two public hearings after the maps are drawn to receive public input on the content of the draft maps and the proposed sequence of elections (that is, the year in which each individual council district elects its representative councilmember). The third and fourth public hearings must occur within a period of 45 days. Then a final public hearing must be held before the Town may adopt an ordinance implementing the final district map.

If a city does not adopt a district election ordinance and is unsuccessful in defending a lawsuit, it must not only pay the costs of its defense but also the attorney's fees and costs of the challenger. To date no city has successfully defended a CVRA lawsuit, and cities' litigation costs have ranged from $800,000 to $4,500,000. Reported costs of settling litigation have ranged from $125,000 to $3,000,000. Also, if a CVRA violation is found, the court is authorized to implement appropriate remedies, including imposing district-based elections and choosing the plaintiff's proposed district maps without any public input. Finally, even if a city did successfully defend a lawsuit, it would remain vulnerable to subsequent lawsuits by different plaintiffs.

If the Town elects to transition to district elections, there may be additional discussion on whether the Town is interested in retaining a rotating mayor selected by the Council or having a mayor elected at large by residents Town wide, and whether the number of seats on the Town Council should be changed.

For further information, please contact Maria De La O, Town Clerk at 707-838-5315 or mdelao@townofwindsor.com.

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VIA CERTIFIED MAIL

October 15, 2018

Maria De La O – Town Clerk
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9291 Old Redwood Hwy.
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Re: Violation of California Voting Rights Act

I write on behalf of our client, Southwest Voter Registration Education Project. The Town of Windsor ("Windsor") relies upon an at-large election system for electing candidates to its Town Council. Moreover, voting within Windsor is racially polarized, resulting in minority vote dilution, and therefore Windsor's at-large elections violate the California Voting Rights Act of 2001 ("CVRA").

The CVRA disfavors the use of so-called "at-large" voting – an election method that permits voters of an entire jurisdiction to elect candidates to each open seat. *See generally Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667 ("*Sanchez*"). For example, if the U.S. Congress were elected through a nationwide at-large election, rather than through typical single-member districts, each voter could cast up to 435 votes and vote for any candidate in the country, not just the candidates in the voter's district, and the 435 candidates receiving the most nationwide votes would be elected. At-large elections thus allow a bare majority of voters to control *every* seat, not just the seats in a particular district or a proportional majority of seats.

Voting rights advocates have targeted "at-large" election schemes for decades, because they often result in "vote dilution," or the impairment of minority groups' ability to elect their preferred candidates or influence the outcome of elections, which occurs when the electorate votes in a racially polarized manner. *See Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) ("*Gingles*"). The U.S. Supreme Court "has long recognized that multi-member districts and at-large voting schemes may operate to minimize or cancel out the voting strength" of minorities. *Id.* at 47; *see also id.* at 48, fn. 14 (at-large elections may also cause elected officials to "ignore [minority] interests without fear of political consequences"), citing *Rogers v. Lodge*,

458 U.S. 613, 623 (1982); *White v. Register*, 412 U.S. 755, 769 (1973). "[T]he majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Gingles*, at 47. When racially polarized voting occurs, dividing the political unit into single-member districts, or some other appropriate remedy, may facilitate a minority group's ability to elect its preferred representatives. *Rogers*, at 616.

Section 2 of the federal Voting Rights Act ("FVRA"), 42 U.S.C. § 1973, which Congress enacted in 1965 and amended in 1982, targets, among other things, at-large election schemes. *Gingles* at 37; *see also* Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History* (1983) 40 Wash. & Lee L. Rev. 1347, 1402. Although enforcement of the FVRA was successful in many states, California was an exception. By enacting the CVRA, "[t]he Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act of 1965." *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781, 808. Thus, while the CVRA is similar to the FVRA in several respects, it is also different in several key respects, as the Legislature sought to remedy what it considered "restrictive interpretations given to the federal act." Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.

The California Legislature dispensed with the requirement in *Gingles* that a minority group demonstrate that it is sufficiently large and geographically compact to constitute a "majority-minority district." *Sanchez,* at 669. Rather, the CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA, not the desirability of any particular remedy. *See* Cal. Elec. Code § 14028 ("A violation of Section 14027 ***is established*** if it is shown that racially polarized voting occurs ...") (emphasis added); *also see* Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 ("Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).")

To establish a violation of the CVRA, a plaintiff must generally show that "racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision." Elec. Code § 14028(a). The CVRA specifies the elections that are most probative: "elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected

class." Elec. Code § 14028(a). The CVRA also makes clear that "[e]lections conducted prior to the filing of an action ... are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action." *Id.*

Factors other than "racially polarized voting" that are required to make out a claim under the FVRA – under the "totality of the circumstances" test – "are probative, but not necessary factors to establish a violation of" the CVRA. Elec. Code § 14028(e). These "other factors" include "the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns." *Id.*

Windsor's at-large system dilutes the ability of Latinos (a "protected class") – to elect candidates of their choice or otherwise influence the outcome of Windsor's council elections.

The most recent election – in 2016 - is particularly illustrative. In 2016, Rosa Reynoza ran for Town Council. Ms. Reynoza received significant support from Latino voters, but was unable to secure sets on the Town Council due to the bloc voting of the non-Latino majority.

According to recent data, Latinos comprise approximately 31.8% of the population of Windsor. The contrast between the significant Latino proportion of the electorate and what appears to be a complete absence of Latinos elected to the Town Council is telling.

As you may be aware, in 2012, we sued the City of Palmdale for violating the CVRA. After an eight-day trial, we prevailed. After spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale Town Council, with districts that combine all incumbents into one of the four districts.

Given the lack of Latino representation on the Town Council in the context of racially polarized elections, we urge Windsor to voluntarily change its at-large system of electing council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than December 5, 2018 as to whether you would like to discuss a voluntary change to

your current at-large system.

We look forward to your response.

Very truly yours,

Kevin I. Shenkman