Urban Village by the Bay

ALBANY CALIFORNIA

CITY OF ALBANY
1000 SAN PABLO AVENUE
ALBANY, CA 94706
www.AlbanyCA.org

October 4, 2021

MEMORANDUM

To: Albany City Council Members

From: Mala Subramanian, City Attorney

Re: Closed Session
Conference with Legal Counsel – Anticipated Litigation
Government Code section 54956.9(d)(2) (2 cases)

<u>CLOSED SESSION ITEM</u>

On July 20, 2020, the City received the attached letter from Mr. Shenkman of the law firm of Shenkman & Hughes, PC dated July 13, 2020. Mr. Shenkman urged the City to voluntarily change its at-large system of electing its City Council, otherwise on behalf of residents within the jurisdiction he would be forced to seek judicial relief.

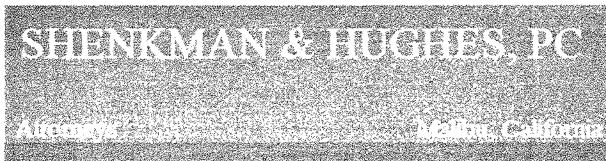
The City Attorney has determined that this written communication from a potential plaintiff threatening litigation qualifies as "existing facts and circumstances" under the Brown Act, specifically Government Code section 54956.9(e)(3) and that there is significant exposure to litigation pursuant to Government Code section 54956.9(d)(2).

On December 14, 2020, the City Manager met with Jim Lindsay and Andrew Tang of Voter Choice Albany (VCA). At this meeting the City Manager received a threat of litigation from VCA if the City continues to move to by district elections rather than rank choice voting at large.

The City Attorney has determined that this statement qualifies as "existing facts and circumstances" under the Brown Act, specifically Government Code section 54956.9(e)(5) and that there is significant exposure to litigation pursuant to Government Code section 54956.9(d)(2).

<u>Attachments:</u>

1. Letter from Shenkman & Hughes
2. City Manager Email



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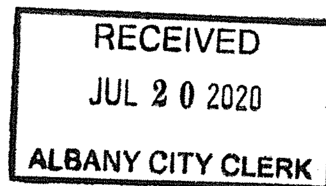

VIA CERTIFIED MAIL

July 13, 2020

Anne Hsu – City Clerk
City of Albany
1000 San Pablo Avenue
Albany, CA 94706

Re: Violation of California Voting Rights Act

I write on behalf of our client, Southwest Voter Registration Education Project and its members residing within the City of Albany ("Albany" or "City"). Albany relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within the City is racially polarized, resulting in minority vote dilution, and, therefore, the District'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 bare candidates in the voter's district, and the 435 candidates receiving the most nationwide votes would be elected. At-large elections thus allow a 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.*

As of the 2010 Census, Latinos comprised 10.2% of the City's population (likely constituting an even greater proportion today) and Asians comprised 31.2% of the City's population.

Albany's at-large system dilutes the ability of Latinos and Asians (each, a "protected class") – to elect candidates of their choice or otherwise influence the outcome of the District's elections. In the last five elections, there have not been even one Latino or Asian candidate for the Albany City Council. Opponents of fair, district-based elections may attribute the lack of Latinos and Asians vying for elected positions to a lack of interest in local government from these communities. On the contrary, the alarming absence of Latino and Asian candidates seeking election to the District's Board 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 lack of Latino and Asian candidates in at-large elections should not be surprising in light of the significant economic disparities between the eastern and western portions of the City. Latinos, and Asians to an only slightly lesser extent, are concentrated in the western portion of the City, while the eastern portion of the City is predominantly non-Hispanic white. The eastern portion of the City enjoys significantly greater wealth, income and education, compared to the western portion of the City. It is no wonder that the Asian and Latino residents of the western portion of the City do not compete in the expensive at-large elections dominated by residents of the eastern portion of the City.

The City's recent election history is additionally illustrative. For example, in 2018 Kevin de Leon lost to Dianne Feinstein in Albany (and statewide), despite significant support from the Latino community (both in Albany and statewide), due to a lack of support from non-Latinos. This election, for example, evidences vote dilution which is directly attributable to the City's unlawful at-large election system.

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 city council, with districts that combine all incumbents into one of the four districts.

Given the racially polarized voting in elections within Albany, we urge the City to voluntarily change its at-large system of electing its City Council. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than September 1, 2020 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

Anne Hsu

From: Malathy Subramanian <Malathy.Subramanian@bbklaw.com>
Sent: Wednesday, December 23, 2020 12:00 PM
To: Anne Hsu
Subject: FW: Threat of Litigation VCA/CVRA

Warning: This email originated from outside the City of Albany. Think before you click!

Hi Anne,

Please attach this email to my staff report.

Best,
Mala

From: Nicole Almaguer <nalmaguer@albanyca.org>
Sent: Wednesday, December 23, 2020 11:52 AM
To: Malathy Subramanian <Malathy.Subramanian@bbklaw.com>
Subject: Threat of Litigation VCA/CVRA

CAUTION - EXTERNAL SENDER.

Mala,
On December 14, 2020, I met with Jim Lindsay and Andrew Tang representing VCA to discuss their questions regarding Measure BB – Ranked Choice Voting at Large and their concern that the City Council may choose to go to districts due to the CVRA threat letter that has been received. They informed me that they would be considering pursuing legal action against the City should the City continue to move to districts as in their opinion it was inconsistent with the Ordinance (Measure BB) as approved by the voters.

Thanks,
Nicole Almaguer

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