CITY OF HUNTINGTON BEACH

OFFICE OF THE
CITY ATTORNEY

Michael E. Gates
City Attorney

Mike Vigliotta
Chief Assistant City Attorney

P.O. Box 190
2000 Main Street
Huntington Beach, California 92648
Telephone: (714) 536-5555
Facsimile: (714) 374-1590

Brian L. Williams
Senior Trial Counsel

Michelle Ditzhazy
Deputy Community Prosecutor

Paul D'Alessandro
Assistant City Attorney

Scott Field
Sr. Deputy City Attorney

Neal Moore
Sr. Deputy City Attorney

Daniel K. Ohl
Deputy City Attorney

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

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, *Jaureguil 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 governance, 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 *Jaureguil 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 or 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

MEG/ct

SHENKMAN & HUGHES
ATTORNEYS MALIBU, CALIFORNIA

28905 Wight Road
Malibu, California 90265
(310) 457-0970
kshenkman@shenkmanhughes.com

VIA CERTIFIED MAIL

April 5, 2017

Robin Estanislau - City Clerk
City of Huntington Beach
2000 Main Street
Huntington Beach, CA

Re: Violation of California Voting Rights Act

The City of Huntington Beach ("Huntington Beach") relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within Huntington Beach is racially polarized, resulting in minority vote dilution, and therefore Huntington Beach'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.*

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

The council elections in 2014, 2004 and 2002 are illustrative. In 2014 election, a Latino candidate – Hector Valdez – ran and lost. In 2002 and 2004, another Latino candidate – Jim Moreno – ran and lost. In each instance, Mr. Valdez and Mr. Moreno, respectively, received significant support from Latino voters, but fell short of securing a seat in Huntington Beach's at-large election due to the bloc voting of Huntington Beach's majority non-Latino electorate. In fact, as a result of this racially polarized voting, Huntington Beach appears to have not had even a single Latino council member in recent history.

According to recent data, Latinos comprise approximately 17.1% of the population of Huntington Beach. The contrast between the significant Latino population and the very limited success of Latinos to be elected to the City 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 city council, with districts that combine all incumbents into one of the four districts.

Given the historical lack of Latino representation on the city council in the context of racially polarized elections, we urge Huntington Beach 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 May 22, 2017 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