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VIA CERTIFIED MAIL

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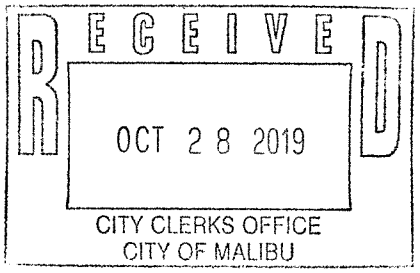


Heather Glaser, City Clerk
City of Malibu
23825 Stuart Ranch Rd
Malibu, CA 90265

Re: Violation of California Voting Rights Act

I write on behalf of our client, Southwest Voter Registration Education Project and its members residing in the City of Malibu. The City of Malibu ("Malibu" or "City") relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within the City of Malibu is racially polarized, resulting in minority vote dilution, and, therefore, the City'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.*

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

Malibu has a population of approximately 13,000, with Latinos comprising a significant and growing portion of the City's population. Even since the 2010 Census, when the Latino population comprised 6.1% of the total population, the Latino proportion has almost certainly increased, based on statewide and local demographics trends. Despite this significant proportion, the Latino community has been consistently underrepresented on the Malibu City Council. Never has any Latino been elected to, or otherwise served on, the Malibu City Council. Therefore, not only is the contrast between the significant Latino proportion of the electorate and the complete present and historical absence of Latinos on Malibu's City Council outwardly disturbing, it is also fundamentally hostile towards participation by members of this protected class.

The City's at-large election system has also impeded the emergence of Latino candidates in Malibu. For instance, in the entire history of the City of Malibu, there has not been one Latino to emerge as a candidate for a seat on the Malibu City Council. Opponents of fair, district-based elections may attribute the lack of protected class members vying for elected positions to a lack of interest in local government from these communities. On the contrary, the alarming absence of Latino candidates seeking election to the Malibu City Council reveals vote dilution. *See Westwego Citizens for Better Government v. City of Westwego*, 872 F. 2d 1201, 1208-1209, n. 9 (5th Cir. 1989).

The City's election history is additionally illustrative. Where there are no "endogenous" elections involving candidates who are members of the protected class, the analysis under the CVRA necessarily turns to "elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class." *See* Elec. Code § 14028. Typically, Propositions 187, 209 and 227 are analyzed for this purpose in California voting rights cases. Each of these propositions, though strongly opposed by the Latino community, were supported by the majority non-Hispanic white electorate in Malibu, resulting in their victory in Malibu. Proposition 187 prevailed in Malibu with 50.9% of the vote; Proposition 209 prevailed in Malibu with 54.6% of the vote; and Proposition 229 prevailed in Malibu with 65.9% of the vote.

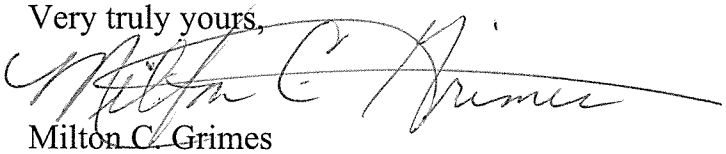
As you may be aware, in 2012, I was involved (coincidentally, with a Malibu law firm) in the lawsuit against the City of Palmdale for violating the CVRA. After an eight-day trial, the plaintiffs prevailed. After spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale city council, with districts that combine all incumbents into one of the four districts.

More recently, after a 7-week trial, I (again, along with that same Malibu law firm) also prevailed against the City of Santa Monica, after that city needlessly spent millions of dollars defending its illegal election system – far in excess of what was spent in the Palmdale litigation - taxpayer dollars which could have been more appropriately spent on indispensable municipal services and critical infrastructure improvements. Just prior to the trial in that case, counsel for the City of Santa Monica – Kahn Scolnick, a partner at Gibson Dunn & Crutcher LLP proclaimed that, "the reality is that if Santa Monica fails the CVRA test, then no city could pass, because Santa Monica is doing really well in terms of full representation and success of minority candidates." ("In Rare California Voting Rights Trial, Gibson Dunn Steps Up for Santa Monica", Law.com, August 1, 2018). Notwithstanding Mr. Scolnick's prediction, Plaintiffs succeeded in proving that Santa Monica's election system was in violation of the CVRA and the Equal Protection Clause of the California Constitution.

Given the complete and historical lack of representation of Latinos on the Malibu City Council in the context of racially polarized elections, we urge the City to voluntarily change its at-large system of electing its City Councilmembers. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than December 20, 2019 as to whether you would like to discuss a voluntary change to your current at-large system.

I look forward to your response.

Very truly yours,



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