



CITY OF HUNTINGTON BEACH

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May 18, 2017

Mr. Kevin Shenkman
28905 Wight Road
Malibu, CA 90265

RE: City's Response: Violation of California Voting Rights Act

Dear Mr. Shenkman,

I am writing in response to your letter dated April 5, 2017, urging the City of Huntington Beach ("City") to voluntarily change its Charter-provided at-large-system of electing Council Members (otherwise you will be forced to seek judicial relief).

Your letter makes a number of unsupported contentions that the City of Huntington Beach employs an election system that somehow creates a "racially polarized" voting scheme that disenfranchises "Latino" voters. You suggest that the City's at-large system dilutes the ability of Latinos, a "protected class," to elect candidates of their choice or otherwise influence the outcome of City elections. To put it simply, the facts do not support your allegations and the City Attorney disagrees with your conclusions of law and notably, your letter fails to state what relief your clients seek. As such, with the support of the Mayor and City Council, we are prepared to vigorously defend any lawsuit brought by your clients. To be clear, the City is prepared to mount a defense using all available resources to affirm by the highest court that the California Voting Rights Act ("CVRA") is unconstitutional as applied to the City of Huntington Beach.

A couple of important facts that have come to light in my Office's research and analysis. Contrary to your 17% assertion, only 13% of eligible voters are of our Latino community – the vast majority of which (77% to be precise), do not live within a particularly concentrated area of the City – so modifying the City's method of electing Council Members such as going to election districts for instance, would be of no import or

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consequence. When reviewing demographic and historical voter information, the data reveals that the City of Huntington Beach has, unlike perhaps other cities, a fairly even racial "mix" across the City, such that no one racial group is disproportionately disadvantaged in the election process. The demographics of the City of Huntington Beach is unlike all the other cities you have filed suit against. It appears by your standard form letter, you either did not research the demographic and historical voter data for this City, or when you did, you drew the wrong conclusions.

While this letter is not intended to reveal the City's defense strategy or provide all the legal theories the City has explored (and will continue to explore) and will advance if sued, the two recent California Court of Appeal cases analyzing the CVRA that you cited are instructive and support the City's position.

The case you cited, *Jamreguil v. City of Palmdale*, provided some guidance with regard to the applicability of the CVRA to Charter Cities; the *City of Palmdale* case is not dispositive with regard to Huntington Beach. For example, notwithstanding recent amendments made to the Elections Code, one of the factors left unaddressed by the Court of Appeal is the applicability of the CVRA to Charter Cities when the City has expressly adopted its voting scheme in its Charter as is the case in the City of Huntington Beach (see concurring opinion of Justice Mosk). In addition, the Court of Appeal made several references to the underlying facts of the case, that were not issues on appeal, and it appears the Court of Appeal would have considered these issues had they been further litigated. One such issue was the Superior Court's exclusion of certain evidence that may have been telling regarding whether there was in fact racially polarized voting.

In addition, to the "Home Rule" doctrine, the *City of Palmdale* case did not present or resolve a number of other constitutional issues and therefore these are left unresolved by California or Federal courts. For example, the CVRA improperly places a clearly legislative process, i.e., determining a voting scheme for a jurisdiction, into the hands of the judiciary.

The "Separation of Powers" doctrine, crucial to the Federal, State, and Local government, is unconstitutionally disregarded by the CVRA. "The accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." (James Madison, Federalist No. 51, 1788; among other authorities). It is the legislative branch of government that makes the law, including determining voting schemes and creating districts by determining through the legislative process district boundaries. The Courts on the other hand are tasked with interpreting and enforcing laws, not creating new laws (i.e., how Charter Cities conduct elections) by judicial fiat.

As you know, prior to *Jauregui v. City of Palmdale*, the California Court of Appeal decided a leading case with regard to the constitutionality of the CVRA, *Sanchez v. City of Modesto*. Notably and very importantly, the Court of Appeal in *City of Modesto* provided a road map to cities seeking to challenge the CVRA. The Court of Appeal specifically instructed (cities like Huntington Beach) that “[A] city may, however, use similar arguments to attempt to show *as-applied* invalidity later if liability is proven and a specific application of remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, *defendants may again assert the weighty constitutional issues they have raised here.* (*Sanchez v. City of Modesto*, (2006) 145 Cal. App. 4th 660, 665.)

Notwithstanding the City of Huntington Beach's other strong arguments, there are a host of issues alluded to by the Court of Appeal in the *City of Modesto* case with regard to the constitutionality of the CVRA. Among such issues is the reverse discrimination at work if the CVRA is applied to the City of Huntington Beach. This kind of reverse discrimination implicates Equal Protection and Due Process clauses of the U.S. and California Constitutions. A certain class cannot displace any classification of voters, including the First Amendment rights of free speech. Any lawsuit against the City of Huntington Beach will draw a Cross-Complaint by the City against Plaintiff with possible anti-SLAPP ramifications. Finally, with regard to issues we are raising in this letter, the issue of Federal Preemption of the CVRA by the Federal Voters Rights Act provisions remains unresolved.

We also note that the imposition of mandated programs such as set forth in the CVRA, appears to be a State-imposed mandate, which the State must reimburse cities cost otherwise such a mandate amounts to an unconstitutional and impermissible “Unfunded State Mandate.” If a lawsuit is filed, the City of Huntington Beach plans to immediately seek reimbursement from the State for any and all costs associated with any studies, implementation and legal fees, etc., required by the City. The City will encourage other California cities to seek similar reimbursement from the State as well.

If your claim is to advance the interests of the Latino voters in our community, you need to ask yourself and discuss with your clients, is it better that our Latino community have 13% influence over the election of seven Council Members in an at-large system, or is it better they have up to (at most) 23% influence over a single Council Member (as hypothetically determined) in a district-by-district system. Based upon the demographics in the City and historical voting patterns, many in our Latino community may decide for themselves that they would rather influence all seven elections of Council Members, rather than have an attorney like yourself effect a change in the system such that the voices in our Latino community are diminished, restricted, or taken away, and relegated

to a mere 23% influence of a single Council Member. By the way, 23% does not guarantee the election of any particular candidate from any particular racial group. Clearly your "cause" as it relates to Huntington Beach does not have the best interest of our Latino community, or any racial group in mind. If that was your design and motivation, you would see that the at-large system in Huntington Beach is *more beneficial as it offers more of a voice, with more influence*, to the "class" of our Latino voters you claim to represent.

With the unanimous support of the Mayor and Members of the City Council, we are ready, willing, and able to fight any such lawsuit contemplated by your letter. Because you are clearly unfamiliar with the demographic and historical voting in Huntington Beach you clearly do not have the best interests of our Latino community in mind, and you clearly have not identified all of the meritorious constitutional arguments in favor of the City of Huntington Beach, I would request that you reconsider your threat to file a lawsuit against the City. I believe that as long as the Mayor and Members of the City Council are willing to defend the City against such a lawsuit, by your lawsuit, you may chart a course to set new, uninvited legal precedent that finds the CVRA, or portions of it, unconstitutional, which will allow the City of Huntington Beach and other cities like it, to conduct elections as they have been.

As the City Attorney of this great City, and in the interest of having all of the people of the City informed, I request that you share this letter in its entirety with your clients. It is important to me that those seeking the best interest of the City, or to improve the City, have *all* of the information available to them.

Thank you and please let me know if you have any questions.

Sincerely,



Michael E. Gates
City Attorney

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