



**CITY OF ELK GROVE
CITY COUNCIL STAFF REPORT**

AGENDA TITLE: Consider a resolution of the City Council declaring the City’s intent to transition to by-district (district-based) City Councilmember elections consistent with Elections Code section 10010 and consider a resolution of the City Council amending the City Clerk Budget by \$40,000 for demographer consulting services

MEETING DATE: August 28, 2019

PREPARED BY/ Jason Behrmann, City Manager
DEPARTMENT HEAD: Jonathan Hobbs, City Attorney
Jason Lindgren, City Clerk

RECOMMENDED ACTION:

Staff recommends that the City Council adopt a resolution declaring the City’s intent to transition to by-district (district-based) City Councilmember elections consistent with Elections Code section 10010 and consider a resolution of the City Council amending the City Clerk Budget by \$40,000 for demographer consulting services.

BACKGROUND INFORMATION:

California cities may establish voting districts for the election of councilmembers as “by-district” or “from-district.” A by-district approach means that the city is divided into certain districts with the voters of that district alone electing the councilmember. A from-district approach means that the councilmember must live in the designated district, but he or she is elected by the voters of the entire city. (Gov. Code § 34871.) Under either method, a city may have an elected mayor, elected directly by the voters of the entire city.

The City of Elk Grove currently has a “from-district” election method for its four Councilmembers, with a directly elected Mayor. Under this method, the Councilmembers must live within a designated district to be eligible to run for office for that district, with the voters of the entire city eligible to vote for each of the four Councilmembers, regardless of districts. The City’s Mayor is also

elected directly by the voters of the entire city, but the Mayor may live in any district. Councilmembers serve for staggered four year terms, and the Mayor serves a two year term.

The California Voting Rights Act of 2001 (“CVRA”) is set forth at Elections Code sections 14025 to 14032. The CVRA defines “at-large” and “district-based” election methods. An “at-large election method” includes an election method by which the voters of the entire city vote for members of the city council, regardless of where they reside, as well as an election method under which candidates must reside in certain districts and the voters of the entire city elect the councilmembers, i.e. a “from-district” method. (Elec. Code § 14026.) The CVRA uses the term “district-based elections” and defines that term in substantially the same manner as “by-district” elections, i.e., the candidate is elected only by the voters residing within the election district. (Elec. Code § 14026.) Even though the City of Elk Grove has districts, because the City uses a “from-district” election method, the City’s election method is considered to be an “at-large” method of election under the CVRA.

The CVRA prohibits “racially polarized voting.” (Elec. Code §§ 14027, 14028.) Racially polarized voting means that there is a difference between the choice of candidates preferred by voters of a racial minority class, and the choice of candidates that are preferred by voters in the rest of the electorate, so as to dilute the vote of the racial minority class of voters. (Elec. Code §§ 14026, 14028.) In other words, the CVRA prohibits an at-large election method that impairs the ability of a racial minority class from influencing the outcome of an election due to dilution of their vote by non-racial minority voters. This is typically proven or disproven by way of detailed statistical and demographic analyses of voting behavior. Proving a violation of the CVRA does not require proof of an intent to discriminate. (Elec. Code § 14028.)

Any voter in a city may sue to establish a violation of the CVRA. If the plaintiff wins the lawsuit, the court may impose an injunction on the city, including imposing a by-district method of election. A prevailing plaintiff may also recover attorneys’ fees and costs incurred, which could be substantial. (Elections Code §§ 14029, 14030.)

Prior to filing a lawsuit against a city for an alleged violation of the CVRA, a prospective plaintiff must submit a written demand to the city asserting a claimed violation of the CVRA. (Elec. Code § 10010(e)(1).) A city receiving the demand may then pass a resolution of intent within 45 days of receipt of such demand letter indicating the city’s intent to transition to a by-district

election method. If the city passes such resolution of intent, the prospective plaintiff may not file a lawsuit for at least 90 days from the passage of the resolution.

Once the resolution of intent is passed, a city has 90 days to hold hearings and pass an ordinance transitioning to a by-district approach in order to avoid exposure to the lawsuit by the prospective plaintiff. (Elec. Code § 10010(e)(3)(A), (B).) This 90-day period may be extended by an additional 90 days by written agreement between the prospective plaintiff and the city. (Elec. Code § 10010(e)(3)(C).)

During the 90-day period (or any extension thereof), the city must hold at least two public hearings over a 30-day period to invite input concerning the composition of the proposed district maps, as well as at least two additional hearings over a 45-day period to provide input after the proposed maps are drawn. The city may then adopt an ordinance selecting a district map. (Elec. Code § 10010(a)(1), (2).) The City may adopt such ordinance without submitting the ordinance to the voters for approval. (Gov. Code § 34886.)

If the city adopts an ordinance establishing a by-district election method, the prospective plaintiff may seek recovery of his or her costs for generating the demand letter. Such costs are capped at \$30,000 (adjusted annually by the Consumer Price Index), and must be supported by financial documentation, such as detailed invoices of demography services. (Elec. Code § 10010(f).)

ANALYSIS:

On July 15, 2019, the City of Elk Grove received a letter dated July 10, 2019 from the law firm of Shenkman & Hughes. The letter was submitted on behalf of the firm's clients and prospective plaintiffs the Southwest Voter Registration Education Project and Elk Grove resident Andres Ramos. (Attachment 3.) By the letter, Mr. Shenkman contends that the City's at-large, from-district election method results in racially polarized voting and vote dilution detrimental to the Latino voting community in Elk Grove.

The City has 45 days from receipt of the Shenkman letter to pass a resolution of intent to transition to a by-district voting system in order to invoke the 90-day stay period preventing the prospective plaintiffs from filing a lawsuit for violation of the CVRA. That 45-day period expires on August 29, 2019. Staff recommends that the City Council pass the proposed resolution of intent to transition to a by-district election method for the four City Councilmember positions. The position of the Mayor would remain subject to election by all the voters of the City.

To date, neither racially polarized voting, vote dilution, nor a violation of the CVRA has been established detrimental to Latinos or any other racial minority class within the City. However, passing the resolution of intent will stay the filing of expensive litigation for the City, and it will provide the opportunity for public hearings and outreach toward transitioning to a by-district election approach. Ultimately, the decision to transition to a by-district election method and the approval of any new district maps will be for the City Council to make following the public hearing process. Nonetheless, for the reasons presented, staff recommends that the City Council adopt the resolution of intent to initiate this process. Should the City Council pass such resolution of intent, staff would begin scheduling upcoming public hearings and mapping processes toward transitioning to a by-district election method.

ALTERNATIVE ACTIONS:

As an alternative, the City Council could decline to pass the proposed resolution of intent and/or provide staff with further direction.

FISCAL IMPACT:

Should the City Council approve the resolution of intent to transition to a by-district form of election, the City would need the services of a professional demographer to assist with the redistricting and public hearing process. Staff anticipates that the cost of the demographer services would be less than \$40,000, which would be within the City Manager's contracting authority.

The City's Opportunity Reserve Fund Balance was established in part to provide funding for unforeseen events or need, and the fund has a sufficient balance to fund the transition to a by-district form of election. A budget adjustment resolution for the cost of demographer services of up to \$40,000 to aid in the transition to a by-district election method is attached for City Council consideration.

If the City Council ultimately adopts an ordinance moving to a by-district method of election, the City may also be liable for costs to the prospective plaintiffs of up to an additional \$30,000 (as adjusted by inflation). The matter of those costs is dependent on the City Council's future action on the decision whether to transition to a by-district election method, following the public hearing process, and, therefore, such costs will be addressed at a later date, as necessary.

ATTACHMENTS

1. Resolution of Intent to Transition to By-District Elections
2. Resolution to Amend the City Clerk Fiscal Year 2019-20 Budget
3. Letter from Shenkman & Hughes

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ELK GROVE
DECLARING ITS INTENT TO TRANSITION TO BY-DISTRICT (DISTRICT-BASED)
CITY COUNCILMEMBER ELECTIONS CONSISTENT WITH
ELECTIONS CODE SECTION 10010**

WHEREAS, the City of Elk Grove (“City”) is a general law city and currently has a “from-district” election method whereby four members of the City Council are required to reside within designated districts of the City, with voters of the entire City electing these four members of the City Council, which election method is considered an “at-large method of election” under Elections Code section 14026; and

WHEREAS, the City has an elected Mayor, pursuant to Government Code section 34902, whereby the Mayor is directly elected on a citywide basis by the voters of the entire City for a two-year term; and

WHEREAS, on July 15, 2019, the City received a letter by certified mail from the law firm of Shenkman & Hughes, P.C. asserting that the City’s at-large City Council electoral system violates the California Voting Rights Act (“CVRA”) and threatening litigation against the City if the City does not voluntarily change its at-large system of electing City Councilmembers; and

WHEREAS, Government Code section 34886 authorizes the City to adopt an ordinance to change to a by-district system without submitting the ordinance to the voters for approval; and

WHEREAS, while the City Council feels that the City’s current system of election is consistent with applicable law, including, without limitation, the California Voting Rights Act of 2001 (Elections Code sections 14025, *et seq.*) given the risk and costs of potential litigation over the City’s election method, and other considerations of the City Council, the City Council intends to transition to a by-district (district-based) method of election whereby four members of the City Council would be elected by voters of an identified district within the City alone, all in furtherance of the purposes of the California Voting Rights Act of 2001; and

WHEREAS, the City intends to retain an elected mayor, who shall remain elected on a citywide basis by the voters of the entire City for a two-year term.

NOW, THEREFORE, BE IT RESOLVED that:

- 1) The City Council hereby expresses its intent to transition to a by-district (district-based) system of election for its four City Councilmembers, as set forth herein; and
- 2) The City Council intends to commence the process for drawing of district maps for district boundaries consistent with the procedures set forth at Elections Code section 10010, including the holding of public hearings and meetings as required by Elections Code section 10010 and/or other

applicable law; the estimated time frame to facilitate this transition to a by-district (district-based) election method is ninety (90) days from the date of passage of this resolution, which estimated time frame is subject to revision; and

- 3) The City Council directs the City Manager to retain the services of a qualified demographic consultant to assist in the development of districts maps; and
- 4) Following the development of district maps, the City Council intends to adopt an ordinance transitioning to a by-district (district-based) election method, pursuant to Elections Code section 10010 and Government Code section 34886, utilizing the district maps developed through the district mapping process; and
- 5) The City intends by the ordinance transitioning to a by-district (district-based) election method to retain the position of a directly elected mayor as an office elected on a citywide basis by the voters of the entire City for a two-year term.

PASSED AND ADOPTED by the City Council of the City of Elk Grove this 28th day of August 2019

STEVE LY, MAYOR of the
CITY OF ELK GROVE

ATTEST:

APPROVED AS TO FORM:

JASON LINDGREN, CITY CLERK

JONATHAN P. HOBBS,
CITY ATTORNEY

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ELK GROVE
AMENDING THE FISCAL YEAR 2019-2020 BUDGET FOR THE CITY CLERK
BUDGET IN THE AMOUNT OF \$40,000 FOR DEMOGRAPHER CONSULTING
SERVICES**

WHEREAS, the City Council of the City of Elk Grove has established an Opportunity Reserve Fund Balance; and

WHEREAS, the Opportunity Reserve was established in part to provide funding for unforeseen events or need; and

WHEREAS, the City Council has adopted a resolution declaring the City's intent to transition to by-district (district-based) Councilmember elections; and

WHEREAS, the City has a need for the services of a professional demographer to assist with the City Council redistricting and public hearing process.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Elk Grove hereby amends the Fiscal Year 2019-2020 City Clerk Budget in the amount of \$40,000 (Fund 1011400.5152006).

PASSED AND ADOPTED by the City Council of the City of Elk Grove this 28th day of August 2019

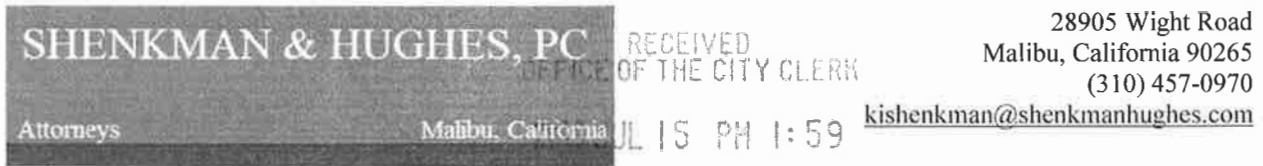
STEVE LY, MAYOR of the
CITY OF ELK GROVE

ATTEST:

APPROVED AS TO FORM:

JASON LINDGREN, CITY CLERK

JONATHAN P. HOBBS,
CITY ATTORNEY



VIA CERTIFIED MAIL

July 10, 2019

Office of the City Clerk
City of Elk Grove
8401 Laguna Palms Way
Elk Grove, CA 95758

Re: Violation of California Voting Rights Act

I write to follow up on my letter of February 16, 2018, on behalf of our clients, Southwest Voter Registration Education Project and its members, including Andres Ramos. In that previous letter, I explained that: the City of Elk Grove (“Elk Grove”) relies upon an at-large election system for electing candidates to its City Council; voting within Elk Grove is racially polarized, resulting in minority vote dilution; and, therefore, Elk Grove’s at-large elections violate the California Voting Rights Act of 2001 (“CVRA”). I am writing this follow up letter out of an abundance of caution, updating my previous letter now that the November 2018 election has been conducted and analyzed.

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.*

Elk Grove’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 Council elections. Elk Grove has four council residency districts, council members are elected citywide (at-large), and each council member must reside within the district of the city that they oversee. It is well known that numbered post elections (a/k/a designated seat elections), as employed by Elk Grove, enhance the dilutive effects of at-large elections. This was explained by Justice Marshall in *City of Rome v. United States*, 446 U.S. 156, 183-85, fn. 19 (1980) (finding that City of Rome’s proposed change from plurality at-large elections to at-large elections with numbered posts would eliminate the potential for “single shot” voting by the minority community, and thus further dilute the minority vote).

In the 2018 election, Andres Ramos and Orlando Fuentes each sought a seat on the City Council. Each had significant support from the Latino community, but lost. This election, like those discussed in my previous correspondence, are demonstrative of the Latino vote dilution in Elk Grove and the inability of Latinos to elect their preferred candidates or influence the outcome of elections.

As of the 2010 Census, the City of Elk Grove had a population of 153,015. According to recent data, Latinos comprise approximately 18% of the City’s population. However, there are currently no Latinos on the Elk Grove City Council, nor have there been for several years.

The City of Elk Grove has a real and active problem with racism. Recent racist incidents include the discovery of a racist and threatening note at a black-owned business and “KKK” graffiti at a local apartment complex. Following these high-profile incidents of racism in Elk Grove, the American Leadership Forum – Mountain Valley Chapter released its report with recommendations on how to combat the racism rampant in the City. The City Council received those recommendations in January 2018, but has, thus far, failed to address the hostile and violent racism in the City. The lack of diversity on

the City Council, as perpetuated by the City's at-large election system, exacerbates the racial tensions in the City.

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.

More recently, after a 6-week trial, we 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 historical lack of Latino representation on the Elk Grove City Council in the context of racially polarized elections, we urge Elk Grove to voluntarily change its at-large system of electing City Council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief.

We look forward to your response.

Very truly yours,



Kevin I. Shenkman

Shenkman & Hughes PC
28905 Wright Rd.
Malibu, CA 90265

CERTIFIED MAIL



UNITED STATES
POSTAL SERVICE



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Office of the City Clerk
City of Elk Grove
8401 Laguna Palms Way
Elk Grove, CA 95758

